IN THE SUPREME COURT OF FLORIDA

TIMOTHY LEE HURST,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC07-1798

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

STEPHEN R. WHITE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 159089

Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300 Ext. 4579
(850) 487-0997 (FAX)

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Hurst." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State. The following are examples of other references:

"R/III 450": p. 450 of volume III of the record of the direct appeal;

"TT/IV 654-67": pp. 654 to 667 of volume IV of the trial transcript contained within the record of the direct appeal;

"PCR/II 273-349": pp. 273 to 349 of volume II of the record of the postconviction proceedings;

"IB 28": p. 28 of the Initial Brief dated as served June 20, 2008.

Footnote numbers contained within quotations are enclosed in brackets and preceded by "fn".

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

STATEMENT OF THE CASE AND FACTS

As authorized by Fla.R.App.P. 9.210(c), the State submits its rendition of the case and facts.

Case Timeline.

DATE	NATURE OF PLEADING OR COURT EVENT
5/2/1998	Victim, Cynthia Harrison, an assistant manager of a Popeye's fast food restaurant on Nine Mile Road in Pensacola (TT/II 206-207, 209), was murdered, See, e.g., TT/II 231-35, 241-

	42; TT/IV 654-67).
5/1998	Grand jury indictment charging Hurst with this murder (R/I 1-2).
3/2000	Jury trial (TT/I-V), at which Hurst found guilty as charged (TT/V 942-46; R/III 448) and at which jury recommended death sentence by an 11 to 1 vote (TT/V 1002; R/III 450).
3/2000-4/2000	After a sentencing hearing (R/III 465-67) and the parties submitted memoranda regarding the death penalty (R/III 451-53, 456-64), the Circuit Judge imposed the death sentence (R/III 469-80, 482-95).
2002	On direct appeal, this Court affirmed the conviction and death sentence in Hurst v. State, 819 So.2d 689 (Fla. 2002).
2002	United State Supreme Court denied Hurst's Petition for writ of certiorari at Hurst v. Florida, 537 U.S. 977, 123 S.Ct. 438 (2002).
10/2003-1/2004	Hurst's first postconviction motion pursuant to Fla.R.Crim.P. 3.851 (PCR/II 273-349); State's Response to Hurst's first postconviction motion (PCR/II 352-76); Hurst's Reply to State's Response … (PCR/II 377-85).
2/2004	Hearing pursuant to Huff v. State, 569 So.2d 1247 (Fla. 1990) (PCR/III 388-441); resulting orders (PCR/III 442-48).
6/2004	Three-day evidentiary hearing (PXR/XI; PCR/XII; PCR/XIII; PCR/XIV; PCR/XV) and exhibits (PCR/III 493-579; PCR/IV 580-719)
7/2004	Continuation of evidentiary hearing, with David Kladitis and Carl Hess testifying. (PCR/V 760-96)
9/2004-1/2005	Hurst's First "Supplemental Motion to Vacate…" (PCR/V 802-825); State's responses to First Supplemental postconviction motion (PCR/V 826-55); Hurst's Reply to State's responses to First Supplemental postconviction motion (PCR/V 856-901).
1/2005-2/2005	Hurst's "Second Supplemental Motion to Vacate…" (PCR/V 919-32); State's Motion to Strike Defendant's "Second Supplemental Motion to Vacate…" (PCR/V 934-37); Defendant's Response to State's Motion to Strike … (PCR/V 938-41).
3/2005	Second Huff hearing (PCR/VI 942-990).
5/2005	Hurst's "Third Supplemental Motion to Vacate…" (PCR/VI 1008-1015); State's Motion to Strike Defendant's "Third

	Supplemental Motion to Vacate…" (PCR/VI 1004-1007).
8/2005	23-page Order Denying an Evidentiary Hearing on Defendant's First and Second Supplemental Motions without Prejudice (PCR/VI 1016-77).
9/2005-10/2005	Hurst's "Fourth Supplemental Motion to Vacate…" (PCR/VI 1082-1121); State's response to Defendant's "Fourth Supplemental Motion to Vacate…" (PCR/VI 1122-1131).
11/2005-12/2005	Order Denying State's Motion to Strike Defendant's Third Supplemental Motion for Postconviction Relief and ordering the State to respond to it (PCR/VI 1132-34); State's Response to Defendant's "Third Supplemental Motion…" (PCR/VI 1135-40).
1/2006-2/2006	Huff hearing on Defendant's Third and Fourth supplemental motions (PCR/VII 1147-67); Order granting an evidentiary hearing on a claim in the Third Supplemental Motion pertaining to Willie Griffin and summarily denying the Fourth Supplemental Motion (PCR/VII 1171-72).
2/2006-2/2007	Litigation and proceedings concerning the scope of, and evidence related to, the Third Supplemental Motion (PCR/VII 1173-1299).
2/2007	Order vacating order granting evidentiary hearing on Third Supplemental Motion, finding that "it appears the taking of further evidence is unnecessary," and scheduling written closing arguments (PCR/VII 1300-1309).
5/2007-6/2007	Parties' written closing arguments regarding Hurst's Postconviction motions (PCR/VII 1315-40; PCR/VIII 1341-86, 1387-97)
2007	Judge Noble's comprehensive 63-page Order Denying Defendant's Motion to Vacate Judgment of Conviction and Sentence (PCR/VIII 1398-1460), with volumes of supportive attachments (PCR/VIII 1461-1541; PCR/IX; PCR/X 1742-1907); this Order is on appeal here.

Basic Facts Surrounding the Murder.

This Court's opinion affirming the conviction and death sentence summarized guilt-phase evidence against Hurst:

> *** On the morning of May 2, 1998, a murder and robbery occurred at a Popeye's Fried Chicken restaurant in Escambia County, Florida,

where Hurst was employed. Hurst and the victim, assistant manager Cynthia Lee Harrison, were scheduled to work at 8 a.m. on the day of the murder. A worker at a nearby restaurant, Carl Hess, testified that he saw Harrison arriving at work between 7 a.m. and 8:30 a.m. Afterwards, Hess said that he saw a man, who was about six feet tall and weighed between 280 and 300 pounds, arrive at Popeye's and bang on the glass windows until he was let inside. The man was dressed in a Popeye's uniform and Hess recognized him as someone he had seen working at Popeye's. Shortly after the crime, Hess picked Hurst from a photographic lineup as the man he had seen banging on the windows. Hess was also able to identify Hurst at trial.

On the morning of the murder, a Popeye's delivery truck was making the rounds at Popeye's restaurants in the area. Janet Pugh, who worked at another Popeye's, testified she telephoned Harrison at 7:55 a.m. to tell her that the delivery truck had just left and Harrison should expect the truck soon. Pugh spoke to the victim for four to five minutes and did not detect that there was anything wrong or hear anyone in the background. Pugh was certain of the time because she looked at the clock while on the phone.

Popeye's was scheduled to open at 10:30 a.m. but Harrison and Hurst were the only employees scheduled to work at 8 a.m.[fn1] However, at some point before opening, two other Popeye's employees arrived, in addition to the driver of the supply truck. None of them saw Hurst or his car. At 10:30 a.m., another Popeye's assistant manager, Tonya Crenshaw, arrived and found the two Popeye's employees and the truck driver waiting outside the locked restaurant.

fn1. Before 10:30, the doors would have remained locked, causing the State to develop the theory that the victim must have known her killer and trusted the person enough to open the locked door.

When Crenshaw unlocked the door, and she and the delivery driver entered, they discovered that the safe was unlocked and open, and the previous day's receipts, as well as $375 in small bills and change, were missing. The driver discovered the victim's dead body inside the freezer. The victim had her hands bound behind her back with black electrical tape and she also had tape over her mouth. Similar tape was later found in the trunk of Hurst's car. The scene was covered with a significant amount of the victim's blood, and it was apparent from water on the floor that someone had attempted to clean up the area.

The victim suffered a minimum of sixty incised slash and stab wounds, including severe wounds to the face, neck, back, torso, and arms. The victim also had blood stains on the knees of her pants, indicating that she had been kneeling in her blood. A forensic pathologist, Dr. Michael Berkland, testified that some of the wounds cut through the tissue into the underlying bone, and while several

wounds had the potential to be fatal, the victim probably would not have survived more than fifteen minutes after the wounds were inflicted. Dr. Berkland also testified that the victim's wounds were consistent with the use of a box cutter. A box cutter was found on a baker's rack close to the victim's body. Later testing showed that the box cutter had the victim's blood on it. It was not the type of box cutter that was used at Popeye's, but was similar to a box cutter that Hurst had been seen with several days before the crime.

Hurst's friend, Michael Williams, testified that Hurst admitted to him that he had killed Harrison. Hurst told him that he had an argument with the victim, she 'retaliated,' and that Hurst hit the victim and cut her with a box cutter. Hurst said he had killed the victim because, 'he didn't want the woman to see his face.' Williams stated that Hurst had talked about robbing Popeye's on previous occasions.

Another of Hurst's friends, 'Lee-Lee' Smith, testified that the night before the murder, Hurst said he was going to rob Popeye's. On the morning of the murder, Hurst came to Smith's house with a plastic container full of money from the Popeye's safe. Hurst instructed Smith to keep the money for him. Hurst said he had killed the victim and put her in the freezer. Smith washed Hurst's pants, which had blood on them, and threw away Hurst's socks and shoes. Later that morning, Smith and Hurst went to Wal-Mart to purchase a new pair of shoes. [fn2] They also went to a pawn shop where Hurst saw some rings he liked, and after returning to Smith's house for the stolen money, Hurst returned to the shop and purchased the three rings for $300. An employee at the shop, Bob Little, testified that on the day of the murder, a man fitting Hurst's description purchased three rings. Little picked Hurst out of a photographic lineup as the man who had purchased the rings. The police recovered the three rings from Hurst.

fn2. The Wal-Mart accounting office manager and records custodian, Deborah McKnight, testified that on May 2, 1998, a pair of LA Gear white and navy shoes were purchased at 10:10 a.m. and no other shoes of this type were purchased on the day of the murder. The police found a pair of LA Gear shoes in Hurst's car with the Wal-Mart sales ticket on them.

Smith's parents were out of town the weekend of the murder but upon their return, and after discovering the container with the money from Popeye's in Smith's room, Smith's mother contacted the police and turned the container over to them. The police interviewed Smith and searched a garbage can in Smith's yard where they found a coin purse that contained the victim's driver's license and other property, a bank bag marked with 'Popeye's' and the victim's name, a bank deposit slip, a sock with blood stains on it, and a sheet of

> notebook paper marked 'Lee Smith, language lab.' On the back of the notebook paper someone had added several numbers, and one number was the same as the amount on the deposit slip. Smith's father also gave the police a pair of size fourteen shoes that appeared to have blood stains on them and that he had retrieved from the same trash can.
>
> Jack Remus, a Florida Department of Law Enforcement (FDLE) crime lab analyst, testified that the shoes were tested with phenolpthalein to detect blood, and while the test results exhibited some of the chemical indications associated with blood, attempts at DNA testing were not successful. Remus also tested the blood-stained sock and determined that the DNA typing was consistent with the victim. Hurst's pants were also tested, but no blood evidence was detected. FDLE fingerprint expert Paul Norkus testified that the deposit slip in the garbage can had three of Hurst's fingerprints on it.
>
> At trial, the State played the tape of an interview the police had conducted with Hurst shortly after the murder. Hurst said that on the morning of the murder he was on his way to work and his car broke down. He said that he telephoned Harrison at Popeye's to say he was unable to come to work, and when he talked to her, she sounded scared and he heard whispering in the background. Hurst then went to Smith's house and changed out of his work clothes. Hurst said he went to the pawn shop and bought necklaces for friends, but he did not mention purchasing the three rings or buying a new pair of shoes at Wal-Mart.
>
> At the close of the guilt phase of the trial, the jury deliberated for approximately six hours before finding Hurst guilty of first-degree murder.

819 So.2d at 692-94.

The Time of the Murder.

The State contests Hurst's multiple attempts (E.g., IB 38-39, 60 n.10 and accompanying text) to rely upon a precise time of the murder. Therefore, at this juncture, the State highlights the trial evidence and related proceedings undermining Hurst's specific time-assertions.

Popeye's manager Cynthia Knight testified at trial that on the day of the murder, the victim and Hurst, and no one else, were scheduled to be at work at 8 o'clock. (TT/II 331) The victim had a key to the Popeye's, but Hurst did not. (TT/II 332) The Popeye's was scheduled to open for customers

at 10:30a.m. (TT/II 337)

At trial, Jeanette Hayes (Pugh) testified that she spoke with the victim on the phone at 7:55a.m., and the victim did not sound scared. (TT/II 286-87) She talked with the victim for "about four or five minutes." (TT/II 290) About the time that Hayes spoke with the victim, a delivery truck was "getting ready to leave to go to" the victim's store. (TT/II 287) On cross-examination, she acknowledged that she had locked the door behind the truck driver and then called the victim, but she also said that it takes the driver a "few minutes for him to leave." (TT/II 289-90)

David Kaditis testified that sometime prior to 7:30a.m., he was waiting for the Barnes feed Store to open, when he saw the victim drive by with a large blue sedan "just behind her" and driven by a black male whom he was unable to more-specifically describe or otherwise identify. (TT/II 292-93, 296, 298) He estimated the time as approximately "7:20 - 7:15 to 7:20." (TT/II 293) At the time, Kladitis "was sitting on the back of the tailgate." (TT/II 295) Kladitis identified Hurst's car as the large blue sedan. (Compare TT/II 294 with TT/III 519)

For "probably about a year or less," Carl Hess had worked at Wendy's next door to the Popeye's. (TT/II 299) He was not looking at his watch, and he estimated that he saw the victim arrive at the Popeye's "anywhere between 7:00 and 8:30." (TT/II 300) After the victim arrived, Hess said he saw a "blue Ford Taurus car coming down Nine Mile Road on the west side and turn left into that little road there, made another left," and park. (TT/II 301) When the driver exited the car, Hess said he recognized the driver as

Hurst and described him. (TT/II 302-305) Hess said that Hurst, at about 7:30 to 8:30, "started banging on the glass window and banging on the glass door" and the victim "let him in." (TT/II 303, 317)

Some employees arrived at the Popeye's at undetermined times after 8a.m., but they did not initially go inside. Anthony Brown, a Popeye's employee, was scheduled to be at work at 9a.m. (TT/II 207) His mother took him to work that morning, and she had to be at her job by 8:30a.m. Brown testified that they left home sometime after 8:00a.m. (TT/II 207-208) When he arrived at the Popeye's, the door was locked, no one came to the door, and the victim's car was parked in the front, but he did not see Hurst's car there. (TT/II 208-210) "Like five minutes after" Brown arrived at Popeye's, a delivery truck driver arrived, and Brown "sat down in the back with him." (TT/II 209) Tonya, a manager, arrived "probably after 10:00" and unlocked the business. (TT/II 211) Brown testified that the truck driver found the victim's body. (TT/II 211-12)

On cross-examination, Brown said that he told the police that he arrived "like 8:05" and that his mother said he arrived at 8:15a.m., but he had no watch on. (TT/II 212) On re-direct examination, Brown reiterated he and his mother left their house after 8 o'clock and acknowledged that "all [he] knows is that the truck driver arrived five minutes after [he] got there." (TT/II 218) Therefore, the State disputes Hurst's unqualified assertion (IB 38 n.9) that Anthony Brown testified "he believed he arrived for work at approximately 8:05a.m."

The delivery truck driver, Raymond Curtis, did not testify at the

trial, but, for the defense's case, the parties stipulated that the truck driver made a statement that he had arrived at Popeye's at 8:10 a.m. (TT/I 158; TT/IV 716). Contrary to Hurst's assertion (IB 38 n.9), the prosecutor ultimately did not stipulate that the driver actually arrived at that time:

> MR. RIMMER: … Mr. Curtis is not available as a witness, but we have stipulated to the admissibility of his handwritten statement because they have a time on there, that he arrived at 8:10. I'm stipulating that is, in fact, his statement. I'm not stipulating that is, in fact, his statement. I'm not stipulating or agreeing that he got there at 8:10, but that's what the statement says. So I just want to make sure that's what the stipulation is.

(TT/I 158) Thus, while defense counsel indicated that the prosecutor had been amenable to stipulating to the time, the prosecutor subsequently only agreed to the defense introducing Curtis' statement. (Id.)

Lee-Lee Smith testified that at about 8:30 to 8:45 Hurst came to his house with the container with money in it and blood on his pants and shoes and stated he got the money from Popeye's and killed the manger. He testified to additional details and testified that he went with Hurst into Wal-Mart for Hurst to buy some new shoes. (TT/III 396-404, 407)

Arguing to the jury, the prosecutor rejected Curtis' 8:10 time and contended that the only times that were "absolutely reliable" were Jeanette Hayes calling the victim at 7:55 (because she had looked at the clock) and Hurst buying shoes at Wal Mart at 10:10 (the time evidenced by the store's records). (TT/V 898-99, 905)

Tonya Crenshaw testified that she arrived at Popeye's at about 10:30a.m. and unlocked the door to let the employees and delivery driver inside, resulting in the discovery of the victim's body and other evidence.

(TT/II 220-25) The victim and Hurst were scheduled to be at the Popeye's at that time. (TT/II 221)

The first officer arrived at the Popeye's at 10:46a.m. (TT/II 232-33) The time of the murder was argued to the jury (See, e.g., TT/V 883-86, 898-900, 905, 910-12), and the jury found Hurst guilty as charged (TT/V 942-46).

Based on these events, as well as the other evidence amassed against Hurst and summarized in this Court's direct appeal opinion, the State disputes Hurst's conclusion that this was a "close" case (See, e.g., IB 39), Hurst's wish to retry this case on postconviction (See, e.g., IB 38: "simply not believable"), and his suggestions that the State did not rebut his alibi (See, e.g., IB 38: "a fact never rebutted").

The Postconviction Proceedings.

As listed in the Case Timeline, in four days, the Circuit Court conducted extensive evidentiary hearings on several of the claims. (See PXR/XI; PCR/XII; PCR/XIII; PCR/XIV; PCR/XV; PCR/V 760-96; exhibits at PCR/III 493-579; PCR/IV 580-719).

Witnesses included **trial defense counsel** (PCR/XI 1923-2005; PCR/XIV 2630-48), trial defense counsel's investigator, **Larry Smith** (PCR/XI 2207-39, and the trial prosecutor, **David Rimmer** (PCR/XIII 2355-2404, PCR/XIV 2525-2627).

