IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1798

TIMOTHY HURST,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal is from the denial of Appellant's motion for post-conviction relief by The Honorable Linda L. Nobles, Circuit Judge, First Judicial Circuit, Escambia County, Florida. This appeal challenges Appellant's conviction and sentence of death. References in this brief are as follows:

"EHT." refers to the transcript of proceedings held on June 16-18 and July 9, 2004.

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

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

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

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

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STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

On May 26, 1998, Mr. Hurst was charged by indictment with first-degree murder. (R. 1) Mr. Hurst was tried by a jury in March, 2000. Mr. Hurst was convicted of first-degree murder on March 23, 2000. (R. 448) The same day, after a penalty phase, the jury recommended a sentence of death by a vote of 11-1.(R. 450) The trial court held a sentencing hearing on April 17, 2000.(R. 466) The trial court sentenced Mr. Hurst to death on April 26, 2000.(R. 469-89)

This Court affirmed Mr. Hurst's conviction and death sentence on direct appeal. Hurst v. State, 819 So. 2d 689 (Fla. 2002).[1] The United States Supreme Court denied certiorari. Hurst v. Florida, 123 S.Ct. 438 (2002). Mr. Hurst filed an initial post-conviction motion on October 16, 2003. (PC-R. 273-346) A Huff[2] hearing was held on February 23, 2004. An

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[1] On direct appeal, Mr. Hurst raised the following issues: 1) The trial court erred in finding the avoid arrest aggravating circumstance because it was never presented to the jury or judge via argument or instruction and because the evidence does not support the existence of the factor; 2) The trial court failed to properly consider and weigh the statutory and non-statutory mitigating circumstances; 3) the death sentence is disproportionate; and 4) imposition of the death sentence in the absence of notice of the aggravating circumstances to be considered or of jury findings on the aggravating circumstances and death eligibility violates due process and the protection against cruel and unusual punishment.

[2] Huff v. State, 569 So. 2d 1247 (1993).

evidentiary hearing was subsequently held June 16-18 and July 9, 2004. At the conclusion of the July, 2004 evidentiary hearing, Mr. Hurst was given until October 1, 2004, to amend his post-conviction motion with any additional claims arising from previously undisclosed law enforcement documents.(PC-R. 800-01) Mr. Hurst filed his Supplemental Motion on September 30, 2004.[3] (PC-R. 802-25) Mr. Hurst filed a Second Supplemental Motion on January 24, 2005, asserting that the grand jury testimony of trial witness Carl Hess was perjured. (PC-R. 919-33) A Huff hearing was held March 18, 2005. The trial court issued an order summarily denying the first and second supplemental motions on August 17, 2005. (PC-R. 1016-77) Mr. Hurst filed a third supplemental motion to vacate on May 23, 2005.[4] (PC-R. 1008-15) Mr. Hurst filed a fourth supplemental motion on September 29, 2005.[5] (PC-R. 1082-1121) On February 2, 2006, the trial court summarily denied the fourth supplemental motion and, further, held that an evidentiary hearing was necessary as to

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[3] In that motion, Mr. Hurst also filed a claim that the prosecutor and trial judge engaged in an improper *ex parte* contact. This claim arose from testimony given by prosecutor David Rimmer at the June 2004, evidentiary hearing.

[4] This motion asserted that jailhouse trial witness Willie Griffin had recanted his testimony that Mr. Hurst confessed to him.

[5]This motion amended the *ex parte* claim contained in Mr. Hurst's first supplemental motion.

the third supplemental motion. (PC-R. 1171-72) An evidentiary hearing was scheduled for March 10, 2006, on the third supplemental motion. (Id.) After a series of motions, hearings, and a proffer regarding the availability of witness Willie Griffin, the trial court summarily denied the third supplemental motion on February 27, 2007. (PC-R. 1300-09) In the same order, the trial court ordered written closing arguments. (Id.) After closing arguments were submitted, the trial court issued a final order denying relief on August 23, 2007. (PC-R. 1398-1541) A timely notice of appeal was filed on September 19, 2007. (PC-R. 1908-09) This appeal follows.