Trial defense counsel, among other things, testified concerning his rationale for not pursuing a mental health expert. (PCR/XIV 2635-40)

Prosecutor Rimmer denied having any conversations with Lee-Lee Smith or

Lee-Lee's mother about charging Lee-Lee. Instead, Judge Tarbuck's inquiry about any such charges prompted him to think about it more, and he ultimately charged Lee-Lee with Accessory After the Fact. (PCR/XIV 2586-87)

Lee-Lee Smith testified that after Hurst's trial he was charged with, and pled no contest to, Accessory After the Fact. (PCR/XII 2251-56) Lee-Lee's mother testified that at some point prior to Hurst's trial the prosecutor said that Lee-Lee would be charged with Accessory After the Fact. (PCR/XII 2270-74)

Anthony Williams, who had testified at trial, testified that he had lied, and committed perjury, about Hurst confessing to him. (PCR/XII 2188-2212)

Andrew Salter testified that when he was in the area of the Popeye's the morning of the murder, he saw no cars in the Popeye's parking lot. Later, he left and returned a couple of times, and he saw "the driver ringing the bell at the back" and "the whole police." (PCR/XII 2257-67)

At a continuation of evidentiary hearing, **David Kladitis** and **Carl Hess** testified. (PCR/V 760-96) Kladitis testified about some African American males he saw and heard playing loud music the morning of the murder. (Id. at 769-70) Hess testified that Hurst "came up, brought me an application. I looked it over and left it at that." (Id. at 786-87)

John Sanderson, who had been an investigator in the Escambia County Sheriff's Office, testified that he assisted Buddy Nesmith in the investigation of this murder. Among other things, he was asked extensive questions about Wal-Mart. (PCR/XIII 2282-2351) Sanderson was not present

when Hurst made the statement to Nesmith that was played to the jury. (Id. at 2344) Investigator Buddy Nesmith also testified extensively about Wal-Mart, and he brought notes to court with him, which became a source of extensive argument from counsel. (PCR/XIII 2426-55; PCR/XIV 2458-2523)

Two psychologists, **Dr.s Valerie McClain** (PCR/XI 2013-68)) and **James Larson** (PCR/XI 2069-2105; PCR/XII 2108-87) testified and disputed regarding the significance of various test results.

The State discusses pertinent postconviction evidence in greater detail under each issue.

SUMMARY OF ARGUMENT

In these postconviction proceedings Hurst attempts to whittle away at the massive evidence introduced against him at trial. However, the case against Hurst remains extremely strong. Multiple friends and acquaintances of Hurst, such as **Lee-Lee Smith** and **Michael Williams**, testified at trial that Hurst confessed. The attempted and discredited recantation of **Anthony Williams (**ISSUE I) and the possible partial recantation of **Willie Griffin** (ISSUE V) are inconsequential. The morning of the murder, **David Kladitis** saw the victim headed for work and being followed closely by Hurst's car; Kladitis seeing some other African American males earlier in the area playing loud music and conspicuously talking among themselves (ISSUE I) is irrelevant to Hurst's guilt.

If **Lee-Lee Smith** thought he would be charged with Accessory After the Fact to this murder (ISSUE I, ISSUE II), the elements of that crime would match the content of his trial testimony against Hurst, reinforcing that

incriminating trial testimony. Accordingly, if Judge Tarbuck inquired of the prosecutor about whether Lee-Smith had been charged with anything (ISSUE V), this would not be an **"ex parte" communication** that mattered regarding Hurst's guilt or sentence.

Hurst wants to re-hash **Carl Hess**'s trial testimony concerning his role at Wendy's regarding employment applications (ISSUE II, ISSUE V), but Hess's positive identification of Hurst at the murder scene remains firm, along with Hurst's fingerprint on the Popeye's deposit slip, Hurst's possession of a box cutter similar to the murder weapon, Hurst's car containing tape like the tape used on the victim, … .

If **Andrew Salter** (ISSUE III) wandered around the general area of the Popeye's, went home for a lengthy period, and went in the nearby Winn-Dixie for awhile, Hurst is just as guilty as he was when he was tried. If two police officers got their wires crossed in writing up their reports regarding **Wal-Mart** (ISSUE III), Hurst is still just as guilty.

Investigator Nesmith's notes (ISSUE V) are no basis of relief, but rather, over-all they re-confirm Hurst's guilt.

Long after the trial, Hurst finding an **mental health expert** (ISSUE IV) to test and testify on matters that Hurst directed his trial counsel not to pursue is no basis for relief concerning the death sentence, especially where an expert for the State testified concerning flaws in the defense expert's testing.

Therefore, to the degree that Hurst has preserved his postconviction claims, they merited no relief in the trial court and they merit no relief

now. The trial court's denial of postconviction relief should be affirmed.

ARGUMENT

As a threshold matter, the State contests Hurst's mantra throughout his brief (See, e.g., IB 32, 39, 40, 49) that this was a weak, close circumstantial case at trial. In spite of his trial attorney's diligent efforts at trial and Hurst's postconviction attempt to re-try and recast the evidence to his benefit, the jury had before it the totality of the evidence, weighed it, and found that it proved beyond a reasonable doubt that, on May 2, 1998, Hurst murdered Cynthia Harrison.

Moreover, where a defendant is placed at the murder scene and confessed to multiple people, as here, the case is not circumstantial. Here, in addition to Hess putting Hurst at the crime scene, Kladitis saw Hurst's car driving to the crime scene following the victim. Here, Hurst's fingerprints were on the deposit slip tied to the murder. Hurst was seen with a box cutter resembling the murder weapon. Hurst had tape in his car like the tape used on the victim. The day of the murder, Lee-Lee Smith saw Hurst bloodied from the murder. Hurst concealed from the police his buying new shoes at Wal-Mart to replace his bloodied shoes. Hurst worked at the Popeye's, which was locked when the victim's body was recovered, indicating an inside job. Hurst's story that his car breaking down kept him from arriving at work was incredulous, as Kladitis saw Hurst's car following the victim's, Hess saw Hurst at the Popeye's, and Hurst subsequently ran a number of errands in his car that same day. These are some of the key facts showing that this was not a weak circumstantial case.

ISSUE I: HAS HURST DEMONSTRATED THAT THE TRIAL COURT ERRED IN DENYING RELIEF ON CLAIMS ALLEGING VIOLATIONS OF BRADY V. MARYLAND, 373 U.S. 83 (1963), OR GIGLIO V. UNITED STATES, 405 U.S. 150 (1972), AFTER AN EVIDENTIARY HEARING? (RESTATED)

In the first issue, Hurst contends that Circuit Judge Nobles, after conducting an evidentiary hearing on these matters, erroneously concluded that violations of Brady and Giglio had not been established. His ISSUE-I claims focus on David Kladitis, Anthony Williams, and Lee ("Lee-Lee") Smith. The State summarizes the applicable law regarding Brady and Giglio, then, as to each claim, discusses Judge Nobles' sound and extensive reasoning for denying the claim and follows-up with discussion.

A. Brady, Giglio, and appellate burdens.

To establish a Brady violation, a defendant must show: (1) evidence favorable to the accused, because it is either exculpatory or impeaching; (2) the State willfully or inadvertently suppressed it; and (3) that the suppression resulted in prejudice. See, e.g., Jones v. State, 2008 Fla. LEXIS 1565 (Fla. Sept. 4, 2008); Wright v. State, 857 So.2d 861, 870 (Fla. 2003). The burden is on the defendant to demonstrate each of these elements. See Wright, 857 So.2d at 870.

The prejudice prong is not satisfied unless the defendant shows the withheld evidence is material. Under Brady, the undisclosed evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985). The mere possibility that undisclosed items of information

may have been helpful to the defense in its own investigation does not establish the materiality of the information. Wright, 857 So.2d at 870, citing United States v. Agurs, 427 U.S. 97 (1976); Gorham v. State, 521 So.2d 1067, 1069 (1988).

"To establish a *Giglio* violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. ***Ventura v. State***, 794 So.2d 553, 562 (Fla. 2001); ***see also Rose v. State***, 774 So.2d 629, 635 (Fla. 2000)." Guzman v. State, 868 So.2d 498, 505 (Fla. 2003).

If the defendant demonstrates the first two Giglio prongs, then "the State bears the burden to show that the false evidence was not material," 868 So.2d at 507. For this materiality burden, the State must demonstrate that "the presentation of false testimony at trial was harmless beyond a reasonable doubt." Id. at 506-507.

Guzman v. State, 941 So.2d 1045, 1050 (Fla. 2006), following up on the 2003 Guzman opinion, explained that the Brady's "reasonable probability" test is the same as "the prejudice prong of a claim of ineffective assistance of counsel pursuant to ***Strickland v. Washington***, 466 U.S. 668 (1984)." On the other hand, "the test of materiality under *Giglio* is more 'defense friendly' than the *Brady* materiality test. *** In fact, the test under *Giglio* is the same as the harmless error test of ***Chapman v. California***, 386 U.S. 18 (1967), and *DiGuilio* [State v. DiGuilio, 491 So.2d 1129 (Fla. 1986)]." 941 So.2d at 1050 (parallel cites omitted).

In reviewing trial court determinations of Brady and Giglio claims, the

appellate court is "bound by the trial court's credibility determinations and factual findings to the extent they are supported by competent, substantial evidence." Jones v. State, 2008 Fla. LEXIS 1565 (Fla. Sept. 4, 2008), citing Johnson v. State, 921 So.2d 490, 507 (Fla. 2005), and Guzman v. State, 941 So.2d 1045, 1049-50 (Fla. 2006). See also, e.g., Walls v. State, 926 So.2d 1156, 1165 (Fla. 2006), citing McLin v. State, 827 So.2d 948, 954 n.4 (Fla. 2002), and Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997). Thus, Jones, 2008 Fla. LEXIS 1565, held that "especially when such factual findings are based on an evaluation of credibility and demeanor, we deny each of Jones's *Brady* and *Giglio* claims." Given the deference to the trial court's factual determinations, then the appellate court decides "de novo whether the facts are sufficient to establish each element" of Brady and Giglio." Jones, 2008 Fla. LEXIS 1565.

On appeal, the judge's rulings are presumed correct. See, e.g., Goodwin v. State, 751 So.2d 537, 544 (Fla. 1999)("We interpret section 924.051(7) as a reaffirmation of the important principle that the defendant bears the burden of demonstrating that an error occurred in the trial court, which was preserved by proper objection"); Dragovich v. State, 492 So.2d 350, 353 (Fla. 1986)("it must be presumed that the trial judges of this state will comply with the law"). Accordingly, "the 'tipsy coachman' doctrine, allows an appellate court to affirm a trial court that 'reaches the right result, but for the wrong reasons' so long as 'there is any basis which would support the judgment in the record.'" Robertson v. State, 829 So.2d 901, 906-909 (Fla. 2002)(collecting cases; DCA improperly applied the doctrine

where no basis in record for the alternative theory), citing Dade County School Board v. Radio Station WQBA, 731 So.2d 638, 644-45 (Fla. 1999), and Applegate v. Barnett Bank, 377 So.2d 1150, 1152 (Fla. 1979). Thus, although the "tipsy coachman" doctrine was not explicitly referenced in Carroll v. State, 815 So.2d 601, 618-19 (Fla. 2002), Carroll affirmed a summary denial of a Brady claim based on evidence adduced pursuant to an ineffective-assistance-of-counsel claim.

B. Time of the murder.

As discussed and detailed in the Statement of Facts supra, the State contests Hurst's self-serving conclusions concerning the time of the murder.

The time of the murder was litigated before the jury, and the jury resolved the matter to Hurst's detriment. Hence, on direct appeal, this Court described the timing of others' arrival: "at some point before opening, two other Popeye's employees arrived, in addition to the driver of the supply truck." As bluntly put by Wainwright v. Sykes, 433 U.S. 72, 90 (1977), the "state trial on the merits [was] the 'main event.'"

C. David Kladitis.

Hurst claims (IB 36-39) that the State intentionally suppressed evidence that David Kladitis saw some black males in the parking lot of the Popeye's restaurant prior to the murder on the morning of the murder. Hurst has failed to prove any of the three Brady prongs. The trial court's order rejecting this claim merits affirmance.

Regarding this claim, Circuit Judge Nobles found:

David Kladitis testified at trial that he saw Defendant's vehicle driving behind the victim's vehicle on the morning of May 2, 1998, the date of the murder. [fn20] Defendant now alleges that Mr. Kladitis also provided information to law enforcement and the assistant state attorney that he observed two to three black males in two separate vehicles in the Popeye's parking lot earlier that morning. Defendant asserts that the Escambia County Sheriff's Office and the prosecutor in the instant case both informed Mr. Kladitis that they 'did not want to hear' about this other information, but they only wanted to know about Mr. Kladitis' observations regarding Defendant. Allegedly, the information regarding the other persons outside of the Popeye's restaurant was not disclosed to the defense.

Investigator Nesmith's notes indicate that Mr. Kladitis did indeed reveal this additional information when he was interviewed by Investigator Nesmith. The record demonstrates that this information was not introduced into evidence during the trial. Defendant contends that this additional information was 'blatantly and improperly' suppressed by law enforcement and the prosecutor in violation of *Brady*.

Mr. Kladitis testified at evidentiary hearing that while he was eating breakfast at approximately 6:40 a.m., he saw 'a couple' of African-American males in the parking lot of the Popeye's restaurant; they were in plain view and playing their music 'real loud.' [fn21] When considering this testimony with the other testimony introduced at trial, the Court finds that this additional information does not undermine confidence in the verdict rendered. At trial, Jeanette Pugh (formerly Jeanette Hayes) testified that she spoke with the victim on the telephone at 7:55 a.m. [fn22] Ms. Pugh specifically testified that she did not hear any type of noise in the background, and that the victim did not sound scared, but sounded normal. The exact time of the murder was never determined, but the victim was killed sometime before 10:30 a.m., when her body was found at the restaurant. [fn24] Therefore, at least one hour prior to the murder, Mr. Kladitis observed persons in the Popeye's parking lot, who were in plain sight and who were conspicuously playing 'real loud' music. It would stand to reason that law enforcement and the prosecutor were not 'interested' in this information, and wanted to concentrate on the information that could actually be pertinent to the crime, i.e., the observation of Defendant's vehicle following the victim later on that morning. Additionally, the Court notes that Mr. Kladitis testified at evidentiary hearing that neither the investigator nor the prosecutor suggested that he should withhold this information. [fn25] Consequently, the Court finds that, when taken in consideration with the totality of the evidence produced at trial, Defendant has failed to demonstrate the requisite prejudice necessary to establish a *Brady* violation. Defendant is not entitled to relief as to this claim.

fn21. *See* Evidentiary Hearing Transcript, July 9, 2004 ('EHT2'), pp. 11-12.

fn22. *See* Attachment 1, TT, Vol. 11, pp. 287.

fn23. *See* Attachment 1, TT, Vol.11, pp. 285-288.

fn24. *See* Attachment 1, TT, Vol. 11, pp. 220-223; Vol. V, pp. 898-899.

fn25. *See* EHT2, pp. 17-20; 24-25.

(PCR/VIII 1404-1406) The well-documented ruling, standing on its own, merits affirmance. The State highlights some aspects of the record supporting it.

According to Kladitis' postconviction testimony, the police and the prosecutor were not interested in his observations of some young African-American males playing loud music in the Popeye's parking lot about an hour before the murder:

> They said the only concern they had - the only thing that they felt was important was the fact that I saw the young lady that morning about quarter till seven, the vehicle that I saw behind that … and that's what they wanted me to keep in my mind until the deposition and/or trial.

(PCR/V 776) No one, including defense counsel, was interested in what occurred prior to seeing the victim and Hurst's car following the victim. (PCR/V 784) Accordingly, contrary to Hurts's suggestion (IB 37) but as the trial court found, Kladitis unequivocally stated that neither the police nor the prosecutor directed him to withhold that information (PCR/V 783), and he would have told whoever would have asked him about seeing the African American males (PCR/V 777).

As a general principle, there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." Moore v. Illinois, 408 U.S. 786,

795 (1972). Here, Kladitis mentioning the African Americans to law enforcement is inconsequential, not exculpatory, and therefore not Brady material, and not prejudicial. The facts surrounding the young (See PCR/V 770) African-Americans support the police and prosecutor's disinterest in their presence as irrelevant to this murder. First, there has been no evidence whatsoever that these youngsters were in any way connected to the murder: No evidence that they worked at the Popeye's or were otherwise familiar with the availability of money on the premises prior to Popeye's opening for the day; no evidence that the victim knew them and would have let them into Popeye's prior to opening to the public; no evidence that any of their fingerprints were on the Popeye's deposit receipt; no evidence that any of them confessed to anyone; no evidence that they were anywhere near the Popeye's at the time of the murder[1]; and so on. Second, the actions of the young African-American males were inconsistent with any involvement in the murder and, for that matter, any other criminal activity:

- The first of the two cars drove up with the windows down (PCR/V 770), indicating no effort to mask their identities behind any tinted windows or otherwise;

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[1] As the trial court noted (PCR/VIII 1405-1406) and as elaborated in the Statement of Facts supra, the precise time of the murder and the precise time of Kladitis' observations of the African Americans were undetermined, but it is clear that he saw them significantly prior to seeing the victim driving near the Popeye's with Hurst's large blue sedan with an African-American male driving following closely behind her (Compare PCR/V 771-72, 775-77, 783, 784 with TT/II 292-98 and TT/III 519-20).

- They were parked in a publicly accessible area of the Popeye's parking lot between the rear of Popeye's and the Barnes Feed and Seed (See PCR/V 769-70);
- They were in plain sight of Kladitis, who, at that time, was sitting on his vehicle's tailgate (PCR/V 771) "50 feet - 50 to 75 feet" from them (PCR/V 771);
- "A couple of the gentlemen got out. Were talking to each other, leaning in the car talking back and forth (PCR/V 770-71);
- They were playing music "real loud," indeed, so "awfully loud" that Kladitis, after about 10 minutes, "decided to drive over to Barnes Feed and Seed" (PCR/V 771), where he subsequently saw the victim drive by and being closely followed by Hurst's car driven by an African American male[2] (Compare PCR/V 771-72, 775-77, 783, 784 with TT/II 292-98 and TT/III 519-20).

In sum, Hurst has failed to demonstrate that the supposedly undisclosed evidence was exculpatory, impeaching, or prejudicial. At most Hurst tendered de minimis postconviction evidence, so that he has also failed to demonstrate that a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Moreover, this postconviction evidence especially pales in contrast to the evidence adduced at trial, summarized in the Facts section supra and further discussed infra.

In Wright v. State, 857 So. 2d 861, 870 (Fla. 2003), as here, there was a "mere possibility that undisclosed items of information may have been helpful to the defense." Wright involved "other possible suspects and other criminal activity in the same neighborhood." In contrast, the postconviction evidence concerning Kladitis did not even rise to "possible

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[2] Although Kladitis identified Hurst's car (TT/II 293-94; TT/III 519), he could not identify its African-American male driver (See TT/II 297-98).

suspects" or "other criminal activity" at the Popeye's, as there was nothing proved about the young males that linked them to this murder or even any other criminal activity.

Wright relied upon Carroll v. State, 815 So.2d 601, 618-20 (Fla. 2002), which also provides guidance here. Carroll, like here, involved a claim suggesting that someone else was involved in the murder and law enforcement did not disclose related information to the defense. Moreover, Carroll included information concerning other felonies in the neighborhood. Here, Hurst suggests that the African-American males may have been involved in this murder, but they are not linked to any criminal activity whatsoever. They were merely present earlier in the morning and behaving in a manner inconsistent with their involvement in any criminal activity. In denying relief, Wright applied Carroll:

> In denying relief on this issue, we said, 'As noted by the State, the prosecution is not required to provide the defendant all information regarding its investigatory work on a particular case regardless of its relevancy or materiality.' [quoting Carroll, 815 So.2d at 620]. Likewise, investigators in this case were not required to provide all of the notes and information regarding their investigation. Thus, Wright has failed to demonstrate that the evidence should have been disclosed.