II. STATEMENT OF THE EVIDENTIARY HEARING FACTS

Glenn Arnold was court-appointed by Judge Tarbuck to represent Mr. Hurst. (PC-R. 1928) Larry Smith was hired as the investigator on the case. (PC-R. 1930) Smith performed typical investigation and was responsible for penalty phase issues, including talking to Mr. Hurst and his family. (PC-R. 1930) Smith was "one of the most honest and ethical persons [Arnold] could have possibly hired, and his ability was second to none." (Id.) Smith became the chief investigator with the Escambia County Sheriff's Office (ECSO) after this case. (Id.)

Arnold's theory of the case was that others were involved in committing the murder, primarily Lee Smith and Michael Williams. (PC-R. 1931) Arnold believed that the jail snitches

were helpful to the state, given the circumstantial nature of the case. (PC-R. 1932) Arnold was never informed that Anthony Williams was given a deal for his testimony. (PC-R. 1933)

Arnold did not think the evidence in the case was strong, and, in fact, thought he had won the case. (PC-R. 1935) Arnold stated that he was not informed that David Kladitis had seen two cars and several black males outside Popeye's at approximately 7 a.m. on May 2, 1998. (PC-R. 1936) This information would have been "extremely important" and he "certainly" could have benefited from it. (Id.)

Arnold recalled the prosecutor arguing that Mr. Hurst did not mention going to Wal-Mart in his taped statement. (PC-R. 1940) Arnold had the reports of Buddy Nesmith and John Sanderson. (Id.) Arnold agreed that Nesmith's report appears to reflect that Mr. Hurst told him that he went to Wal-Mart. (PC-R. 1950) Arnold stated that he did not use the reports because the prosecutor argued that Mr. Hurst did not mention Wal-Mart ***on the tape***. (PC-R. 1951) Also, Arnold stated that he "didn't want to go into it in detail, and I didn't want to go into the fact that Rimmer was trying to make that argument." (PC-R. 1952) He also did not want to emphasize Mr. Hurst's use of his car. (Id.)

Arnold recalled suggesting, on numerous occasions, that Lee Smith, Jr. (Lee-Lee) was involved in the murder. (PC-R. 1954) Arnold believed Lee-Lee committed the murder in this case. (Id.)

Lee-Lee had not been indicted with any charge at the time of the Hurst trial. (PC-R. 1955) The fact that Lee-Lee was ultimately convicted of a crime in this case would have been important in attacking his credibility. (PC-R. 1956) Arnold was not informed prior to trial that Lee-Lee was going to be indicted, but would have expected to be if a decision to indict had been made. (Id.)

Arnold recalls witness Carl Hess and believes that he "was a liar." (PC-R. 1957) Hess misidentified both Mr. Hurst's car and clothing. (PC-R. 1957-58) Hess lied about being a general manager at Wendy's and interviewing prospective employees. (PC-R. 1959) The fact that Hess has now admitted he never interviewed Mr. Hurst for a job is important and confirms what Arnold believed he established. (PC-R. 1960) Hess' identification of Mr. Hurst was "an absolute lie." (Id.)

Arnold recalls a suspicious black male being observed and possibly detained at the scene, but never identified who the person was. (PC-R. 1962) Arnold doubts he made any attempts to interview Andrew Salter. (PC-R. 1964) Arnold did not feel he should have attempted to speak with Salter. (PC-R. 1965) Arnold thought he "had the case won" and "had the case in a bag." (PC-R. 1968-69)

Arnold had handled one penalty phase prior to the instant case. (PC-R. 1979) Arnold's theory at penalty phase was that Tim was a good boy who was slow, but who helped in the community

and at church. (PC-R. 1980) Arnold does not recall any discussions with the public defender who handled Mr. Hurst's case prior to him. (PC-R. 1981) Arnold did not have "very much" mitigation. (PC-R. 1982) Arnold stated that he had a discussion with Mr. Hurst and that Mr. Hurst did not want to be examined by a psychologist and, coupled with the fact that Arnold "hadn't seen anything," Arnold told Judge Tarbuck that a mental health expert was not necessary. (PC-R. 1983) Arnold did not talk to a psychologist about the case or have Mr. Hurst examined. (PC-R. 1985) Arnold did not recall his specific conversation with Mr. Hurst, but "under today's law" he would have filed a motion to have Mr. Hurst examined. (Id.) In hindsight, Arnold feels like Mr. Hurst should have been examined. (PC-R. 1986) Arnold felt like presenting psychological testimony would have hurt his credibility with the jury, given the theory of defense at guilt phase. (Id.) Arnold was aware of the statutory mental health mitigating factors. (PC-R. 1989) Arnold suggested that a memo of his conversation with Mr. Hurst as to not using a psychologist should be in his file. (PC-R. 1991) Arnold did not think Mr. Hurst was mentally ill. (PC-R. 1994) Arnold is "almost certain" that he had a conversation with Larry Smith about Mr. Hurst not wanting to use a psychologist and believes Smith wrote him a memo to that effect. (PC-R. 1995) Arnold agreed that he did not have the informed opinion of a mental

health expert. (PC-R. 1997) Arnold does not recall being aware of the fact that Mr. Hurst's mother was 15 years old when she gave birth to him. (PC-R. 1999) However, Arnold stated that "we pretty much weeded out that stuff and went with the good stuff." (PC-R. 2001) Arnold was not aware that Mr. Hurst's mother had abused alcohol when she was pregnant. (PC-R. 2002) Arnold was not aware that Mr. Hurst had been taken as a child by HRS. (PC-R. 2003) Arnold believed that Mr. Hurst was a follower, not a leader. (PC-R. 2005)

Dr. Valerie McClain is a licensed clinical psychologist. (PC-R. 2013) Dr. McClain conducted an evaluation of Mr. Hurst, including a psycho-social interview. (PC-R. 2019-20) Mr. Hurst was a below average student who was placed in special education. (PC-R. 2021) Testing revealed that Mr. Hurst reads at a 4th grade level and does arithmetic and spelling at a 5th grade level. (PC-R. 2022) Mr. Hurst was not malingering. (PC-R. 2023, 2026) Mr. Hurst's I.Q. score was at 70, with a confidence range of 67 to 75. (PC-R. 2024) This is in the borderline range of intellectual functioning. (Id.) Mr. Hurst exhibited deficits in memory and verbal fluency. (PC-R. 2025) Dr. McClain interviewed Mr. Hurst's mother, father, and sister. (PC-R. 2027) The parents indicated that Mr. Hurst had academic problems and had been placed in special education. (Id.) His mother stated that she drank heavily during her pregnancy with Tim. (Id.) His

sister said that Tim was a follower, rather than a leader. (PC-R. 2028) Mr. Hurst has below average adaptive functioning skills. (PC-R. 2029) This may have been the result of speech and language problems, and possibly fetal-alcohol issues. (PC-R. 2030) Dr. McClain could not make a medical diagnosis of fetal-alcohol syndrome. (Id.) Mr. Hurst's neuro-psychological tests suggested brain damage, which is consistent with fetal-alcohol syndrome. (PC-R. 2031) Mr. Hurst suffers from depression. (PC-R. 2032) Mr. Hurst was in the mentally deficient to borderline range of intelligence. (PC-R. 2033) Mr. Hurst's I.Q. is significantly below average. (PC-R. 2035) Mr. Hurst's academic performance was below average and he only completed the 10th grade. (Id.) He repeated 10th grade twice. (PC-R. 2036) Mr. Hurst has a learning and cognitive disorder. (PC-R. 2039) Mr. Hurst, based on testing and history, suffers from brain damage. (Id.) In Dr. McClain's opinion, the brain damage is a result of Mr. Hurst's mother's drug and alcohol use at gestation. (PC-R. 2040) The substantial impairment and duress statutory mitigating circumstances apply to Mr. Hurst. (PC-R. 2043-44)