Here, given the innocent conduct of the African American males and and given its timing non-contemporaneous with this murder, the notes "were not required to [be] provide[d]" and Hurst "has failed to demonstrate that the evidence should have been disclosed."

Smith v. State, 931 So.2d 790, 798 (Fla. 2006), rejected a Brady claim "regarding the State's failure to disclose that Jones initially was listed as a suspect in the murder. The evidence showed that Jones was so listed

shortly after the murder because he lived within a block of the crime scene and had outstanding warrants for his arrest." Jones was present at the murder scene during the murder because he testified as an eyewitness to the murder. Smith held that "the evidence is neither exculpatory nor impeaching." Here, the African American males were not suspects, and Hurst has not demonstrated any concrete evidence that they should have been suspects, and there was no evidence placing them in, or even in the parking lot of, the Popeye's during the murder.

Tompkins v. State, 872 So.2d 230, 233, 240 (Fla. 2003), in which "Tompkins was convicted of the first-degree murder of Lisa Decarr," upheld the summary denial of a Brady claim that suggested that someone else may have committed the murder. There, as here, there was "no indication in these reports that [the victim] ever had contact with [the proposed suspect[s]]." Indeed, at least in Tompkins, there appeared to be some link between the other suspect and the murder victim through one of the murder victim's friends. Here, Hurst has failed to show any link between the African American males and victim or her murder other than they happened to be in the area of the Popeye's prior to the murder. The proposed Brady evidence here is weaker than in Tompkins, and here, Hurst was afforded an evidentiary hearing. The denial of this claim should be affirmed.

As Boyd v. State, 910 So.2d 167, 179-80 (Fla. 2005)("mere possibility that there could have been a print on the trash bag not belonging to Boyd or someone in Boyd's household"), citing United States v. Agurs, 427 U.S. 97, 109-10 (1976), rejected a Brady claim because it was based upon a "mere

possibility" of exculpatory evidence, the mere possibility that one or more of the African Americans was somehow involved in this murder and involved so that somehow Hurst was exculpated, is patently insufficient.

In sum,[3] **Hurst speculates** that the African American males who were socializing and listening to loud music in plain view in the public parking lot well-before the murder could have been involved in the murder, but a defendant's speculation is not Brady material. See also Jimenez v. State, 2008 Fla. LEXIS 1107, *11-12 (Fla. June 19, 2008)(rehearing pending; "trial court correctly found that the first prong under *Brady* was not satisfied because this allegedly suppressed information was neither exculpatory nor impeaching"; "Ali would have merely testified that he picked up a person, who stated that he had been mugged and was bleeding from the face, approximately sixteen blocks from the crime scene and approximately thirty minutes after the murder of Minas"; "would not have logically connected the person that he picked up in his cab to the murder"); Gorham v. State, 521 So.2d 1067, 1069 (Fla. 1988)(" motion only raises the possibility that the

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[3] Moreover, alternatively, Kladitis testified at the postconviction hearing that he was deposed (PCR/V 777-78, 783-84) and that trial defense counsel was not interested in anything that occurred prior to seeing the victim drive by with Hurst's car closely following. Therefore, there can be no Brady violation. See United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980)("when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no *Brady* claim"). Of course, the State maintains that Kladitis' observation of the African American males was not exculpatory and any nondisclosure was non-prejudicial, and, counsel was not deficient and any such omission was non-prejudicial. In any event, a claim of ineffective assistance of counsel on this matter is not raised here.

photograph and plaster casts 'might have proven" that someone else brought the wallet to the body of Carl Peterson after the murder'"; facially insufficient).

Further, Hurst's speculation is indicative of his failure to prove Brady materiality of the law enforcement note. The jury is instructed not to rely upon speculative doubts in reaching its decision. Accordingly, the judicial assessment of any effect of a non-disclosure should exclude from consideration Hurst's speculation that the unidentified African American males were involved in this murder.

D. Anthony Williams.

This claim (IB 39-42), based upon Anthony Williams' postconviction recantation, requests this Court to second-guess the circuit judge's determinations of the credibility of witnesses, contrary to long-established and sound precedent. See, e.g., Jones, 2008 Fla. LEXIS 1565; Dailey v. State, 965 So.2d 38, 46 (Fla. 2007)("Because recantation testimony 'entails a determination as to the credibility of the witness, this Court "will not substitute its judgment for that of the trial court on issues of credibility" so long as the decision is supported by competent, substantial evidence'"), quoting Marquard v. State, 850 So.2d 417, 424 (Fla. 2002), quoting Johnson v. State, 769 So.2d 990, 1000 (Fla. 2000).

The trial court's ruling denying this claim, grounded on credibility findings, merits affirmance:

> Anthony Williams was a fellow jail inmate of Defendant's who testified at trial that Defendant told him that Defendant had participated in the murder of Cynthia Harrison, the victim in the instant case. [fn11] Defendant alleges that the State violated *Brady*

by failing to disclose that it had made 'promises of leniency' to Mr. Williams in exchange for his testimony against Defendant.

Defendant further argues that the prosecutor's closing argument violated Giglio because the prosecutor withheld the fact that Mr. Williams had a 'deal' in place.

At evidentiary hearing, Mr. Williams testified that Defendant did not confess to him about murdering the victim. Instead, Mr. Williams admitted he had testified falsely because the prosecutor told him he would be 'take[n] care of … in the long run.' [fn12]

Recanted testimony, especially when it involves a confession of perjury, is 'exceedingly unreliable.' *Armstrong v. State*, 642 So.2d 730, 735 (Fla. 1994).

> In assessing recanted testimony. [the Florida Supreme Court has] stressed caution, noting that it may be unreliable and trial judges must "examine all of the circumstances in the case." Accordingly, "recantation by a witness called on behalf of the prosecution does not necessarily entitle a defendant to a new trial." That is the purpose of an evidentiary hearing.

Lightbourne v. State, 841 So.2d 431, 441 (Fla. 2003) (*citing Robinson v. State*, 707 So.2d 688, 691 (Fla. 1998) (citations omitted)).

The Court finds Mr. Williams' testimony at evidentiary hearing not credible. During cross-examination it was revealed that Mr. Williams had stated in his deposition that he was providing information regarding Defendant's confession or inculpatory statements to the State because it was 'the right thing to do,' and because Mr. Williams's mother had advised him it was the 'right thing to do.' [fn13] Although Mr. Williams now avers that he committed perjury during the deposition, [fn14] this Court does not find Mr. Williams' testimony credible on this issue.

Mr. Williams further testified at evidentiary hearing that he is now telling the truth because 'you cannot go through life knowing that you committed wrongs against others.' [fn15] However, the Court finds it quite telling that Mr. Williams did not come forward with this information until approximately two years after Defendant had been sentenced to death.[fn16] The timing of Mr. Williams' 'new revelations' does not bode well for his credibility. The Court further notes that Mr. Williams' demeanor throughout his evidentiary hearing testimony was defensive and antagonistic, indicating to this Court that his testimony at evidentiary hearing was not truthful. [fn17]

David Rimmer, the prosecutor in the instant case, testified at evidentiary hearing that he did not make any promises to Mr. Williams about his cases. [fn18] Mr. Rimmer also testified that it was his

practice when dealing with 'inmate-snitches' to 'never give them any indication that I'm going to do anything. I always, in fact, cut them off and tell them to start with, I can't make you any promises.' [fn19] The Court finds Mr. Rimmer's testimony on this subject credible.

As the Court has determined that Mr. Williams was not offered a 'deal' for his 'perjured' testimony at trial, Defendant has failed to establish that either a ***Brady*** or ***Giglio*** violation occurred as to Mr. Williams' testimony. Defendant is not entitled to relief as to this claim.

fn11. *See* Attachment 1, Trial Transcript (TT), Vol. II, pp. 356-363.

fn12. *See* EHT, Vol. II, p. 275.

fn13. *See* EHT, Vol. II, pp. 285-286.

fn14. *See* EHT, Vol. II, p. 290.

fn15. *See* EHT, Vol. II, p. 290.

fn16. At evidentiary hearing, A. Williams testified that he did not come forward sooner because he did not know who he should contact with the information. The Court finds it convenient that even though A. Williams has been represented by four attorneys since testifying at Defendant's trial, A. Williams has been unable to obtain assistance in bringing this information to the correct person(s) earlier. See EHT, Vol. 11, pp. 290-295.

fn17. *See* EHT, Vol. II, pp. 271-295.

fn18. *See* EHT, Vol. IV, p. 671.

fn19. *See* EHT, Vol. IV, p. 675.

(PCR/VIII 1402-1404) This well-documented ruling, standing on its own, merits affirmance. The State highlights some aspects of the record supporting it.

Judge Nobles found prosecutor David Rimmer's postconviction testimony "credible." (PCR/VIII 1404) David Rimmer was the chief prosecutor for Hurst's trial (PCR/XIII 2355), and the direct-examiner of Anthony Williams at trial (TT/II 356-58). At the postconviction hearing, Rimmer testified: "I **never** made any promises to him about his pending cases." (PCR/XIV 2588) Similarly, Rimmer testified in response to a cross-examination question

concerning inmate-snitches: "… I never give them any indication that I'm going to do anything. I always, in fact, cut them off and tell them to start with, I can't make you any promises." (PCR/XIV 2592) He explained that if he made promises, he would "certainly" have to disclose it to the defense and the credibility of the witness would be undermined. (PCR/XIV 2595) Consistent with Hurst's erroneously second-guessing Judge Nobles' credibility determination but contrary to the law, Hurst (at IB 42) attempts broad-stroked character assassination on the prosecutor by pyramiding inferences and then using his inferences to question the Circuit Judge's findings. His leaps to his inferences and then leaping application of those inferences to the issue of the credibility of Anthony Williams and the prosecutor are contrary to case law, to the trial court's grounded findings, and to logic. See also ISSUE V discussing alleged ex parte communication.

Citing to Williams' demeanor on the stand at the postconviction hearing (PCR/VIII 1404), the Circuit Judge found "his testimony at evidentiary [the] hearing was not truthful." The Circuit Judge also noted Williams' delay in coming forward with his recantation in spite of being represented by four attorneys in his cases (PCR/VIII 1404 n.16 and accompanying text; see PCR/XII 2207-2212), and the generally unreliable nature of recantations (PCR/VIII 1403).

The general suspicion of recanted testimony is well-founded, as the former witness subsequently finds himself in a prison or other crime-culture street population that is not sympathetic to snitches. Thus,

Williams, at the time of the postconviction hearing was serving two consecutive life sentences (PCR/XII 2197-99), and he admitted to "going through fights in the county jail for this." (PCR/XII 2209)

Further, the postconviction record shows that Williams substantially testified at a pre-trial deposition consistently with his trial testimony concerning Hurst (See PCR/XII 2202-2206) and reinforced the background for his trial testimony by explaining that he had counseled with his mother who told him that testifying at trial was the right thing to do (PCR/XII 2202-2203). At his deposition, Williams essentially indicated that he followed-up on his mother's advice by speaking with narcotics officer David Blake, who told him to get in touch with his public defender. (See PCR/XII 2203-2207)

Hurst's allegation (IB 41-42) that Rimmer "does not know if they are telling the truth" is also not a ground for reversal. First, Hurst has not shown and the State has not found where this was even alleged in a postconviction motion as a ground for relief. Second, arguendo taking Hurst's accusation at face value, the first prong of a Brady claim is that **the evidence is** exculpatory or, for Giglio claim, that **the evidence is** false, as discussed supra. A prosecutor's subjective personal opinion that s/he is not positive about the truthfulness of a witness is neither exculpatory nor false **evidence.** Primary foundations for the Brady and Giglio analyses are (a) whether there was **actual evidence** (not a lawyer's opinion of a witness) that undermined introduced incriminating evidence through its exculpatory nature (Brady) or through its actual false nature

(Giglio) and, only then, (b) whether the prosecutor knew of that evidence. Hurst totally skips the crucial first step of actual evidence. Third, the State disputes any suggestion that Rimmer even subjectively believed Williams was untruthful at trial. Rimmer indicated that he would not put someone on the stand if he "had some serious questions":

> There have been inmates who wanted to testify, who contacted me, and after talking with them, I decided not to put them on the stand because I had some serious questions. And in some cases, they actually come right out and want some sort of promise from me, which I'm not willing to give, so I don't put them on the stand.

(PCR/XIV 2592) He continued by flatly denying that he puts a witness on the stand "if I think they're lying." (PCR/XIV 2594) The bottom-line is that Rimmer, a seasoned prosecutor, having prosecuted 62 first-degree murder trials (PCR/XIV 2591), knows that sometimes he cannot be 100% certain, "sometimes I just don't know," but he assesses them based upon his personal impression and based upon the consistency of the witness "with other evidence." (PCR/XIV 2593)

Arguendo, even erroneously rejecting the trial court's credibility findings and taking Anthony Williams' evidentiary hearing testimony at face value, Hurst still would not be entitled to relief on this claim. According to Anthony Williams' postconviction testimony, the first time he thought he was being offered "some leniency" was the day of Hurst's trial. (See PCR/XII 2192) That day, when Anthony Williams expressed some sort of reluctance to testify, the prosecutor told him "[t]hat I knew to do the right thing and he would take care of me in the long run." (EHT 275) As a matter of law, this does not support relief, as Ventura v. State, 794 So.2d

553, 563 (Fla. 2001), quoting Tarver v. Hopper, 169 F.3d 710 (11th Cir. 1999), indicated:

> [N]ot everything said to a witness or to his lawyer must be disclosed. For example, a promise to 'speak a word' on the witness's behalf does not need to be disclosed. Likewise, a prosecutor's statement that he would **'take care' of** the witness does not need to be disclosed. Some promises, agreements, or understandings do not need to be disclosed because they are too ambiguous, or too loose or are of too marginal a benefit to the witness to count.

Accord Depree v. Thomas, 946 F.2d 784, 797-98 (11th Cir.1991). Ventura distinguished it facts from Tarver, but here, even according to Anthony Williams, the supposed promise was "ambiguous, loose, and marginal," 794 So.2d at 563. Thus, a witness's subjective belief that the prosecutor would help him is not the basis for a Brady or Giglio claim. See, e.g., Hill v. Johnson, 210 F.3d 481, 486 (5th Cir. 2000)(subjective beliefs of witnesses regarding the possibility of future favorable treatment are insufficient to trigger the State's duty to disclose under Brady and Giglio). Indeed, someone's subjective beliefs fail to provide state action on which to apply these claims.

Further, concerning the Brady/Giglio prejudice/materiality prongs, Anthony Williams' incriminating trial testimony consisted of indicating that Hurst said that he (Hurst) participated in the Popeye's murder. (TT/II 358) This Court's summary of the case against Hurst did not even mention Anthony Williams. See 819 So.2d at 692-94, as excerpted in the Statement of Facts above. At trial, defense counsel conducted a short but focused cross-examination of Anthony Williams (TT/II 358-62) in which he pointed out that the witness was testifying in jail clothes and had four felony convictions

(TT/II 358). Through his leading question, defense counsel also suggested that the witness would lie "so that he could get a break on his case." (TT/II 359)

Therefore, even erroneously rejecting the trial court's credibility findings: Given Anthony Williams' short inculpatory trial testimony, given defense counsel's trial cross-examination of Williams, given the other trial evidence showing Hurst's guilt, and given the ambiguous nature of the supposed promise, the postconviction claims concerning Anthony Williams are inconsequential, harmless, and merit no relief under Brady or Giglio.

E. Lee-Lee Smith.

In this claim (IB 42-44), Hurst again argues that this Court should disregard Judge Nobles' credibility-based factual findings. Hurst's conclusion that he is entitled to appellate relief because the prosecutor told trial witness Lee-Lee Smith, prior to Lee-Lee Smith testifying at trial, that he will be charged for this murder; Hurst's conclusion is erroneous, not the Circuit Judge's findings and ruling. The direct answer to this claim is that it fails because Judge Nobles accredited prosecutor Rimmer's postconviction testimony in which Rimmer denied making any such statement to Smith.

Standing on their own, Judge Nobles' findings and ruling merit affirmance:

> Lee-Lee Smith testified that Defendant had confessed to him that he had murdered the victim. Smith also testified that, at Defendant's direction, Smith washed Defendant’s clothes and disposed of evidence. [fn48] Physical evidence from the scene was found in Smith’s bedroom and the trash can found outside of the Smith home. [fn49]

Defendant contends that prior to Smith's trial testimony, the State informed Smith that he would be charged in connection with the murder. Defendant alleges that this was never disclosed to defense counsel. Defendant argues that if his trial counsel had been aware of this fact, counsel could have argued to the jury the discrepancies between charging Defendant and Smith, and that Smith had been promised lesser treatment for his testimony. [fn50] Defendant alleges that the State's failure to reveal its intention to charge Lee-Lee Smith in the instant case was a violation of both *Brady* and *Giglio*.

At the evidentiary hearing, Smith first testified that he was not told he would be charged with a crime prior to giving testimony in the instant case. [fn51] Later, he testified it was either after the trial or during the trial he was notified that he would be charged with a crime. [fn52] Later still, Smith testified that he really did not remember when he was informed by the prosecutor, David Rimmer, that he would be charged. [fn53] Eunice Smith, Lee-Lee's mother, testified at the evidentiary hearing that Mr. Rimmer informed Lee-Lee before Defendant's trial that he would be charged in the instant case. [fn54] Mr. Rimmer also testified at evidentiary hearing and indicated that he did not tell Smith before Defendant's trial that he intended to charge him with a crime related to the instant case. [fn55] Rimmer testified specifically that when he met with Smith and his mother prior to Defendant's trial he "never said that he'd be charged in the case." [fn56] In fact, Rimmer specifically recalled that at some point he was asked by the trial judge why he had not charged Smith. Rimmer informed the judge that he had not decided at that point if he would charge Smith. [fn57] The Court finds Mr. Rimmer's testimony credible as to the issue of whether he informed Lee-Lee Smith before Defendant's trial that Smith would be charged in the instant matter. Accordingly, the Court finds that Defendant has failed to demonstrate that either *Brady* or *Giglio* violations occurred.

fn48. *See* Attachment 1, TT, Vol. III, pp. 396-397.

fn49. *See* Attachment 1, TT, Vol.111, pp. 498-501; 572-583.

Fn50. The Court has taken judicial notice of the court record in Lee-Lee Smith's case, demonstrating that Smith was indeed charged after completion of Defendant's trial as an accessory after the fact to the murder of the victim in the instant case. Smith's case was adjudicated in juvenile court.

fn51. *See* EHT, Vol. Il, pp. 336-337.

fn52. *See* EHT, Vol. II, p. 338.

fn53. *See* EHT, Vol. II, pp. 335-339.

fn54. *See* EHT, Vol. II, pp. 353-358.

fn55. *See* EHT, Vol. IV, pp. 669-670.

fn56. *See* EHT, Vol. IV, p. 680.

fn57. This testimony at evidentiary hearing is the basis for Defendant's claim VIII alleging *ex parte* communications between the prosecutor and the trial judge. See EHT, Vol. IV, pp. 670; 686-691.