On cross-examination, Dr. McClain stated that there was no prior psychiatric treatment for Mr. Hurst. (PC-R. 2052) Dr. McClain did not find Mr. Hurst to be mentally retarded. (PC-R. 2057) Mr. Hurst received a wide variety of academic grades in school, from A to F. (PC-R. 2060)

Dr. James Larson is a clinical psychologist. (PC-R. 2069) Based on Dr. Larson's testing, Mr. Hurst scored a verbal I.Q. of 78 and a performance I.Q. of 83. (PC-R. 2084-85) The full-scale I.Q. is 78, in the borderline range of intelligence. (PC-R. 2086) Dr. Reibsame scored Mr. Hurst's I.Q. at 78. (PC-R. 2089) Dr. Larson, as well as Doctors Reibsame and McClain, found Mr. Hurst to have borderline intellectual functioning. (PC-R. 2091) Mr. Hurst's academic records demonstrated him to be below average. (PC-R. 2122) Mr. Hurst is not mentally retarded. (PC-R. 2133)

On cross-examination, Dr. Larson stated that he was aware Mr. Hurst's mother drank and used drugs while pregnant with him. PC-R. 2169) This could cause brain damage and fetal alcohol syndrome. (Id.) Dr. Larson agreed that Mr. Hurst is slow and has mental problems. (PC-R. 2170) Dr. Larson's history noted that Mr. Hurst's mother drank too much and his father "whipped [him] too much." (PC-R. 2177) He did not know of any mental illness in his family. (PC-R. 2179) He dropped out in high school. (Id.)

Anthony Williams testified that he is currently incarcerated for armed robbery and previously testified at Mr. Hurst's trial. (PC-R. 2188-89) Williams was Mr. Hurst's cellmate. (PC-R. 2189) Williams testified that Mr. Hurst confessed to him. (PC-R. 2190) Williams testified at the

evidentiary hearing that Mr. Hurst never confessed to him. (Id.) Mr. Hurst never told Williams anything about his involvement in this case. (PC-R. 2191) Williams talked with prosecutor David Rimmer prior to the Hurst trial and told Rimmer that Mr. Hurst confessed to him. (PC-R. 2191-92) The day before his testimony, Williams told Rimmer that he did not want to testify. (Id.) Rimmer told Williams to "do the right thing" and he would be taken care of in the long run. (Id.) Williams expected leniency when he testified. (Id.) Williams testified against Mr. Hurst because he was looking for some help on his case. (PC-R. 2192-93) Williams stated that this "happens all the time in jail." (PC-R. 2193) Williams' direct appeal is still pending. (PC-R. 2134) Williams lied in his testimony at Mr. Hurst's trial and did so expecting leniency in his case. (Id.)

On cross-examination, Williams stated that he has several felony convictions. (PC-R. 2196) Williams has a life sentence. (PC-R. 2197) Mr. Hurst's trial was before Williams was sentenced. (PC-R. 2198) Williams testified at trial that Mr. Hurst confessed to him. (PC-R. 2201) Williams committed perjury at trial. (PC-R. 2207) Williams is testifying truthfully now because he "can't go through life knowing [he] committed wrongs against others." (Id.) Williams told David Rimmer before his testimony that he "couldn't do this." (PC-R. 2209)

Larry Smith testified that he is currently the Chief Deputy

with ECSO. (PC-R. 2228) Prior to that, Smith was a private investigator with his own business. (Id.) Previous to that, Smith worked for FDLE for 29 years, where he was in charge of field operations in Pensacola. (Id.) Smith worked on the Hurst case for Glenn Arnold. (Id.) As part of his investigative work, Smith was never informed that David Kladitis was at Popeye's restaurant on the morning of May 2, 1998, and saw 3-4 black males outside the restaurant. (PC-R. 2234) Smith did not believe that Mr. Hurst had the time or physical ability to do the things that had been alleged as part of the robbery-murder. (PC-R. 2235-36) Smith believes there were other individuals involved in the murder. (Id.) Smith recalls a report of an unidentified black male being at the scene. (Id.) Smith never spoke with him. (PC-R. 2238) Smith interviewed Timothy Hurst at length for mitigation purposes. (Id.) Smith never had a conversation with Mr. Hurst about the use of a psychologist. (PC-R. 2239)

Lee-Lee Smith testified at the trial in this matter and ultimately was charged as an accessory after the fact. (PC-R. 2252) Smith was informed and charged after Mr. Hurst's trial. (PC-R. 2253) At the time of Mr. Hurst's trial, the state had told Smith that he would be charged. (PC-R. 2254) Smith then stated that the prosecutor told him he would be charged "after the trial or during the trial, I don't remember." (PC-R. 2255)

Andrew Salter testified that he lived in Pensacola in 1998. (PC-R. 2257) He was in the area of Popeye's on the morning the murder happened. (PC-R. 2258) Salter woke up that morning around 5:30 and walked to Wendy's, which was directly across from Popeye's, where he was to meet a man he was supposed to work for. (Id.) He waited there for an unknown amount of time. (Id.) He eventually went to Winn-Dixie, which is in the same parking lot, and bought chocolate milk. (Id.) Salter did not see any cars in the Popeye's parking lot, but did recall seeing the delivery truck. (PC-R. 2259) He saw the delivery driver after he had gone home and come back to get his chocolate milk. (Id.) When Salter came back out of Winn-Dixie, law enforcement was on the scene. (Id.) Salter told an officer he had been there at 5:30. (Id.) He was in the parking lot for 1½-to-2 hours. (PC-R. 2260) Salter did not see any Popeye's employees. (Id.) Salter was ultimately questioned by law enforcement about his presence in the area. (Id.) He gave them prints. (PC-R. 2261) Salter did not see Timothy Hurst or a large blue Marquis there that morning. (Id.) Salter saw the guy who takes out the trash at Wendy's. (Id.) No one representing Mr. Hurst talked to Salter at the time of trial. (Id.)

On cross-examination, Salter testified that he saw the delivery driver when he came out of Winn-Dixie. (PC-R. 2263) Salter was in Winn-Dixie less than 10-15 minutes. (Id.) Salter

did not recall seeing the driver when he went into Winn-Dixie. (PC-R. 2264) Salter was not sure of the exact time he was waiting on the man he was to work for. (PC-R. 2265)

Eunice Smith is Lee-Lee's mother. (PC-R. 2271) Eunice was present when the state attorney came and spoke to her son about charging him. (Id.) This was before the Hurst trial. (Id.) Lee-Lee was charged with accessory after the fact and the charge was adjudicated in juvenile court. (Id.) He is now done with probation. (PC-R. 2272) The state attorney, Mr. Rimmer, "let us know that he was going to be charged." (Id.) Rimmer told Lee-Lee that he wanted him to be a witness in the Hurst case. (Id.) Both Eunice and Lee-Lee were present for this conversation. (PC-R. 2273)

John Sanderson is an investigator for the state attorney and was an investigator for ECSO in 1998. (PC-R. 2282) He assisted in the investigation of the Hurst case. (Id.) Buddy Nesmith was the lead investigator. (Id.) Sanderson identified a copy of his supplemental report in this case. (PC-R. 2283, Defense Exhibit 7) Sanderson wrote in his report that he learned from Nesmith that Mr. Hurst went to Wal-Mart on the morning of the murder. (Id.) According to his report, Nesmith got the information "from Timothy Hurst." (PC-R. 2285) Sanderson does not have a recollection of the conversation with Nesmith. (PC-R. 2286) Sanderson reviewed his report prior to

the evidentiary hearing. (PC-R. 2290) Sanderson tries to be accurate in his reports. (PC-R. 2293) His report was turned over in discovery. (Id.) Sanderson does not "necessarily" believe there is anything inaccurate in his report. (PC-R. 2305) Sanderson was not questioned at trial about the Wal-Mart purchase. (PC-R. 2312) The report was made within a couple days of the conversation with Nesmith. (Id.) In talking with Sanderson recently, Nesmith did not remember the conversation with Sanderson, except for the sole fact that Mr. Hurst did not mention Wal-Mart. (PC-R. 2319) In their recent conversation, Nesmith suggested that the Wal-Mart information came from Lee-Lee Smith. (PC-R. 2332)