(PCR/VIII 1410-12)[4]

Contrary to Hurst's suggestion (IB 43) that prosecutor Rimmer "never denied having a conversation with Mrs. Smith informing her he would be charging her son," Rimmer's accredited testimony included the following:

> Q. So I'm just going to put it to you this way: There's been allegations concerning -- by Lee-Lee Smith or Lee-Lee Smith's mother concerning conversations you had with Lee-Lee Smith about when and if you were going to prosecute him and for what. Do you remember conversations with Lee-Lee or Lee-Lee Smith's mother or in the presence of Lee-Lee Smith's mother?
>
> A. I had no conversations with him about charging him in connection with this case.
>
> Q. Okay. Would you tell the Court, then, what conversations you had with Lee-Lee Smith and how it came about that you, in fact, charged him.
>
> *** I **never** mentioned anything to Lee-Lee about being charged.
>
> *** I **never** told him that he was going to be charged in connection with the case. ***
>
> Q. Then subsequently, you did charge him with a crime?
>
> A. Right. After -- after Judge Tarbuck asked me that question, I got to thinking about it and I thought, well, maybe I should.
>
> Q. That was accessory after the fact?
>
> A. I believe it was.
>
> Q. But he's never been charged with the murder itself?

[4] The Circuit Judge's order then lengthily discusses law enforcement notes regarding Lee-Lee Smith (PCR/VIII 1412-19), which is not claimed in ISSUE I.

A. No.

***

Q. (By Mr. Brody [cross-examination]) Well, let me -- did you go talk to **Lee-Lee Smith's mother** prior to the trial?

A. I went out to the house **to meet with Lee-Lee and his mother**, and again, Lee-Lee was being -- he was acting evasive. He was acting like, you know, he didn't want to cooperate. And that's when I impressed upon him that he would have to appear in court, and if he did not appear in court, he could be held in contempt. But **I never said that he'd be charged in the case.**

Q. And his mother was there?

A. I believe she was.

(PCR/XIV 2586-88, 2596-97)

Finally, Hurst (IB 43-44) argues that the prosecutor believed that Lee-Lee Smith "committed a crime in this case." However, Hurst fails to demonstrate how such a belief, by itself, is Brady or Giglio material.

Moreover, the prosecutor even argued details to the jury demonstrating Lee-Lee Smith was an accessory after the fact, "helping Hurst after the crime" (TT/V 841. See also TT/V 902), the precise charge ultimately levied against Smith (See, e.g., PCR/VIII 1411 n.50), thereby fully disclosing the gravamen of the charge underlying this claim. This emphasis to the jury not only negates any supposed Brady non-disclosure or Giglio misrepresentation, but also negates any prejudice or materiality. Further negating prejudice and materiality, trial defense counsel, in the context of other facts tending to undermine Smith, tactically used the fact that Smith had not been charged at the time that he testified at trial. Defense counsel elicited from Smith that the police had fingerprinted him and read him his "rights," but he has not been charged in this case. (TT/III 467-68) Then on

closing argument, defense counsel hammered the point: "And to this day, Lee-Lee Smith has not been charged with one thing, not one offense, not one crime." (TT/V 878) Thus, defense counsel obtained more "mileage" at trial with the posture of then-known facts and innuendos than if this claim's allegedly concealed information had been disclosed.

In sum, nothing was concealed, and the formality of any supposed intended charge, if anything, would have been consistent with the content of Smith's trial testimony: Smith's trial testimony showed that he was, as matter of law and fact, an accessory after the fact. This consistency, combined with all the evidence establishing Hurst's guilt, also negates any prejudice and any materiality.

F. No judicially cognizable harm.

Assuming that any of the foregoing claims establish any error, it is de minimis, especially when compared to the other extensive trial evidence amassed against Hurst, summarized by this Court's direct appeal opinion and at the beginning of the Argument section supra, there was no prejudice under Brady and no materiality under Giglio. See, e.g., Wright v. State, 857 So.2d 861, 870 (Fla. 2003)("fact of other criminal activities and the existence of other criminals in the same neighborhood where this murder occurred does not affect the guilt or punishment of this defendant").

ISSUE II: HAS HURST DEMONSTRATED THE TRIAL COURT ERRED IN DENYING HIM RELIEF ON NEWLY DISCOVERED EVIDENCE CLAIMS AFTER AN EVIDENTIARY HEARING? (RESTATED)

ISSUE II contends that Circuit Judge Nobles, after conducting an evidentiary hearing, erred in denying newly-discovered evidence claims

concerning Anthony Williams' recantation, Lee-Lee Smith's charge for accessory after the fact, and the degree that Carl Hess interacted with Hurst prior to seeing him at the Popeye's the morning of this murder. With the exception of the claim regarding Carl Hess, the ISSUE II claims overlap those in ISSUE I, except couched in newly-discovered-evidence terms rather than Brady or Giglio.

The State submits that the trial court's well-documented and well-reasoned denials of these claims, after conducting an evidentiary hearing, merit affirmance.

A. Hurst's Burdens to Demonstrate Newly-Discovered-Evidence Claims and to Demonstrate Error on Appeal.

Jones v. State, 709 So. 2d 512, 521-22 (Fla. 1998), summarized Hurst's burdens to obtain relief on a newly discovered evidence claim:

> Two requirements must be met in order for a conviction to be set aside on the basis of newly discovered evidence. First, in order to be considered newly discovered, the evidence 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence.' *Torres-Arboleda v. Dugger*, 636 So.2d 1321, 1324-25 (Fla. 1994).
>
> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *Jones*, 591 So.2d at 911, 915 [Jones v. State, 591 So. 2d 911, 915 (Fla. 1991)]. To reach this conclusion the trial court is required to 'consider all newly discovered evidence which would be admissible' at trial and then evaluate the 'weight of both the newly discovered evidence and the evidence which was introduced at the trial.' *Id.* at 916.
>
> In considering the second prong, the trial court should initially consider whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility. *See Johnson v. Singletary*, 647 So.2d 106, 110-11 (Fla. 1994); *cf. Bain v. State*, 691 So. 2d 508, 509 (Fla. 5th DCA 1997). Once this is determined, an evaluation of the weight to be accorded the evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. *See Williamson*

> *v. Dugger*, 651 So.2d 84, 89 (Fla. 1994). The trial court should also determine whether the evidence is cumulative to other evidence in the case. ***See State v. Spaziano***, 692 So.2d 174, 177 (Fla. 1997); ***Williamson***, 651 So. 2d at 89. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence. Where, as in this case, some of the newly discovered evidence includes the testimony of individuals who claim to be witnesses to events that occurred at the time of the crime, the trial court may consider both the length of the delay and the reason the witness failed to come forward sooner.

Melton v. State, 949 So.2d 994, 1011 (Fla. 2006), reiterated Hurst's two-pronged burden and continued:

> If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence. *See Jones v. State*, 591 So.2d 911, 915 (Fla. 1991) (*Jones I*).
>
> In determining whether the evidence compels a new trial, the trial court must 'consider all newly discovered evidence which would be admissible,' and must 'evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial.' ***Id.*** at 916.

Melton, 949 So.2d at 1011, summarized the appellate standard of review after an evidentiary hearing, like here, that defers to the trial court's factual findings and reviews legal questions do novo:

> When the trial court rules on a newly discovered evidence claim after an evidentiary hearing, we review the trial court's findings on questions of fact, the credibility of witnesses, and the weight of the evidence for competent, substantial evidence. ***Blanco v. State***, 702 So.2d 1250, 1252 (Fla. 1997). As with rulings on other postconviction claims, we review the trial court's application of the law to the facts de novo. ***

See also, e.g., Robinson v. State, 865 So.2d 1259, 1262 (Fla. 2004)(reviewed standards; deferred to trial court's "fact-based determination").

B. Anthony Williams.

Circuit Judge Nobles, as in the Brady/Giglio claim, found that Anthony

Williams postconviction testimony was not credible. The trial court designated Anthony Williams, as "A. Williams," distinguishing him from Michael Williams, to whom Hurst also confessed (TT/II 321-22). The trial court's order merits affirmance:

> At Defendant's trial, Anthony Williams testified that Defendant told him about participating in the murder of the victim. [fn74] Defendant alleges that A. Williams now claims that his trial testimony was a complete fabrication based upon promises made to him by the prosecutor. ***
>
> A. Williams testified at evidentiary hearing that his deposition and trial testimony were false.[fn75] As previously discussed [block-quote in ISSUE I, supra], recanted testimony is exceedingly unreliable. *See Armstrong*, 642 So.2d at 735. In hearing the testimony of A. Williams at evidentiary hearing, and reviewing A. Williams's previous deposition and trial testimony, the Court finds, as detailed above [block-quote in ISSUE I, supra], that A. Williams's evidentiary hearing testimony is not credible. In addition, A. Williams's evidentiary hearing testimony, when weighed with the other evidence adduced at Defendant's trial, would not have changed the outcome of Defendant's trial.
>
> fn74. *See* Attachment 1, TT, Vol. II, pp. 356-358.
>
> fn75. *See* EHT, Vol. II, pp. 274-275; 289-293.

(PCR/VIII 1427-28)

As in ISSUE I, Hurst's claim based upon Anthony Williams' postconviction recantation must fail because the trial court, based upon an evidentiary hearing, rejected its credibility. See Jones, 2008 Fla. LEXIS 1565; Dailey, 965 So.2d at 46 ("Because recantation testimony 'entails a determination as to the credibility of the witness, this Court "will not substitute its judgment for that of the trial court on issues of credibility" so long as the decision is supported by competent, substantial evidence'"), quoting Marquard, 850 So.2d at 424, quoting Johnson, 769 So.2d at 1000.

Moreover, arguendo in the alternative, as the trial court found, even considering Anthony Williams' postconviction testimony, the outcome of the trial would not have been different. (See discussions of the brief nature of Williams' trial testimony, defense counsel's biting cross-examination of Williams in ISSUE I, and the totality of trial evidence immediately prior to ISSUE I, and the summary of facts in Statement of Facts, supra)

C. Lee-Lee Smith.

The trial court ruled:

> Defendant alleges that it was not discovered until after trial that Lee-Lee Smith was actually a 'co-defendant.' According to testimony adduced at evidentiary hearing[] and the record in Smith's case, Smith was charged after the completion of Defendant's trial as an accessory after the fact. [fn77] Smith's case was transferred to juvenile court; he entered a plea as a juvenile delinquent, and was adjudicated guilty. [fn78] Defendant argues that if the jury had known that Smith was Defendant's codefendant and had been convicted in the instant case, they would have scrutinized Smith's testimony more closely, and the outcome of Defendant's trial would have been different.
>
> The court concludes that, had the jury known that Lee-Lee Smith had been found guilty as an accessory after the fact, it is quite likely that the jury may have given Smith's trial testimony even more weight. The fact that Smith would have already been found guilty of assisting Defendant with the murder after the fact would have likely reinforced the content of his testimony. The Court finds that Smith's charge and conviction for accessory after the fact would have done little to change the outcome of Defendant's trial. Defendant is not entitled to relief as to this claim.
>
> fn77. *See* EHT, Vol. II. pp. 335-336; see also information in Lee-Lee Smith's case 00-2078.
>
> fn78. *See* EHT, Vol. IV, pp. 690; 704-706; see also court docket in case 00-2078.

(PCR/VIII 1429-30) The trial court's determination merits affirmance. See also White v. State, 817 So.2d 799, 810 (Fla. 2002)("'A trial court's determination concerning the relative culpability of the co-perpetrators in

a first-degree murder case is a finding of fact and will be sustained on review if supported by competent substantial evidence'"), quoting Puccio v. State, 701 So.2d 858, 860 (Fla. 1997).

Hurst's ISSUE II claim overlooks the gravamen of Circuit Judge Noble's ruling: The charge eventually levied against Lee-Lee Smith was consistent with his trial testimony that he was guilty of assisting Hurst after-the-fact, that is guilty of Accessory After the Fact. Accordingly, Hurst overlooks the gravamen of the case that he cites (IB 50) as purported support for this claim, Scott v. Dugger, 604 So.2d 465, (Fla. 1992). Scott, 604 So.2d at 469, explained:

> The instant case is distinguishable from ***Garcia v. State***, 492 So.2d 360 (Fla.), cert. denied, 479 U.S. 1022, 93 L. Ed. 2d 730, 107 S. Ct. 680 (1986), where this Court rejected a defendant's argument that his death sentence denied him equal justice because none of the other three participants in the crime received a sentence of death. Garcia did not involve equally culpable participants; Garcia admitted that he was the trigger-man. Although this Court addressed the hypothetical situation where one of the accomplices was also a trigger-man, the Court concluded that the evidence in ***Garcia*** supported the sentencing judge's conclusion that the aggravating factors outweighed the mitigating factors. ***Id.*** at 368. This is in sharp contrast to the instant case where Judge Schaeffer stated 'I will have to go on record at the time of my sentence if the codefendant [had] already been sentenced to life, I would have sentenced Mr. Scott to life despite the jury's recommendation.'
>
> Accordingly, we hold that in a death case involving **equally culpable codefendants** the death sentence of one codefendant is subject to collateral review under rule 3.850 when another codefendant subsequently receives a life sentence.

See also, e.g., Bradley v. State, 787 So.2d 732, 746-747 (Fla. 2001)(Linda Jones procured Bradley to kill her husband; she received a life sentence and Bradley received death sentence; no indication that Mrs. Jones had directed the savage manner in which Bradley killed Mr. Jones; affirmed

Bradley's death sentence).

Here, as argued in ISSUE I and as the trial court reasoned, the jury and the sentencing judge were apprised of Smith's after-the-fact and role **less culpable** than Hurst, and, postconviction, Hurst has shown no credible evidence different from what was already before the jury and sentencing court. Ultimately, Smith's "conviction" as a juvenile of Accessory After the Fact reinforced his less culpable role, to which he had already testified during Hurst's trial. In the trial court's words, the eventual conviction "reinforced the content of his [trial] testimony." There is nothing substantively "new" after the trial, and the post-trial "conviction" changes nothing. Further, Smith's post-trial juvenile "conviction" pales in comparison with the totality of evidence against Hurst. It would not have "probably produce an acquittal [or life sentence] on retrial."

Accordingly, in comparing culpability, the analysis is bound by the crime on which the "codefendant" is actually convicted, here only Accessory After the Fact. Therefore, as a matter of law, he is not as culpable as Hurst. See Shere v. Moore, 830 So.2d 56, 62 (Fla. 2002)("once a codefendant's culpability has been determined by a jury verdict or a judge's finding of guilt we should abide by that decision, and only when the codefendant has been found guilty of the same degree of murder should the relative culpability aspect of proportionality come into play").

Moreover, even if Smith had been convicted of First Degree Murder, he, as a juvenile (See TT/III 395: age 17 in March 2000; PCR/XII 2252: age 21

in June 2004; PCR/VIII 1429), would not have been death-eligible, further negating Hurst's ISSUE II claim. Compare Shere ("the codefendant should not only be convicted of the same crime but should also be otherwise eligible to receive a death sentence, i.e., be of the requisite age and not mentally retarded") with Roper v. Simmons, 543 U.S. 551 (2005)(death penalty is disproportionate punishment for offenders under 18"). See Farina v. State, 801 So. 2d 44, 49, 56 (Fla. 2001)(16-year-old "Jeffery was tried on the same charges and convicted, but he is not subject to the death penalty because his age of sixteen at the time of the offense prevents him from receiving the death penalty as a matter of law").

D. Carl Hess.

Hurst (IB 51-52) continues to attempt to re-hash what essentially was already "aired out" for the jury to consider. Hurst improperly wants to disregard applicable legal standards by re-trying this case before this Court.

The trial court's order merits affirmance:

> Defendant alleges that it is 'newly discovered evidence' that Carl Hess now admits that he never interviewed Defendant for a job. Defendant claims that this information renders Hess's credibility 'crippled,' and that the concession that he did not interview Defendant taints 'every other aspect' of Hess's testimony. ***
>
> The allegation that Carl Hess did not interview Defendant is not 'newly discovered.' Trial counsel for Defendant fully explored during trial Hess’s 'manager trainee' position at Wendy's, [fn79] and his limited role concerning interviewing job applicants. [fn80] In fact, the defense even called the Wendy's manager Sun Nguyen to testify that Hess did not interview candidates or make hiring decisions regarding employees. [fn81] Hess himself testified at trial that he did not make hiring decisions. [fn82] The jury was able to hear all of this testimony at trial and determine how much weight to give Hess's trial testimony. Defendant has failed to demonstrate that this

information is 'newly discovered,' and he is not entitled to relief on this basis.

fn79. See Attachment 1, TT, Vol. II, pp. 303-304; Vol. IV, pp. 747-748.

fn80. See Attachment 1, TT, Vol.11, pp. 307-312; Vol. IV, pp. 746-748; Vol. V, pp. 876-877.

fn81. See Attachment 1, TT, Vol. IV, p.749.

fn82. See Attachment I, TT, Vol. II, pp. 311-312.

(PCR/VIII 1430-31)

Contrary to Hurst's assertion (IB 30-31) that there was "no basis" on which Hess to base his identification of Hurst other than interviewing Hurst for a job, it is unrebutted that Hess had worked at the Wendy's, nearby the Popeye's murder scene, for several months prior to this May 2, 1998, murder (TT/II 299. See PCR/V 785-87) and that he had seen Hurst prior to the day of the murder "[f]rom [Hurst] working at Popeye's, coming and going, and he had filled out an application out at Wendy's" (TT/II 304). Thus, at trial the defense called Sun Nguyen, the general manager of the Wendy's, who testified that, although Hess had been rejected for Wendy's manager program because he failed a test (TT/IV 747-48), Hess did work there at the time (Id. at 746-47), Hess was "management material," dependable, and hard working (Id. at 749), Hess's duties included "clean[ing] up the parking lot" (TT/IV 747), which he testified he was doing when he saw Hurst arrive at the Popeye's the morning of the murder (TT/II 300-302, 319), and Hess could have received Hurst's application and

talked with Hurst about a job at Wendy's (TT/IV 749)[5].

At trial, as the trial court's postconviction order indicates, defense counsel explored, for the jury to weigh, Hess's position at Wendy's and his role concerning job applications. (See TT/II 307-12; TT/IV 746-49; TT/V 876-77)[6] Therefore, the jury had the gravamen of the facts of this claim before it to weigh Hess's positive identification of Hurst arriving at the Wendy's the morning of the murder (TT/II 305-306).

In sum, this matter was explored at length during the trial, the jury weighed it and found Hurst guilty, and, indeed, it still does not matter in the context of all the incriminating evidence introduced at trial.

ISSUE III: HAS HURST DEMONSTRATED THE TRIAL COURT ERRED IN DENYING HIM RELIEF ON GUILT-PHASE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS AFTER AN EVIDENTIARY HEARING? (RESTATED)

ISSUE III asserts that the trial court erred in denying two guilt-phase ineffective assistance of counsel (IAC) claims. The first ISSUE III claim argues that trial defense counsel should have found Andrew Salter and put him on the witness stand. The second ISSUE III claim argues that defense

[5] Therefore, term "interview" may be more of a semantical "issue" than a meaningful factual issue. Thus, Hurst's labeling it a "lie" (IB 47) is self-serving.

[6] In his "facts" for this issue, Hurst states (IB 47) that "Hess misidentified both Mr. Hurst's car and clothing. (PC-R. 1957-58)" However, he is only citing trial defense counsel's postconviction opinion. Hurst has not tendered to the trial court postconviction evidence for a claim regarding the description of the car or Hurst's clothing beyond what was produced for the jury at trial. To the contrary concerning the car, the State discussed in its postconviction memorandum to the trial court Hess's uncertainty in his deposition concerning the specifics of Hurst's car. (See PCR/VIII 1367 n.8)

counsel should have "dispute[d] the evidence and argument that Mr. Hurst failed to mention going to Wal-Mart" (IB 63), where Hurst bought some new shoes.

A. Hurst's Burdens to Demonstrate Guilt-Phase Ineffective Assistance of Counsel Claims and to Demonstrate Error on Appeal.

Ford v. State, 955 So. 2d 550, 553 (Fla. 2007), summarized the basic standards:

> Following the United States Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), this Court has held that for ineffective assistance of counsel claims to be successful, two requirements must be satisfied: First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied. *Maxwell v. Wainwright*, 490 So.2d 927, 932 (Fla. 1986) (citations omitted). ***
>
> There is a strong presumption that trial counsel's performance was not ineffective. *See Strickland*, 466 U.S. at 690. 'A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.' *Id.* at 689. The defendant carries the burden to 'overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."' *Id.* (*quoting Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)). 'Judicial scrutiny of counsel's performance must be highly deferential.' *Id.* In *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000), this Court held that 'strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.'

Extensive experience of trial defense counsel can inform the evaluation whether a defendant has met his Strickland burdens. See, e.g., Henry v. State, 948 So.2d 609, 619-20 (Fla. 2006)(citing to defense counsel's

extensive experience); Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000)("When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger"). Here, Hurst's postconviction burden is weightier due to his trial counsel's extensive experience. He had tried "hundreds and hundreds of life felony and other cases," including ones with high media exposure. He had been "involved in numerous murder cases." (PCR/XI 1923-27) It is also noteworthy that his investigator was very experienced. (See PCR/XII 2227-28)

Ford also addressed the non-prevailing party's burden on appeal: "Because both prongs of the ***Strickland*** test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo. ***See Sochor v. State***, 883 So.2d 766, 771-72 (Fla. 2004)."

Concerning a non-prevailing defendant's burdens, also see, e.g., Walls v. State, 926 So.2d 1156, 1164-65 (Fla. 2006).

Here, even with years of hindsight, after multiple supplemental postconviction motions, and after affording Hurst days in which to present postconviction evidence, Hurst has failed to show Strickland deficiency or Strickland prejudice on either of these IAC claims. His burden was to prove both prongs; he proved neither.

B. Andrew Salter.

The trial court's well-documented and well-reasoned order merits

affirmance:

> Defendant alleges that Andrew Salter is the 'suspicious' unidentified person that witness Rochelle Tingler saw the morning of the murder. [fn93] She reported Salter's presence to law enforcement at the scene. [fn94]
>
> Defendant alleges that even though counsel was aware that Salter might be a possible witness via discovery, he failed to interview Salter. Defendant contends that if counsel had interviewed Salter, he would have discovered 'exculpatory' information. According to Defendant, Salter would have testified that he was in the Popeye's parking lot at approximately 7:30 a.m. to 8:00 a.m. on May 2, 1998. Salter observed the victim's Toyota Tercel in the parking lot, Carl Hess in the Wendy's parking lot, and witnessed Anthony Brown, a Popeye's employee, knock on the door of Popeye's. Later, Salter observed Raymond Curtis, the delivery truck driver, park behind the Popeye's restaurant. However, Salter did not observe Defendant or his vehicle at the Popeye's restaurant. Defendant alleges that Salter's testimony would have been 'crucia1ly important' in refuting Hess's testimony that Defendant and his vehicle were at the Popeye's on the morning of May 2, 1998.
>
> Salter's evidentiary hearing testimony does not support Defendant's allegations. Salter testified at evidentiary hearing that he woke up at 5:30 a.m., left the trailer park located behind the West Florida Motel, and walked to the Wendy's restaurant to await a ride to work. [fn95] According to Salter's evidentiary hearing testimony, he **did not** observe any vehicles or persons, including Popeye's employees, in the Popeye's parking lot that morning. [fn96] Salter also testified that he was not sure if he had seen the Wendy's employee (Hess) that morning; he stated that he thought he saw somebody from Wendy's take out the trash. [fn97] Salter also testified that he left the area to go home and eat, but that he was still hungry, and decided to walk to Winri-Dixie, [fn98] 'maybe a two-and-a-half-minute walk' from Popeye's. [fn99] Salter estimated that he was 'probably' in the Winn-Dixie less than 10 to 15 minutes. [fn100] Salter remembered seeing the delivery truck driver at the back of the Popeye's restaurant, but could not be sure if the delivery truck arrived before he went into Winn-Dixie, or if he saw it at the back of the restaurant after he left the grocery store. [fn101] Additionally, while Salter testified that the Popeye's was in his 'eye-view,' Salter was unable to say that he was watching the Popeye's very carefully between the hours of 7:00 a.m. to 8:20 a.m.[fn102] When asked whether Salter was in the parking lot for an hour and a half to two hours, Salter responded. '[y]es. Sitting over by the Wendy's, maybe an hour and a half, perhaps. I'm not sure.' [fn103] The Court finds that this testimony would not have exonerated Defendant at trial.

Additionally, trial counsel testified at evidentiary hearing that he made the strategic decision not to locate and interview Andrew Salter. At evidentiary hearing, trial counsel stated, '[f]or some period of time I made serious efforts to try to find out who the guy was [that the ladies from the beauty shop had seen that morning] and was unsuccessful… . But then, frankly, it became, in my opinion, an advantage not to know who he was and to simply argue that he was a strange, suspicious black guy out there on a place, and I inferred that it was earlier than it really was, and it give [sic] me an out, which supported my theory and argument in the case.' [fn104] '[D]efense counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered and rejected.' ***Spencer***, 842 So.2d at 62 [Spencer v. State, 842 So.2d 52, 62 (Fla. 2003)]. The Court finds that counsel investigated other courses of action but ultimately decided that it was in the best interest of his client if he did not locate and interview Andrew Salter. The Court finds this to be a reasonable strategy and further finds that Defendant has failed to demonstrate that he was prejudiced by his counsel's actions or that he was prejudiced by the absence of Salter's testimony at trial. Defendant is therefore not entitled to relief as to this claim.

fn93. Laura Rochelle Tingler was one of the ladies from the hair salon who testified regarding the unidentified person. See Attachment 1, TT, Vol. IV, pp. 720-724.

fn94. ***See*** Attachment 1, TT, Vol. IV, pp. 722-723.

fn95. ***See*** EHT, Vol. II, pp. 340-341.

fn96 ***See*** EHT, Vol. II, pp. 342-343.

fn97. ***See*** EHT Vol. II, p. 344.

fn98. ***See*** EHT, Vol. II, p. 342.

fn99. ***See*** EHT, Vol. II, p. 346.

fn100. ***See*** EHT, Vol. II, p. 346.

fn101. ***See*** EHT, Vol. II, pp. 342; 346-347.

fn102. ***See*** EHT, Vol. II, p. 348.

fn103. ***See*** EHT, Vol. II, p. 349.

fn104. ***See*** EHT, Vol. I, p. 45.

(PCR/VIII 1435-37, bold emphasis in original)

Hurst claims (IB 60) on appeal that the Circuit Court's order was wrong in its analysis that Salter's testimony was not exculpatory. Hurst argues that at one point Salter saw "the delivery driver"; Salter did not see Hurst but would have seen him if Hurst was there as Hess testified at

trial; the murder transpired while Salter was in the Winn-Dixie. Hurst also suggests (See IB 60) that Salter saw Hess during this time. However, Hurst is wrong, not the trial court.

Hurst improperly builds his argument upon his inferring certain, fixed times regarding the time of the murder and the specific times Salter was at various locations that the evidence does not establish. Hurst also self-servingly infers that the trash man Salter may have seen was Hess.

The State has already discussed in the Statement of Facts, supra, the time of the murder as uncertain. Salter's estimated times were also non-specific, uncertain, and riddled with his guesstimates. He responded to a question when he awakened that morning as "I think it was about 5:30." (PCR/XII 2258) He somehow arrived in the vicinity of the Wendy's and Popeye's instantaneously after waking up because he said was "there about 5:30 in the morning." (Id. at 2250) He stayed at Wendy's until "I really don't remember what time." (Id. at 2258) While waiting for his ride, whenever that was, he "saw no one and nothing at that time." (Id. at 2259) At one point he thought he went home. (Id. at 2259) If he went home, he returned and walked over to the Winn-Dixie, which took "[m]aybe two-and-one-half minutes" (Id. at 2263), was in the Winn-Dixie for he "guess[ed]" "[p]robably" less than 10 to 15 minutes (Id.), "came back out," and saw the police at the Popeye's (Id. at 2259), which would have been after 10:46 a.m., when the first officer arrived (TT/II 232-33).

Salter was supposedly in the Wendy's parking lot a total of "about an hour and a half, maybe two hours" (PCR/XII 2260), "maybe an hour and a

half, perhaps" (adding, "I'm not sure"), (Id. at 2266) netting as entirely unaccounted-for: 5:30 a.m. to 10:46 a.m. minus about two hours; that is, about three hours the morning of the murder, in Salter's testimony, are unaccounted for.

Apparently in that three hours that Salter was not observing anything in the area of the Popeye's, the victim arrived and was killed because Salter unambiguously stated that he did not see any cars in the Popeye's parking lot (PCR/XII 2259). Whenever Salter looked towards the Popeye's, it was not when or after the victim arrived there and therefore not at a time when Hurst and his car would have also been there.

Regarding the delivery driver, Salter ambiguously testified that he (Salter) **thought** he (Salter) went home, came back, saw a delivery driver ringing the bell, walked to the Winn-Dixie, was in the Winn-Dixie for probably less than 10 to 15 minutes, then saw the police. (PCR/XII 2259, 2263. See also Id. at 2264: did not recall delivery driver there but was possible he was there when he walked to Winn-Dixie) On cross-examination, Salter testified that he thought it was not until he left Winn-Dixie that he saw the delivery driver. (PCR/XII 2263) Again, key to Salter's vague testimony is that he did not recall seeing anyone or any car at the Popeye's until after the delivery driver and the police arrived. (See PCR/XII 2259-60)

Hurst's suggestion (IB 60) that the person taking out the trash at Wendy's was Hess is not supported by the evidence. Salter testified:

> Q. Do you recall if you ever saw a white gentleman from Wendy's, an employee of Wendy's?

> A. **I don't know** if I saw the cleaning guy that morning, that one that comes. **I thought** I saw **somebody take out the trash.**

(PCR/XII 2261) Moreover, apparently Salter was not there when and after the victim arrived at Popeye's, the period to which Hess testified at trial. Thus, Salter's testimony was extremely vague, but he distinguished the person who usually cleans up (who might have been Hess) from the person he thought he saw take out the trash, and he was not really sure of anything.

So, Salter basically knows he was in the area at some points-in-time prior to the police arriving, but he did not place himself there at any time while the victim and her murderer were at Popeye's, he did not testify he saw Hess, and he did not even see the loud black males who were there sometime prior to the murder. As the trial court concluded, even viewing Salter's postconviction testimony alone, it was not exculpatory, and therefore, Hurst has failed to meet Strickland's prejudice prong. Contrasting the extremely weak nature of Salter's postconviction testimony with the incriminating evidence at trial, the failure of Hurst to demonstrate Strickland prejudice is even more palpable.

Moreover, as trial defense counsel testified at the postconviction hearing, the defense realized a net gain by not finding Salter and not calling him as a witness. Trial counsel's tactic was better than Hurst's postconviction hindsighted tactic: "[F]rankly, I didn't want him identified to the jury. I'd rather him be the strange black guy out on a parking lot." (PCR/XI 1962) Accordingly, trial defense counsel argued this point to the jury. (See, e.g., TT/I 192) Buttressed by his extensive experience, See Henry; Chandler, trial defense counsel's strategy was reasonable, See

Henry, 948 So.2d at 617 (discussion of strategy negating deficiency), and, indeed, the weak nature of Hurst's postconviction evidence concerning Salter vindicated counsel's strategic choice.

Further, in contrast to trial defense counsel's postconviction testimony that he initially "made some serious efforts to find out who the guy was" (PCR/XI 1962. See also PCR/XII 2236-38: experienced trial defense counsel's investigator testifying "problem concerning the identification of that individual"), Hurst has failed to show that trial defense counsel's "serious efforts" were unreasonable, thereby failing to establish Strickland's deficiency prong.

C. Wal-Mart.

In violation of Strickland, here as in the other IAC claims, Hurst hindsightedly secondguesses his trial counsel, who had tried "hundreds and hundreds of life felony and other cases" and had been "involved in numerous murder cases" (PCR/XI 1923-27). See Henry; Chandler. Hurst at postconviction argues that his trial counsel should have done more to attack the prosecution concerning Hurst not mentioning Wal-Mart to the police.

Under its coverage of the Giglio claim, the trial court explained the Wal-Mart evidence:

> Defendant gave a recorded statement to law enforcement regarding his activities on the day of the murder. Nowhere within the recorded statement was there any indication that Defendant had informed the authorities that he had gone to Wal-Mart. Defendant's recorded statement was played for the jury during trial. The State introduced evidence at trial that Defendant had gone to Wal-Mart after killing the victim so that he could purchase shoes to replace the shoes he had worn during the murder.

(PCR/VIII 1407-1408) The prosecutor's closing arguments discussed the role of shoes in the case and Hurst's failure to mention to the police buying new shoes at Wal-Mart. (See TT/V 830, 844-46, 892-93, 898-900)

Again, the trial court's order merits affirmance:

> Defendant alleges that trial counsel was ineffective in failing to rebut the evidence and argument submitted by the State that Defendant did not inform law enforcement that he went to Wal-Mart on the day of the murder. [fn91]
>
> Trial counsel's evidentiary hearing testimony demonstrates that counsel made a strategic decision in not attempting to impeach the evidence and argument presented regarding Wal-Mart. [fn92] The Court finds counsel's strategy reasonable. Consequently, Defendant has failed to meet his burden as espoused in Strickland, and he is not entitled to relief as to this claim.
>
> fn91. The Court acknowledges that the legal sufficiency of this claim is questionable. However, within the context of his ***Giglio*** claim based upon this same issue, Defendant alleged that the evidence and argument introduced on this subject prejudiced Defendant. Consequently, the Court will construe this claim as legally sufficient and address it upon its merits.
>
> fn92. See EHT, Vol. I, pp. 21-36.

(PCR/VIII 1434-35) Because the trial court referenced Hurst's Giglio claim concerning Wal-Mart, although not appealed, the State also notes that the trial court under Giglio explained the testimony (PCR/VIII 1407-10) that clarified that, indeed, "Defendant did not tell Investigator Nesmith that he went to Wal-Mart the day of the murder" (PCR/VIII 1410).

At the outset, the State contends that the denial of this claim should be affirmed under the "Tipsy Coachman" (correct-for-any-reason) doctrine because the claim was insufficiently pled, as the State contended in its response to this "claim": "The State denies that trial counsel was constitutionally ineffective at either stage of defendant's trial. Moreover, this claim is insufficiently pled and an evidentiary hearing is

not warranted, as defendant does not contend that the evidence was available pre-trial and could have been discovered through reasonable investigation." (PCR/II 361-62)

Thus, Hurst's original postconviction motion conclusorily alleged concerning IAC: "To the extent trial counsel should have utilized police reports to rebut the state's false presentation, counsel was prejudicially deficient and ineffective." No specificity is alleged whatsoever concerning how trial counsel should have done more and whatsoever how it was unreasonable not to have taken specific available steps.

For example, Doorbal v. State, 983 So.2d 464, 483-84 (Fla. 2008), reiterated then applied the well-established principle that requires specificity in a defendant's postconviction pleadings:

> In ***Downs v. State***, 453 So.2d 1102, 1104-05 (Fla. 1984), this Court explained that a defendant who seeks to present such a claim must (1) identify a specific omission or overt act upon which the claim is based, (2) demonstrate that the omission or act was a substantial deficiency which fell measurably below that of competent counsel, and (3) demonstrate that the deficiency probably affected the outcome of the proceedings. If a capital defendant fails to plead in accordance with these criteria, the claim will not meet the threshold for facial sufficiency. As a result, claims may not receive an evidentiary hearing or be considered by the trial court on the merits.
>
> Various claims raised by Doorbal in this 3.851 proceeding were plagued by a lack of sufficiency in that Doorbal failed to allege a specific omission or overt act upon which his claim of ineffective assistance was based. For example, in claim 8(a), Doorbal contended that the death of the father of trial counsel Anthony Natale immediately prior to trial and the illness of his mother interfered with his representation of Doorbal and caused him to render ineffective assistance. During the ***Huff*** hearing, the trial court refused to grant an evidentiary hearing on claim 8(a) because Doorbal had not specified actions which counsel Natale failed to take during the trial ***

***

> As the foregoing demonstrates, the rule 3.851 proceedings in the trial court, and on appeal before this Court, have been plagued by generality and lack of specificity. Counsel for Doorbal appears to operate under the incorrect assumption that conclusory, nonspecific allegations are sufficient to obtain an evidentiary hearing on claims of ineffective assistance of counsel, and specific facts and arguments need not be disclosed or presented until the evidentiary hearing. We strongly reiterate to those who represent capital defendants in postconviction proceedings that claims of ineffective assistance of counsel must comply with the pleading requirements enunciated by this Court in *Downs* at the time that the initial rule 3.851 motion is filed to be legally sufficient under the rule.

Here, Hurst's postconviction motion asserted some evidence that trial counsel should have found (PCR/II 285086) and then conclusorily stated that trial counsel should have found that evidence, so Hurst's motion, like Doorbal's, "had not **specified** actions" that counsel should have taken to harness that evidence. See also, e.g., Knight v. State, 923 So.2d 387, 403-404 (Fla. 2005)("Defendant does not allege **specifically how** counsel did this..."; "conclusory and are insufficient to support an evidentiary hearing").

Indeed, the postconviction pleading itself indicates Hurst and his postconviction team, armed with years of hindsight, did not know whether counsel was deficient in this regard at all, hence the qualifier, "[t]o the extent counsel should have …." Apparently, Hurst was educated by the postconviction hearing evidence that he had no viable Giglio claim regarding Wal-Mart, that is, that he had no viable evidence that the prosecution knowingly presented anything false, and, now he (IB 61-63) wishes to re-couch the claim into an assertion that trial counsel should have done more. Re-casting and buttressing a postconviction claim after the evidence was presented at a postconviction hearing is the ultimate in

Strickland-prohibited hindsight, and this claim should be denied on that basis.

Further, arguendo considering the merits, as Circuit Judge Nobles elaborated in her discussion of Giglio (PCR/VIII 14071410), there was nothing substantive for trial counsel to pursue. Couched in terms of IAC, trial defense counsel was not ineffective for not pursuing something that was not really there: Hurst, in fact, did not mention Wal-Mart in his audiotaped statement.[7] Defense counsel was reasonable in not pursuing the matter. Thus, trial defense counsel testified at the evidentiary hearing that he carefully analyzed the Wal-Mart matter (See PCR/XI 1939-53. See also PCR/XIV 2631-34, 2642-47); he made reasonable strategic choices, as the trial court found. Defense counsel correctly observed that, in fact, Hurst did not mention Wal-Mart in the actual recording of his statement. (EHT 727) Rimmer's argument was accurate and, as defense counsel stated, "I would look like an idiot objecting to it. He [Rimmer] made a true statement. He [Hurst] did not say in that recorded statement that I went to Wal-Mart." (PCR/XIV 2645-46)

Trial defense counsel was correct. Hurst's statement to Nesmith, in Hurst's own words and Hurst's own chronology said nothing about going to

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[7] Hurst's Initial Brief references (IB 62) two police reports as "written independently of each other." This is incorrect, as the trial court explains and documents (PCR/VIII 1408-1409): one of the officers found out about Hurst going to Wal-Mart through Lee-Lee Smith and erred in writing up his report and the other officer relied upon the first officer. (See, e.g., PCR/XIII 2437-39)

Wal-Mart to buy anything, including shoes. Hurst stated they went to the pawn shop "across the street from Wal-Mart," and said nothing about going to Wal-Mart (See TT/III 531). After describing the pawn shop and his purchase of the necklaces (TT/III 532-33), and in response to another "Okay," Hurst continued his detailed narrative about that day without mentioning going to Wal-Mart:

INVESTIGATOR NESMITH: Okay.

MR. HURST: That's all they got out of the pawn shop. We left the pawn shop to my brother's home --

INVESTIGATOR NESMITH: Now, wait. One question: Why did you buy it? Why didn't they buy it?

MR. HURST: They thought that they couldn't get it because they said that -- they thought they needed somebody 18 or older to get it.

INVESTIGATOR NESMITH: Oh, okay.

MR. HURST: Cause sometime a pawn shop do that.

INVESTIGATOR NESMITH: Okay. I gotcha. I gotcha.

MR. HURST: After we left the pawn shop, me and Lee-Lee went straight to Escambia Arms.

INVESTIGATOR NESMITH: Uh-huh.

MR. HURST: We went to see Lola Hurst, my cousin; and I waited there until --

INVESTIGATOR NESMITH: Okay. Where does Ms. Hurst live in there? What apartment?

MR. HURST: Apartment 119.

INVESTIGATOR NESMITH: Okay.

MR. HURST: We waited there.

INVESTIGATOR NESMITH: About what time did you get there; do you remember?

MR. HURST: I'd say between like -- it seems to me like 8:00, 8:20, estimating.

INVESTIGATOR NESMITH: Okay.

MR. HURST: Okay. We stayed -- we stayed in Escambia Arms like the whole day. We spent our -- almost all our time at Escambia Arms.

INVESTIGATOR NESMITH: Uh-huh.

MR. HURST: And so I got a call from my mom that the police had came to my house looking for me.

INVESTIGATOR NESMITH: Uh-huh.

MR. HURST: So I told mom that I was ready to leave and then go straight home; and I left Escambia Arms like at 1:00 -- between 1:00 and 1:30.

INVESTIGATOR NESMITH: Okay.

MR. HURST: And when I got home, I stayed straight at home.

(TT/III 533-35) A little later in the interview, Nesmith asked Hurst if there was "anything else now that we forgot about," and Hurst responded, "No, That will do it." Hurst then confirmed that "was pretty much what happened today." (TT/III 538-39) Therefore, the recording speaks for itself and Nesmith's summary of it on "page seven" of his report was inaccurate, as he testified at the evidentiary hearing. (See PCR/XIV 2519-20. See also PCR/XIII 2438; PCR/XIV 2459-60)

Trial defense counsel reasonably assessed that attempting to impeach Nesmith and Sanderson on the matter would have looked to the jury like "nitpicking," [a]nd it hurt me, **why keep bringing it back up for the jury. I mean, that's stupid for a trial lawyer."** (PCR/XIV 2645) For these reasons, as well as all the evidence in this case, Hurst has also failed to prove prejudice.

ISSUE IV: HAS HURST DEMONSTRATED THE TRIAL COURT ERRED IN DENYING HIM RELIEF ON A MENTAL-HEALTH PENALTY-PHASE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM AFTER AN EVIDENTIARY HEARING? (RESTATED)

ISSUE IV essentially asserts that trial defense counsel was Strickland ineffective because he did not call as a witness in the penalty phase the mental health expert that Hurst's postconviction team produced for the postconviction evidentiary hearing.

A. Hurst's Strickland and appellate burdens.

Hurst's burden to prove Strickland's two prongs, the presumption of reasonableness of trial defense counsel's actions or inactions, the prohibition against hindsighting trial defense counsel, special deference to trial counsel due to his extensive experience, and deference to trial court finding of fact, discussed in ISSUE III supra, also apply to ISSUE IV.

Willacy v. State, 967 So.2d 131, 143 (Fla. 2007), discussed the application of Strickland's principles to the penalty phase of a capital case:

> 'Under *Strickland*, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."' *Marshall v. State*, 854 So.2d 1235, 1247 (Fla. 2003) (*quoting Strickland*, 466 U.S. at 691); *see also Carroll v. State*, 815 So. 2d 601, 614-615 (Fla. 2002) (same). This Court has stated:
>
> > In evaluating claims that counsel was ineffective for failing to present mitigating evidence, … [t]he principal concern … is not whether a case was made for mitigation but whether the "investigation supporting counsel's decision not to introduce mitigating evidence … was itself reasonable" from counsel's perspective at the time the decision was made.
>
> *Holland v. State*, 916 So.2d 750, 757 (Fla. 2005) (*quoting Wiggins v. Smith*, 539 U.S. 510, 523, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)), *cert. denied*, 547 U.S. 1078, 126 S. Ct. 1790, 164 L. Ed. 2d 531 (2006). '[S]trategic choices made after thorough investigation of law

> and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.' ***Wiggins v. Smith***, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (*quoting* ***Strickland v. Washington***, 466 U.S. 668, 690-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). 'In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.' ***Id.*** at 521-22 (*quoting* ***Strickland***, 466 U.S. at 691).

Hannon v. State, 941 So.2d 1109, 1134 (Fla. 2006), explained the application of the prejudice prong to death sentences:

> In assessing prejudice, we reweigh the evidence in aggravation against the totality of the mental health mitigation presented during the postconviction evidentiary hearing to determine if our confidence in the outcome of the penalty phase trial is undermined. ***See Rutherford v. State***, 727 So. 2d 216, 223 (Fla. 1998) (stating that in assessing prejudice 'it is important to focus on the nature of the mental mitigation' now presented); ***see also Wiggins***, 539 U.S. at 534 ("In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence.").

B. Mental health.

The trial court's order denying this claim after an evidentiary hearing merits affirmance:

> Defendant further alleges that counsel was ineffective during the penalty phase by failing to have Defendant evaluated by a professional mental health expert, and by failing to present the testimony of a mental health expert as mitigation to the jury during the penalty phase and to the judge during the ***Spencer*** hearing. Defendant alleges that counsel's failure to adequately investigate mental health mitigation was not based upon informed judgment but on 'ignorance' and 'neglect.' Defendant further alleges that a mental health expert would have found mitigation, and that in fact, Defendant has now been examined by a mental health expert and both statutory and non-statutory mitigation is available for the Court's consideration. Defendant asserts that his sentence of death should not be permitted to stand.
>
> Initially, the Office of the Public Defender represented Defendant in the instant case. A motion for appointment of a mental health expert was filed by an assistant public defender before Mr. Arnold, Defendant's trial counsel, began representing Defendant. During the

pre-trial hearing regarding the motion for appointment of a mental health expert, Mr. Arnold expressed his opinion that the appointment was not necessary; consequently, Defendant's motion for appointment of mental health expert was denied.

Trial counsel testified at evidentiary hearing that he spoke with Defendant and Defendant's mother about the possibility of having Defendant evaluated by a psychologist or a psychiatrist. [fn136] Defendant informed counsel that he did not want to be examined. [fn137] Counsel stated that he did not observe anything in Defendant's behavior or demeanor which would demand evaluation. [fn138] Counsel further testified that he felt he would lose credibility with the jury if he presented mental health mitigation during the penalty phase, after he had argued vehemently during the guilt phase that Defendant was not the perpetrator in the instant case. [fn139] Counsel also testified that he made his decision regarding the necessity of evaluation based upon the case law in existence at the time. [fn140]

Counsel cannot be held ineffective for following the wishes of his client. *See Fotopolous v. State*, 838 So.2d 1122, 1131 (Fla. 2002). The Court finds counsel's testimony credible that Defendant did not wish to be evaluated by a mental health expert, and that counsel adhered to his client's wishes. Additionally, Defendant has failed to demonstrate that, based upon the law at the time of counsel’s decision, counsel acted deficiently in failing to engage a mental health expert. Further, when weighing the mental health mitigation testified to by Dr. McClain at [the] evidentiary hearing against the aggravating evidence presented at trial, Defendant has failed to demonstrate that he was prejudiced by counsel's failure to have Defendant evaluated by a mental health expert. *See Bell v. State*, No. SC02-1765, 32 Fla. L. Weekly S307, 2007 WL 1628143 at *21. (Fla. 2007); *see also Hannon v. State*, 941 So.2d 1109, 1137-1138 (Fla. 2006).

fn136. See EHT, Vol. I, p. 65.

fn137. See EHT, Vol. I, p. 66; Vol. IV, pp. 713-714.

fn138. See EHT, Vol. I, p. 66; Vol. IV, pp. 713-714.

fn139. See EHT, Vol. I, pp. 69-70.

fn140. See EHT, Vol. I, pp. 69-70.

Concerning Strickland's deficiency prong, trial defense counsel applied his extensive experience to the decision not to pursue a mental health expert prior to trial, and as the trial court found, trial defense counsel

followed Hurst's explicit directions,[8] as illustrated in the following excerpts from trial counsel's postconviction testimony:

> Mr. Hazen, I've used mental health experts in numerous cases, okay? In this particular case, I elected not to. I think I've explained why. But I have used Jim Larson, Brett Turner, and numerous other psychologists and psychiatrists in cases, including collateral cases, which I have not previously mentioned. But I believe in their testimony. I believe in their ability to assist you. In this particular case, I did not, specifically at Timothy Hurst's request and his mama's request. And, in my opinion, I didn't need it because of the reasons I've explained, and I thought it would be adverse to me, even on the penalty phase.
>
> ***
>
> Q. Mr. Arnold, you testified that you conferred with Mr. Hurst about the use of a psychologist or some sort of mental health expert?
>
> A. That's correct.
>
> Q. Where did the conversation take place?
>
> A. In ARC, Escambia County Jail.
>
> Q. And what -- what was the conversation? How did the conversation go?
>
> A. Well, it was basically, you know, I had to prepare for penalty phase, even though at that time I thought I was going to win the guilt phase. And it was like, Tim, you know, at the end of this case, if they convict you, I've got to put on testimony about things in your life which may become important, what we call mitigation. And I had to go through and explain what mitigation was, and I told him that one of the ways of doing that was through mental health testimony.

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[8] Hurst argues (IB 72) that trial counsel's reason was not credible, thereby improperly attacking the trial court's finding that "counsel's testimony [was] credible" (PCR/VIII 1450). Further, Hurst's improper appellate argument overlooks the nature of Hurst's pre-trial communications to his counsel as privileged and an obvious defense tactical reason of not sharing with the prosecution the inner workings of the defense's trial preparation.

> And we talked about it and he asked me what was involved, and I told him I'd have to have a shrink examine him. And it really didn't go a heck of a lot further than that. It was basically, no, I don't want to do that. So then I talked to him about -- and Tim wasn't overly helpful in that particular area, by the way. I think I finally put in eight or nine nonstatutory mitigators, and all of those came from the family. Tim may have given me one or two but -- you know.

(PCR/XI 1989-90; PCR/XIV 2635-37)

Like the defendant in Sims v. State, 602 So 2d 1253, 1258 (Fla. 1992), Hurst "had directed defense counsel not to collect this evidence" that he raised at postconviction. Here, as in Sims, counsel is not "ineffective for honoring the client's wishes."

Schriro v. Landrigan, __U.S.__, 127 S. Ct. 1933, 1941 (2007), indicated that "[i]f [the Defendant] issued … an instruction [to "his counsel not to offer any mitigating evidence"], counsel's failure to investigate further could not have been prejudicial under ***Strickland***." Landrigan applied this principle, holding:

> Because the Arizona postconviction court reasonably determined that Landrigan 'instructed his attorney not to bring any mitigation to the attention of the [sentencing] court,' App. to Pet. for Cert. F-4, it was not an abuse of discretion for the District Court to conclude that Landrigan could not overcome § 2254(d)(2)'s bar to granting federal habeas relief.

127 S.Ct. at 1941-42.

In Newland v. Hall, 527 F.3d 1162, 1202-1203 (11th Cir. 2008), the Eleventh Circuit applied Landrigan's rationale in the context of pre-existing precedent on Strickland's deficiency prong:

> We have also emphasized the importance of a mentally competent client's instructions in our analysis of defense counsel's investigative performance under the Sixth Amendment. ***Rutherford v. Crosby***, 385 F.3d 1300, 1313 (11th Cir. 2004) (recognizing that the 'duty [to investigate] does not include a requirement to disregard a mentally competent client's sincere and specific instructions about

> an area of defense.'); *Tafero v. Wainwright*, 796 F.2d 1314, 1320 (11th Cir. 1986)('[A] defendant's decision communicated to his counsel as to who he wants to leave out of the investigation, while not negating the duty to investigate, does limit the scope of the investigation.'). In *Mulligan v. Kemp*, [771 F.2d 1436 (11th Cir. 1985),] we explained why a client's instructions are given such weight: 'Because we recognize that a defendant [has the choice whether or not to be represented by counsel], it follows that, in evaluating strategic choices of trial counsel, we must give great deference to choices which are made under the explicit direction of the client.' 771 F.2d 1436, 1441 (11th Cir. 1985). The state habeas court found that petitioner specifically instructed Manning not to contact his family and generally discouraged him from researching his past. Petitioner has not challenged these findings.

Here, trial counsel had no reason to suspect that Hurst was not competent, and, therefore, trial counsel's decision to follow Hurst's directions was reasonable under Strickland. Indeed, defense counsel testified in response to a question from Hurst's postconviction counsel:

> Actually, I thought Timothy was smart, but he was slow. I don't know how to answer you any other way than that. I mean, he was able to converse with me. He seemed to understand everything that -- you know, that I told him and that we talked about. He, more importantly, understood the significance of things. And I didn't, frankly, observe the, quote, slowness that his parents told me about, but, you know, I needed that for mitigation, so – [cut-off by postconviction counsel]

(PCR/XI 1994) Later in the evidentiary hearing, defense counsel testified:

> ... The -- Timothy was able to converse with me appropriately. I mean, I'm not a mental health expert, but I've been doing this a lot of years and I've had a lot of trials and a lot of cases involving situations where I considered or did use psychological testimony. Tim seemed to understand everything that I asked him or inquired about, and he was able to articulate with me and talk about the case. I didn't see anything.
>
> Now, I'm aware that he was a little bit slower, based on conversations with his family members, than perhaps other people in school, but he didn't -- he did not display to me anything that I would deem to be mental inability.
>
> I thought he was a nice guy. He was humble but articulate and conversed with me and seemed to understand everything. So I didn't see a reason beyond their wishes to go to a psychologist.

(PCR/XIV 2631) He later reiterated that he did not think that Hurst "was in trouble mentally" (PCR/XIV 2647), and indicated that he did not think there was a good faith basis to pursue an expert's mental examination (See Id.).

Thus, **Hurst's mother** testified at the jury penalty phase that Hurst, although "slower" in school (TT/V 972) and a follower (TT/V 973-74),

- was her "helper" (TT/V 971),
- had "average" grades in school (Id.),
- bought a car (TT/V 975),
- held this job at Popeye's (Id.), [9] and
- "never had any psychiatric problems" to her knowledge, and "never been treated by a psychologist or a psychiatrist" (Id. at 975-76. See also PCR/XI 2052)).

Hurst's sister testified at the jury penalty phase that Hurst

- "play[ed] a lot of games" with her (TT/V 977),
- went to the museum with her (Id.),
- "took care of" and supervised the other children in the family when their parents worked (Id. at 978), and
- was non-violent and a "happy-type person" (Id. at 979).

Hurst's father testified at the jury penalty phase that Hurst

- initiated cleaning up, associated with the family's Bible studies (See TT/V 981-82) and
- has been non-violent (Id. at 982).

Accordingly, as illustrated in Sims, discussed above, this Court has long-recognized defense counsel's deference to the defendant's directions

[9] And, of course, the trial evidence showed Hurst's Popeye's employment, driving the morning of the murder, and conducting transactions.

in denying Strickland claims. See Henry v. State, 948 So.2d 609, 617 (Fla. 2006)("evidence that counsel's conduct was part of a deliberate, tactical strategy that the defendant understood and approved almost always precludes the establishment of this prong"); Brown v. State, 894 So.2d 137, 146 (Fla. 2004), citing Waterhouse v. State, 792 So.2d 1176, 1183 (Fla. 2001) (holding that counsel was not ineffective for failing to present certain mitigation evidence where the client instructed him not to pursue that evidence); Brown, 894 So.2d at 146 ("counsel's ability to present sufficient mitigation was limited by the defendant's desire not to involve his family"); Fotopoulos v. State, 838 So.2d 1122, 1131 (Fla. 2002)("Just as counsel will not be considered ineffective for honoring his client's wishes, he cannot be deemed ineffective for relying on his client's statements when he had no reason to doubt his client's veracity"), citing Sims, 602 So.2d at 1257-58 (Fla. 1992).

As indicated in the trial court's order, trial counsel also testified at the postconviction hearing that he thought presenting a mental health expert would damage his credibility with the jury (See PCR/XI 1986-87). Trial counsel testified:

> Q. (By [postconviction counsel] Mr. Hazen) The jury had already convicted him and believed he was guilty at that point, correct?
>
> A. That's exactly right. But, still, you still can't afford to lose the credibility with the jury even though you're just simply dealing with the penalty phase. Now I'm at the point where I'm having to argue for this kid's life. I don't want to come in now and say -- and especially the way I started my closing argument to them. I mean, I basically said, you know, you were wrong, but -- now, I don't want to come back in and say, you know, I was wrong. I've established this alibi, and now I admit that I was wrong, but now I've got a shrink who says he was crazy or he was -- you know, in some way retarded or

> something. I mean, that's absurd, and you lose total credibility with the jury.

(PCR/XI 1987)

Tactically, here, trial counsel found himself in a situation akin to counsel in Jones v. State, 528 So. 2d 1171, 1175 (Fla. 1988), which reasoned, in part:

> When asked why he did not put Dr. Miller on the stand during the penalty phase, Fallin said that to do so would have been contrary to his theory of the case. He explained that he had spent the entire trial saying that appellant did not commit the murder and that appellant had testified in detail that he had not done so. Fallin believed that to later go before the jury in the penalty phase and say that appellant committed the crime because he was paranoid would have destroyed any credibility that the defense might have had with the jury.

Concerning prejudice, Landrigan explicitly pointed to a defendant's directions not to pursue mitigation, as here, as undermining prejudice.

In addition, here the jury vote (11-1, TT/V 1002, R/III 450) was not close; trial counsel elicited sympathetic background for the jury to consider, as discussed above; aggravation included the serious aggravator of HAC (detailed at R/III 471-73), See also Hurst v. State, 819 So.2d 689, 695-97 (Fla. 2002)(erroneous finding of avoid-arrest aggravator harmless in light of the remaining aggravation); and, contrary to Hurst (IB 73-74), the guilt-phase evidence was not "close." See discussions of facts supra. In any event, residual lingering doubt is not a mitigator. See, e.g., Williamson v. State, 961 So. 2d 229, 237-238 (Fla. 2007), citing Rose v. State, 675 So.2d 567, 572 n.5 (Fla. 1996) and Reynolds v. State, 934 So.2d 1128, 1152 (Fla. 2006).

Further, here, Hurst's postconviction expert, Dr. McClain, even though

she was aware of it, had not even reviewed Hurst's audiotaped statement to the police. (See PCR/XI 2053) McClain did not even talk to trial defense counsel (PCR/XI 2050), the man interacting with Hurst extensively in the events in and surrounding the trial of this case (See, e.g., PCR/XIV 2632-34, 2636-38, 2644).

Perhaps if McClain had spoken with trial defense counsel, she would have learned that, for the trial proceedings, Hurst did not want to undergo a psychological examination (See, e.g., PCR/XI 1989-90; PCR/XIV 2635-37).

Instead of reviewing what Hurst was objectively able to do, McClain primarily relied on Hurst himself through interviews and his responses to test questions. (See PCR/XI 2019-2026) McClain also interviewed Hurst's family,[10] who told her about Hurst's slowness in school, his managing his own money and for awhile having a bank or savings account, his driving a car, and obtaining a driver's license, (PCR/XI 2027-28), essentially the same type of information that the family provided to the jury during the penalty phase.

McClain apparently did not have the benefit of the family-provided facts that Hurst initiated work and that he was in charge of the family when his parents were not in the house, facts that counsel elicited as part

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[10] Even though McClain testified that Hurst's mother had been drinking heavily while pregnant with Hurst, Hurst failed to prove to the trial court that trial defense counsel could have and should have produced evidence of fetal alcohol syndrome. McClain testified that she could make no such formal diagnosis. (PCR/XI 2030) Further, trial counsel testified that there was "a lot more" information on the syndrome at the time of the postconviction hearing than at the time of the trial. (PCR/XI 2002)

of his evidence humanizing Hurst as worth saving.

In contrast to McClain, Dr. Larson, who also testified at the postconviction evidentiary hearing, not only reviewed Hurst's grades and school records (PCR/XI 2079; PCR/XII 2121-23), his family's trial testimony (PCR/XI 2079), his staff's testing of Hurst (PCR/XI 2084-87, 2095-99; PCR/XI 2145-46), interviewed Hurst (PCR/XII 2162), but also reviewed Hurst's statement to the police (PCR/XI 2079). Larson reviewed McClain's testing and indicated that the great divergence of her scores was a "red flag that there's an inaccurate measurement" (PCR/XII 2108-2115); Larson indicated that McClain's results "can't be … accurate" and her finding was "unreliable" (PCR/XII 2115). (See also PCR/XII 2117-21) Larson said it was very clear that Hurst malingered or stopped trying. (PCR/XI 2119-20)

Bell v. State, 965 So.2d 48, 74 (Fla. 2007), affirmed the rejection of a postconviction claim like here. In Bell, like here trial counsel produced evidence at the penalty phase from family. In Bell, like here, a family member testified at trial that the defendant had "never been treated for mental or psychiatric problems." In Bell, the penalty-phase mitigation evidence was less weighty than here, as outlined above. In Bell, like here, the defendant claimed that penalty-phase evidence should have included mental health evidence. In Bell, like here, there was very serious aggravation, there including CCP and prior violent felony and here including HAC. See Buzia v. State, 926 So.2d 1203, 1216 (Fla. 2006)("We have held that both the HAC and CCP aggravators are 'two of the most serious aggravators set out in the statutory sentencing scheme'"). Bell,

like here, "did not present evidence at the postconviction evidentiary hearing that demonstrated that any mitigating evidence existed that would have outweighed the State's evidence in aggravation."

Moreover, contrary to the theme that trial counsel presented to the jury, Larson could have testified in rebuttal at trial that Hurst told him that he (Hurst) was thrown out of school for using drugs and fighting. (PCR/XII 2180)[11] See Arbelaez v. State, 898 So.2d 25, 39 (Fla. 2005)(generally deny relief where the attorney's chosen strategy was to "humanize" the defendant rather than to portray him as psychologically troubled.); Rutherford v. State, 727 So.2d 216, 222-223 (Fla. 1998)(counsel made the decision to focus on the solid, 'Boy Scout' character traits of Mr. Rutherford; theory that Mr. Rutherford was a 'good ol' fellow' who must have just lost it, that he was really a good guy); Haliburton v. Singletary, 691 So.2d 466, 471 (Fla. 1997)("penalty phase strategy … to humanize [the Defendant] by dwelling upon his close family ties and on the positive influence he had on his family" and positive behavior in prison).

In conclusion, Hurst failed to meet his Strickland burdens of proving both deficiency and prejudice. He proved neither.

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[11] After Larson testified to this fact once, postconviction counsel asked the same question again, at which time the prosecutor objected. (See PCR/XII 2180-83)

ISSUE V: HAS HURST DEMONSTRATED THAT A TRIAL COURT REVERSIBLY ERRED BY DENYING CLAIMS CONCERNING INVESTIGATOR NESMITH'S NOTES, ALLEGED EX PARTE COMMUNICATION, HESS'S GRAND JURY TESTIMONY, AND WILLIE GRIFFIN'S ALLEGED RECANTATION? (RESTATED)

The State disputes that the trial court "summarily" denied all of the claims related to ISSUE V. The trial court conducted an evidentiary hearing that spanned June 16 to 18, 2004, consuming pages 1920 to 2675 of volumes PCR/XI to XV, and resumed hearing evidence on July 9, 2004, (PCR/V 760-88). At the end of the July 9, 2004, hearing the Court granted the defense leave to file an amended postconviction motion based upon the handwritten notes of Investigator Nesmith (PCR/V 788-95), which was formalized in an Order also entered that date (PCR/V 797-801). On September 30, 2004, Hurst filed his "Supplemental Motion to vacate Judgment and Sentence" (PCR/V 802-825), on which he supposedly based his Nesmith-notes appellate claims in ISSUE V. On October 21, 2004, the State responded (PCR/V 826-53), and on January 3, 2005, the defense filed a Reply (PCR/V 856-901). On March 18, 2005, the trial court conducted an additional extensive Huff hearing. (PCRVI 942-90) On August 17, 2005, Circuit Judge Nobles rendered an extensive order (PCR/VI 1016-79), "find[ing] Defendant is not entitled to **another** evidentiary hearing at this time." (PCR/VI 1016) Interspersed in these events were a number of "supplemental" postconviction motions. (See PCR/V 919-32; PCR/VI 1008-15; PCR/VI 1082-1121) The State responded to the "supplemental" postconviction motions through various pleadings. (See PCR/V,VI)

Each of the claims and sub-claims in ISSUE V pale in contrast to the evidence adduced at trial. They facially fail to demonstrate any requisite

prejudice, especially in light of the totality of evidence adduced at trial. Moreover, whatever very speculative probative value any of the notes might have for Hurst would be more than offset by the State's ability to introduce the remainder of the notes on each matter, which are incriminating against Hurst.

The State addresses each claim and sub-claim and contends that the trial court merits affirmance of the trial court.

B. Detective Nesmith's Notes.

ISSUE V raises several sub-claims concerning Investigator Nesmith's handwritten field notes. As to each appellate sub-claim concerning Nesmith's notes, Hurst essentially requested an evidentiary hearing so he could **possibly** develop something facially sufficient. However, Hurst's **conjecture** that he **might** be able to construct something viable on such a "fishing expedition" does not establish a prima facie ground for yet another evidentiary hearing. See, e.g., Gorham.

Notes regarding Kladitis. Hurst contends (IB 83-84) that Nesmith's handwritten notes support his claim that Kladitis told Nesmith about the "3-4 young black males in the Popeye's parking lot prior to the murder." Hurst argues (IB 83-84) that if he had been provided the postconviction opportunity, he would have "likely called detective Nesmith to testify" and he "could have" called the trial prosecutor to determine what he knew about the notes and their testimony "may have provided" prejudice. "Likely" calling someone as a witness and "fishing" for a possible Giglio claim and possible prejudice are not grounds for any evidentiary hearing. Further, as

the trial court found (PCR/VI 1019), ISSUE V fails to specify anything new that had not been already raised prior to and at the evidentiary hearing. The trial court indicated that it would consider the notes in resolving the Kladitis claim, which it did (See PCR/VIII 1404-1406). Put another way, Hurst has failed to allege that the notes changed or added anything specific and substantive to what had already been presented to the trial court. See discussion of Kladitis in ISSUE I supra. In the multiple days of the postconviction evidentiary hearing, Hurst received a full and fair hearing on this matter.

Notes regarding Hess. In this sub-claim (IB 84-85) Hurst fails to argue any additional evidence he would have produced at any continued evidentiary hearing.

Concerning Hess's position at Wendy's, the trial court quoted trial counsel's cross-examination of Hess (PCR/VI 1019-1022) and correctly ruled that trial defense counsel's impeachment of Hess was "thorough" on this matter, indicating that trial counsel already knew the scope of Hess's responsibilities at Wendy's (Id. at 1022). Indeed, Trial defense counsel's cross-examination of Hess (TT/II 306-312), as well as calling Sun Nguyen as a witness (See TT/IV 746-48) focused the jury on Hess's position at the Wendy's. See also deposition of Nguyen attached to trial court's order (at PCR/VI 1039-49) and discussion of Hess under ISSUE II supra.

Hurst also argues (IB 84) that "Nesmith's notes reveal that Hess told him that he saw the victim arrive at 7:15" whereas he testified at trial to 7:00 to 8:30. Actually, Hess's trial testimony indicated that it could have

been "**anywhere**" in the 7:00 to 8:30 time span (See TT/II 300), and Nesmith noted "**around** 7:15" (PCR/IV 881),[12] showing that Hess was consistently uncertain of the exact time he observed the victim. At trial, Hess testified that he was not looking at his watch when he saw the victim. (TT/II 300) Therefore, the time in the notes was not "sufficiently exculpatory []or impeaching to support a *Brady* violation" (PCR/VI 1022), so substantively "no false testimony was presented" (Id. at 1019).[13]

In the multiple days of the postconviction evidentiary hearing, Hurst received a full and fair hearing concerning Hess.

Notes regarding Lee-Lee Smith. Hurst claims (IB 85) that he was entitled to more evidentiary hearing to clarify whether Nesmith's handwritten notations of "he got rid of the weapon" from an interview of Lee-Lee Smith referred to Hurst getting rid of it and to pursue where "he" got rid of the murder weapon (See PCR/V 814). As a threshold matter, an allegation that the defendant would like to explore a matter does not state any cognizable claim. Hurst failed , and on appeal fails to, claim that the hand-noted "he" actually meant anyone other than himself. As the trial

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[12] Accordingly, Kladitis testified at trial that he saw the victim driving towards the Popeye's at approximately "7:20 - 7:15 to 7:20." (TT/II 292-93)

[13] Illustrating the inconsequential nature of the timing sub-claim and establishing that the trial court correctly denied any further evidentiary hearing, at the continued evidentiary hearing that the defense was actually afforded and that was after postconviction counsel possessed Nesmith's notes (See PCR/V 764), the defense did not ask Hess anything about the timing of his observations the morning of the murder (See PCR/V 785-87). As such, Hurst abandoned this "supplemental" sub-claim.

court put it, speculation does not constitute a prima facie claim. (See PCR/VIII 1412)

The defense was clearly informed pre-trial that the police took two recorded statements from Lee-Lee Smith (See PCR/IV 613; PCR/III 497-501), and Nesmith's typed supplemental reports indicated who "he" was (See PCR/III 500: "Hurst's intentions were … He planned … to get dispose of the weapon"; discovery indicates that supplemental reports provided, at R/I 44). Further, the trial court's finding (PCR/VI 1022) that "obviously" "he" refers to Hurst is supported by any common sense reading of the notes. The May 3, 1998, notes state:

… Tim said he was going to get money

Then, later, Smith

Saw Tim driving his blue grande marquis … ."

Then there is a list of Hurst's actions and comments that Smith observed. Then the notes state:

- I asked him why he did it?
  A 'I cut her up because I needed the money' (quotes in the note)
- Asked how
- Put foot on neck (laughing)
  Cut neck
  Cut arms

***

(PCR/IV 682-84) Similarly, the May 6, 1998, handwritten notes, at issue here, stated:

***

- Tim talking about robbing Popeye's

***

Tim said

- he was going to kill the person
- for the money
- He said he was going to slice her throat
- Said he was going to come up behind her
- Said he was put her in freezer
- Said he was going to tie her up then put her in freezer
- Said he was going to take the money
- get rid of the weapon – in the dumpster behind Popeye's
- Said he got rid of the weapon and mopped all the blood up

- PLAN
- His car
- Tim to go in store
- Lee Lee sit and wait in car for signal

***

- get rid of weapon

Lee Lee backed out

Tim started calling me a punk/pussy (week before)

(PCR/IV 690-93)

Therefore, the notes indicate that Hurst discussed a "PLAN" with Lee-Lee Smith in which he would get rid of the weapon in the dumpster, but when it mentioned that he "got rid of the weapon, it does not say where, which then could have been anywhere, and, indeed, this was in the context of "mopp[ing] all the blood up," which would have been inside the Popeye's.

(PCR/IV 691-92) Moreover, the notes indicate that Smith "backed out" of Hurst's plan and, and as a result, Hurst called Smith a "punk/pussy." So, Smith was clearly referring to Hurst as saying he "got rid of the weapon."

Further, the trial court, at length, correctly reasons that defense counsel possessed a transcript of Lee-Lee Smith's May 6, 1998, recorded statement. (See PCR/VI 1023-28)

Moreover, the appellate claim fails to state what specifically yet-another evidentiary hearing would reveal that was not already part of the record.

Further, the above excerpts vividly illustrate that whatever very speculative probative value the notes might have for Hurst would be more than offset by the State's ability to introduce the remainder of the notes, which are very incriminating against Hurst.

Notes regarding Laura Ussery. (PCR/IV 706 et seq.) Nesmith's handwritten notes appear to indicate that Laura Ussery told Nesmith that Michael Williams told her (Ussery) that "Popeye's was going to get robbed and someone would end up dead" and "it was going to be one of his friends." Towards the end of the page, the note states: "Since the incident at Popeye's 5/2 Michael said his friend didn't do it. The person arrested didn't do it." (PCR/IV 707) The State has four responses.

First, this sub-claim is based upon Hurst's speculation, not a sufficient prima facie claim. Nesmith's handwritten notes indicate that Williams told Ussery one of his friends planned the robbery of the Popeye's, but other than stating that the friend and person arrested did

not do it, the notes, contrary to Hurst's assertion, do not indicate that Williams designated Hurst as the person Williams thought did not do it. Rather than Hurst's postconviction speculation that the arrested "friend" was Hurst, it also could have been Lee-Lee Smith, who at the time of the trial, had not been formally charged, but who testified that the police read him his rights (TT/III 467-68), which, some laymen (such as Ussery interpreting Michael Williams' statement to her) might think is tantamount to an arrest. Thus, Williams indicated to the police that he, Lee-Lee, and Hurst had talked about doing a robbery, and Hurst "came up with the idea of robbing Popeye's" (PCR/IV 716), indicating that Williams might have thought that Lee-Lee was a suspect who was arrested. Hurst might respond in his Reply Brief that this is speculation, but the burden is on Hurst, not the State, to present a prima facie claim. **Hurst's speculation** is not a prima facie claim.

Second, Williams' raw opinion about who committed this crime is irrelevant. Hurst has failed to even allege whether Williams' opinion regarding whoever he was referencing was based on something he observed that would have been admissible at trial? **Hurst's speculation** that Williams opinion could have been based upon something admissible does not allege a prima facie claim. Put another way, any opining statement that Williams may have made to Ussery does not directly refute Williams' testimony about what he heard Hurst say.

Third, as the trial court found (PCR/VI 1029) the notes are hearsay: They are the statement of Nesmith that Ussery stated that Williams stated

something to Ussery; they are tendered to supposedly prove the truth that Williams told her he did not think his friend did it. Therefore, arguendo, overlooking the nature of the matter as an unsupported opinion concerning an unknown person, Hurst did not allege that Ussery would testify at a postconviction hearing that Williams made the statement to her. (See PCR/V 815-16)[14]

And, fourth, the speculative, hearsay nature of this claim, especially when juxtaposed to the admissible evidence inculpating Hurst, demonstrates that there has been no showing of prejudice, as the trial court also found (PCR/VI 1029-30).

Notes regarding Michael Williams. Hurst claimed that aspects of Nesmith's notes of his interview of Michael Williams (PCR/IV 716-19) constituted Brady material. (PCR/V 847-20) The trial court, as in the other aspects of the notes, correctly denied these sub-claims. (See PCR/VI 1030-31) At the outset, Hurst overlooks that any aspect of the notes that he thinks would be exculpatory is more than offset by the balance of the notes that are very inculpatory, negating any supposed prejudice. If part of the notes had been admitted into evidence, then the incriminating balance of them would be admissible also, including Hurst initiating the idea of robbing the Popeye's, Hurst stating that he had to do what he had to do,

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[14] Indeed, even armed with the additional hindsight of this appeal, he does not even argue what specifically Ussery would say at an evidentiary hearing. (See IB 86-87) Of course, the appellate level would not be the proper time to add to a claim.

and Hurst stating that

> … I … just go in there and cut her.
>
> ***
>
> Tied bitch up, put in freeze
>
> Cut bitch wide
>
> Bitch was screeming,
>
> he didn't want to leave a witness
>
> cut her up with a box cutter.

(PCR/IV 718-19)

In the face of the nature of the notes overwhelmingly incriminating Hurst, Hurst claims (IB 87-88) that Williams stating to Nesmith that Hurst stated to Williams that he (Hurst) needed to get his car fixed is exculpatory because it corroborates his story that his car broke down the morning of the murder and he never arrived at Popeye's that day. However, Nesmith stating what Williams stated Hurst stated is hearsay with no applicable exception. Further, as the trial court extensively documented (PCR/VI 1030 n.6), the trial record is replete with Hurst's car troubles, negating any exculpatory or prejudicial aspect to the hearsay. Further, a weakness in Hurst's trial evidence is also the weakness in the claim: Evidence established that Hurst made it to the Popeye's the morning of the murder and subsequently drove around after the murder; the hearsay did not state or infer that Hurst had any car trouble the morning of the murder.

Hurst also argues (IB 87) that Nesmith noted that Williams stated that "Tim would do always do what Lee Lee wanted" was Williams' speculation without any predicate. The appellate claim, then, is compound speculation,

pales in contrast to the very specific incriminating statements that Hurst made in Williams' presence and the introduced incriminating evidence, and not grounds for any relief. Moreover, the trial court found that Williams' deposition disclosed this matter, negating that it was undisclosed to the defense (See PCR/VI 1031 and attachment at PCR/VI 1074).

Finally, Hurst's claim that Nesmith's notes concerning Williams' statement about Lee-Lee Smith stating "we got that mother fucker" (PCR/IV 718) speculates that Williams was talking about Lee-Lee talking about his (Lee-Lee's) participation in this murder. Speculation does not prima facie state a claim. Indeed, especially since Lee-Lee did not say "I got that…," speculatively assuming the statement referenced this murder, it could have been bravado, especially given Hurst's calling Lee-Lee names for backing out of Hurst's plan. Moreover, however one interprets the statement, it does not exculpate Hurst, especially when considering the incriminating context of the statement. Further, as the trial court found (PCR/VI 1031 n.7 and accompanying text and attachment), the substance of this statement was disclosed to the defense in Williams' deposition, negating any Brady claim.

C. Alleged Ex Parte Communication.

In this claim, Hurst argued that the trial judge (Tarbuck), after all the evidence had been presented in Hurst's trial, asking the prosecutor in this case "why Lee-Lee Smith had not been charged or are you going to charge him, something like that" was an ex parte communication constituting a "constitutional violation." (See IB 88-89; PCR/V 820—22) Circuit Judge

Nobles' postconviction order extensively excerpted the pertinent portion of the evidentiary hearing (PCR/VIII 1453-56), narrated pertinent procedural history (PCR/VIII 1456-57), and correctly ruled as follows:

> *** At the case management conference, the defense argued that 'it doesn't make any sense' that the conversation was limited to Mr. Smith. That assertion, however, does not equate to a sufficient factual basis to support a postconviction claim. After reviewing the evidentiary hearing transcript and supplemental claim, the Court agreed with the State's characterization of this claim. The Court determined that Defendant's claim of *ex parte* communication was insufficiently pled. However, Defendant was given leave to depose Mr. Rimmer and Judge Tarbuck, and amend the instant claim.
>
> In Defendant’s fourth supplemental motion, Defendant attaches the depositions of Mr. Rimmer and Judge Tarbuck as exhibits, and again asserts that *ex parte* communication occurred in the instant case. Even with the benefit of postconviction discovery, Defendant has failed to establish that he was deprived of a neutral, detached judge. The Court finds that the communication in question was limited to matters concerning Lee-Lee Smith and had no bearing on the judge's treatment of Defendant either during trial or during sentencing. Defendant is not entitled to relief as to this claim.

(PCR/VIII 1456-57) As the order indicates, in spite of the trial court affording the defense every opportunity to formulate a cognizable claim, the Fourth Supplemental Motion to Vacate (PCR/VI 1082-1121) remained facially deficient.

As the trial court indicates, communications between the judge and one of the attorneys to a law suit may concern matters that do not implicate impropriety. For example, a judge may communicate to one attorney about administrative matters in the defendant's case without opposing counsel being present. See Jimenez v. State, 2008 Fla. LEXIS 1107 (Fla. June 19, 2008)(communication for a strictly administrative reason--i.e., the purpose was to enter the order denying the successive rule 3.851 motion in open court"); Riechmann v. State, 966 So.2d 298, 318 (Fla. 2007)(reviewing

cases; "inquiry concerning the depositions, communicated by the court's judicial assistant, did not result in any improper or nonrecord material being considered by the court"). See also Sochor v. State, 883 So.2d 766, 786 (Fla. 2004)("postconviction circuit court denied some of Sochor's motions (to compel production of public records and to clarify other orders of the court related to public records production) during a hearing at which Sochor's counsel was not present"; legally insufficient to disqualify).

In contrast, ex parte submitting or reviewing significant orders concerning the complaining defendant are forbidden. See, e.g., Roberts v. State, 840 So.2d 962, 968 (Fla. 2002)(motion to disqualify legally sufficient; judge had asked the State to draft the sentencing order and had failed to independently weigh the aggravators and mitigators).

In this case, Judge Tarbuck's inquiry focused solely upon Lee-Lee Smith. He did not indicate anything about Hurst's culpability or sentencing. At most, it is speculative concerning whether Tarbuck was even indicating anything at all about **Smith's** culpability.

Indeed, even where a circuit judge presides over accomplices' cases, communications in those cases do not per se constitute improper ex parte communications concerning non-present parties. See Kokal v. State, 901 So.2d 766, 774-75 (Fla. 2005)(capital case; "fact that Judge Carithers had previously determined that O'Kelly was being truthful in the Kight action is not a legally sufficient ground for disqualification"). See also Jackson v. State, 599 So.2d 103, 107 (Fla. 1992)(affirming summary denial of motion

to disqualify that argued same judge had previously heard the evidence in five previous trials).

Arguendo, even if Judge Tarbuck was suggesting that Smith should be charged with something, such a suggestion would have merely indicated that, in the Judge's opinion, the Smith bore some sort of culpability for this murder, which was consistent with what Hurst's defense advocated as its position.

Most importantly, Judge Tarbuck testified at his deposition that he "absolutely" did not ever have any ex parte communications concerning the Hurst case. This claim is less than speculative and thereby woefully less than facially sufficient. See Connor v. State, 979 So.2d 852, 867 (Fla. 2007)("absence of a notation in the record is not sufficient evidence to demonstrate that the defendant was absent at any particular point"); Rodriguez v. State, 919 So.2d 1252, 1269 (Fla. 2005)("Rodriguez offers nothing more than such 'speculative assertions' in the face of direct testimony that refutes his claim that the State drafted his sentencing order"); Mansfield v. State, 911 So.2d 1160, 1168-1171 (Fla. 2005)(during penalty phase Judge questioned plea offer; "statement concerning the timing of a plea offer"; "nothing in the statement that indicated bias or prejudice against Mansfield"); Waterhouse v. State, 792 So.2d 1176, 1192, 1195 (Fla. 2001)(prior to re-sentencing defendant, "Sentencing Judge, Robert E. Beach, commented that the subject is a dangerous and sick man and that many other women have probably suffered because of him"; "comment to the Commission did not constitute a prejudgment of any pending or future

motions that the defendant might file"). See also Tompkins v. State, 872 So.2d 230, 245 (Fla. 2003)("Although we do not condone the ex parte communication, we conclude that under the circumstances of this case, which we here set out in detail, Tompkins is not entitled to a new penalty phase because he has not demonstrated that he was denied his right to a neutral, detached judge or that Judge Coe failed to independently weigh the aggravating and mitigating circumstances").

D. Carl Hess's Grand Jury Testimony.

Hurst's Second Supplemental postconviction motion alleged (PCR/V 921-27) that Carl Hess lied to the grand jury about interviewing Hurst and the prosecution knew it; he attempted to invoke Anderson v. State, 574 So.2d 87 (Fla. 1991).

As an important preliminary matter, the State disputes any suggestion (See IB 89) that Hess recanted his positive identification of Hurst at Popeye's the morning of the murder. He positively identified Hurst in a photospread (TT/II 305; TT/III 517-18), he positively identified Hurst at trial (TT/II 305-306), and there is no indication that Hess has recanted those identifications (See PCR/V 785-87). See also discussion of Hess in ISSUE II supra.

Hurst's written postconviction claim went on for pages and mentioned Hess's pre-trial deposition to attempt to argue the falsity of Hess interviewing Hurst, but he failed to mention to the trial court the excerpt that he now (IB 90) presents to this Court quoted in bold typeface and then discusses. Further, at the Huff hearing counsel expressly disavowed

reliance upon Hess's deposition for this claim. (See PCR/VI 951-52) As such, this appellate reliance was unpreserved and cannot be used here. Hurst requests that this Court second-guess a trial court decision on a matter not presented to the trial court. See, e.g., Harrell v. State, 894 So.2d 935, 940 (Fla. 2005)(three components for "proper preservation"; "purpose of this rule is to 'place[] the trial judge on notice that error may have been committed, and provide[] him an opportunity to correct it at an early stage of the proceedings'"); Gore v. State, 706 So.2d 1328, 1334 (Fla. 1997)(argument below was not the same as the one on appeal); Hill v. State, 549 So.2d 179, 182 (Fla. 1989)("constitutional argument grounded on due process and Chambers was not presented to the trial court … procedurally bars"); U.S. v. Taylor, 54 F.3d 967, 972 (1st Cir. 1995)("raise-or-waive rule prevents sandbagging"). Indeed, because counsel expressly disavowed reliance upon Hess's deposition, reliance upon the deposition on appeal was affirmatively waived. See State v. Lucas, 645 So.2d 425, 427 (Fla. 1994) ("The only exception [to fundamental error] we have recognized is where defense counsel affirmatively agreed to or requested the incomplete instruction"), citing Armstrong v. State, 579 So.2d 734 (Fla. 1991).

Moreover, if Hess's deposition is considered, it was taken on September 14, 1998, (PCR/V 871), prior to the March 2000 trial, and trial defense counsel's hammering at trial Hess's role at Wendy's as not a formal job interviewer (See TT/II 306-312; TT/IV 746-48) indicates that this claim could have and should have been raised on direct appeal, procedurally

barring it here. See Evans v. State, 808 So.2d 92, 101 (Fla. 2001)(Anderson claim unpreserved). See also, e.g., Sexton v. State, 2008 Fla. LEXIS 1610 (Fla. 2008)("any complaint regarding the trial court's response to this objection should have been raised on direct appeal and is therefore procedurally barred"), citing Pooler v. State, 980 So. 2d 460, 470 (Fla. 2008), citing Spencer v. State, 842 So.2d 52, 60-61 (Fla. 2003).

Moreover, Evans, 808 So.2d at 102, alternatively denied the claim and discussed Brookings v. State, 495 So.2d 135, 137 (Fla. 1986), in terms of trial defense counsel exploring the witness's inconsistencies through cross-examination at trial. Further, as Evans points out, the defendant must show "deliberate subornation, that is, that the "the State … knowingly present false testimony to the grand jury." Hurst's self-serving inferences are insufficient. Therefore, the trial court's finding (PCR/VIII 1458) that Hurst failed to show the State knowingly offered false evidence to the grand jury is correct.

Further, any indication by Hess that he testified about interviewing Hurst does not establish that he lied to the grand jury. He does not indicate in the deposition what he means by "interview," which could simply mean that Hess gave Hurst an application and Hurst returned with it, as Hess testified at the postconviction hearing. (See PCR/VIII 787)

But more importantly, when Hess was plainly asked to focus on the grand jury (Id.), he clearly denied that he testified to the grand jury about

interviewing Hurst, and the trial court accredited this testimony (PCR/VIII 1458-59).[15]

E. Willie Griffin.

Willie Griffin was among the witnesses, such as Michael Williams (TT/II 321-22), who testified that Hurst admitted to killing the victim (TT/II 365). Willie Griffin testified at trial that Hurst told him: "I did that swine, and 'F' the rest of them." Hurst said that "I did that, and I don't care nothing about the rest of it." Hurst also said that he did not get along with the victim. Griffin also testified at trial that he asked for assistance from the prosecution, but the prosecutor did not return his (Griffin's) phone call. (TT/II 365-66)

Indeed, Michael Williams testified to details that Hurst admitted to cutting the victim with a box cutter, tying her up, and putting her in the freezer. Hurst laughed. Hurst said that he cut up the victim because he did not want the victim to see his face. As this Court's opinion summarized, the State's evidence also included evidence such as Hurst's fingerprint on the deposit slip, a few days prior to the murder Hurst's possession of a box cutter resembling the apparent murder weapon, his coming into some money, his omission of mentioning Wal-Mart to the police, his lie about not being at the Popeye's that morning, Hurst being positively identified at

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[15] Perhaps Hess discussed the "interview" with someone while he was at the grand jury but did not testify to the grand jury about it.

the Popeye's,[16] Hurst's car closely following the victims towards the Popeye's, the revival of Hurst's car to run errands the day of the murder conflicting with his story that his car-breakdown precluded him from arriving at the Popeye's that day, and Hurst's car containing tape like the tape used on the victim.

In the face of all of the incriminating evidence, Hurst suggests that it should make a difference in these proceedings that Willie Griffin told someone that he will recant a portion of his trial testimony. Thus, even Griffin's postconviction affidavit, while denying that Hurst said "I did that swine," states that Hurst said "Fuck that swine." His affidavit continues by stating that his testimony was entirely based on "emotion" and what he had been told by the State and law enforcement(PCR/VII 1298-99), but he did not specifically deny that Hurst said "I did that" and that Hurst said that he did not get along with the victim. Moreover, to the credit of Hurst's postconviction counsel, his affidavit states that when he first talked with Griffin, Griffin said he "regrets" his trial testimony but, "Griffin did not state that his testimony against Mr. Hurst was false." (PCR/VII 1292) (See also additional background at PCR/VII 1222-49)

Even if Griffin had appeared in Florida and recanted to the degree he stated in his affidavit, it would have made no difference whatsoever in the outcome of this case. See, e.g., Green v. State, 975 So.2d 1090, 1101 (Fla.

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[16] Hurst's allegation that Hess "recanted" stretches his argument much too far. There has been no showing that Hess has wavered from identifying Hurst as at the Popeye's the morning of the murder.

2008)("when weighed against the other admissible evidence, the recantations of Jerome Murray, Sheila Green, and Lonnie Hillery do not create a reasonable probability of acquittal on retrial").

Under these circumstances, the trial court's order merits affirmance:

> ***
>
> Defendant's postconviction counsel asserted that the only way he would be able to obtain Griffin's presence for the evidentiary hearing was if the State would submit paperwork pursuant to the Interstate Act of Detainers. The State objected to accepting responsibility for procurement of Defendant's witness. Defendant then filed a motion to perpetuate Griffin's testimony, or in the alternative, to compel the State to assist Defendant in procuring Griffin. [fn87] The State filed its objections. [fn88]
>
> The Court denied Defendant's motion regarding the perpetuation of Griffin's testimony for several reasons. First, Defendant failed to specifically allege, or attach documentation, regarding the purported content of Griffin's testimony. This Court concludes that perpetuation was not justified in light of the speculative nature of Defendant's pleading. Additionally, this Court is not convinced that Griffin could have been held accountable for his proposed deposition testimony. While the Court does not assume that Griffin would have necessarily been motivated to testify falsely, there is also no suggestion that Griffin would have been motivated to tell the truth, as he would not have been properly subject to potential perjury charges.[17] As to Defendant's suggested alternative of compelling the State's assistance in procuring Griffin, this Court agrees with the State that it should not have to be responsible for retrieving Defendant's witnesses. The Court finds that the State's participation in obtaining Griffin's presence before this Court would have amounted to more than a 'ministerial act.' Consequently, Defendant's motion to perpetuate testimony was denied in its entirety. [fn89]
>
> As this claim now stands, the Court has nothing but the bare allegations of Defendant to support this claim. Defendant has failed to present any reliable admissible evidence regarding the recantation of Griffin. [fn90] Consequently, Defendant's claim must fail.

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[17] However, an argument can be made that perjury may apply through conflicting sworn statements.

fn87. See Attachment 7, 'Affidavit and Motion to take Deposition to Perpetuate Testimony or, in the Alternative, to Compel the State of Florida to Assist in Procurement of Witness Attendance,' February 27, 2006.

fn88. See Attachment 8, 'Suggestions in Opposition to Defendant's "Affidavit and Motion to Take Deposition to Perpetuate Testimony or, in the Alternative, to Compel the State of Florida to Assist in Procurement of Witness Attendance,' March 3, 2006.

fn89. See Attachment 9, 'Order on Status Conference Held April 27, 2006,' April 28, 2006.

fn89. Defendant attempted to supply the affidavit of Griffin, and proposed that testimony from postconviction counsel for Defendant, and counsel's investigator would be admissible evidence regarding this claim. However, this Court found the affidavit and the proposed testimony of counsel and the investigator to be inadmissible as hearsay. *See* Attachment 10, Order denying Defendant's proffer of evidence, vacating and setting aside order granting evidentiary hearing, and setting closing arguments, February 28, 2007.

Further, recognizing that the trial court merits affirmance if correct for any reason, requiring the executive branch to produce Green through its executive functions would violate Florida's separation of powers provisions. See Art. 5 §17, Fla. Const.; State v. Cotton, 769 So.2d 345 (Fla. 2000) ("strict separation of powers doctrine"; "State's broad, underlying prosecutorial discretion"). See also Office of State Attorney v. Parrotino, 628 So.2d 1097, 1099 n. 2 (Fla. 1993)("judicial attempt to interfere with the decision whether and how to prosecute violates the executive component of the state attorney's office").

Again recognizing that Hurst is appealing a trial court order that merits affirmance if correct for any reason, also see authorities and reasoning at PCR/VII 1222-32.

ISSUE VI: HAS HURST SHOWN COGNIZABLE CUMULATIVE ERROR? (RESTATED)

The State respectfully submits that there is no error to accumulate in

this case.

Further, even if there had been some error somewhere, the case against Hurst was not close. It was overwhelming. See Statement of Facts supra, facts summarized immediately prior to ISSUE I, HAC aggravator and testimony supporting it (E.g., TT/IV 653-73), and discussion of incriminating evidence in ISSUE V.E supra. Any error is inconsequential. The trial court's denial of postconviction relief merits affirmance. See, e.g., Bell v. State, 965 So.2d 48, 75 (Fla. 2007)("where individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail"), citing Griffin v. State, 866 So. 2d 1, 22 (Fla. 2003).

CONCLUSION

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

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished to the following on September 23, 2008, by U.S. Mail:

JEFFREY M. HAZEN, ESQ. & HARRY BRODY, ESQ.
P.O. Box 16515
Tallahassee Florida 32317

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted and certified,
BILL McCOLLUM, ATTORNEY GENERAL

____

By: STEPHEN R. WHITE
Florida Bar No. 159089
Attorney for Appellee, State of Fla.
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300 (VOICE)
(850) 487-0997 (FAX)