David Rimmer was the prosecutor in the trial of this case. (PC-R. 2355) Rimmer told the jury that Mr. Hurst did not mention Wal-Mart in the taped interview. (PC-R. 2357) Rimmer asserted that Nesmith's statement to Sanderson that Mr. Hurst said he went to Wal-Mart "was an error." (PC-R. 2358) Rimmer was aware of Sanderson's report. (Id.) Rimmer stated that he was under no obligation to correct the "error." (PC-R. 2361) Rimmer agreed that Nesmith's report says that Mr. Hurst told him he went to Wal-Mart. (PC-R. 2366) This was "erroneous" so Rimmer ignored it. (PC-R. 2368) Mr. Hurst's recorded statement was taken at 2:58 p.m., but he was at the sheriff's office for seven hours according to Nesmith's testimony. (PC-R. 2271) Rimmer conceded

that Nesmith may have told Sanderson that Mr. Hurst told him that he went to Wal-Mart. (PC-R. 2372) Rimmer was aware that Mr. Hurst was with Nesmith for approximately seven hours the day of the taped interview. (PC-R. 2284) Rimmer never spoke with Nesmith, prior to trial, regarding the "error" in his report. (PC-R. 2392)

Rimmer was familiar with the police reports and attended the depositions of the detectives. (PC-R. 2403) He reviewed the same for trial preparation. (Id.) Rimmer did not feel duty-bound to disclose discrepancies in either police reports or depositions. (PC-R. 2404) He did not feel there was any conflicting information regarding the Wal-Mart statement. (Id.)

Donald "Buddy" Nesmith testified that he investigated this case for ECSO. (PC-R. 2426) Nesmith identified his report in the case. (PC-R. 2427, Defense Exhibit 1) Nesmith conceded that his report states that Mr. Hurst told him he went to Wal-Mart. (PC-R. 2429) Nesmith was with Mr. Hurst for 7-8 hours on May 2, 1998, the day of the taped interview. (PC-R. 2431) Nesmith went through Mr. Hurst's story with him prior to the taped interview. (PC-R. 2433) Nesmith identified a copy of the taped interview transcript. (PC-R. 2435, Defense Exhibit 13) The taped interview lasted 14 minutes. (PC-R. 2436) The tape does not include all of the conversations that Nesmith had with Mr. Hurst. (Id.) Nesmith claimed that Sanderson's report is wrong

when it states that Nesmith got the Wal-Mart information from Mr. Hurst. (PC-R. 2438) Nesmith stated this information came from Lee-Lee. (Id.) Nesmith took no steps to correct the alleged error. (PC-R. 2439) Nesmith prepared his report on June 23, 1998. (PC-R. 2440) The interview with Mr. Hurst lasted 3-4 hours. (PC-R. 2443) Nesmith has notes of his witness interviews and brought them to the stand with him. (Id.) There are notes from his interview with Mr. Hurst. (PC-R. 2448) Nesmith stated that these notes encompass the entire 3-4 hour interview with Mr. Hurst. (PC-R. 2452-53) The discrepancy between the reports and Nesmith's assertion that Mr. Hurst did not tell him he went to Wal-Mart was never clarified. (PC-R. 2465) When asked why he did not clarify it, Nesmith stated that he "did not catch it." (PC-R. 2466)

On cross-examination, Nesmith stated that Mr. Hurst never told him about going to Wal-Mart, before or after the taped statement. (PC-R. 2510) Nesmith stated that he found out about Wal-Mart from Lee-Lee. (PC-R. 2511) Nesmith claimed that there was no further interview of Mr. Hurst after the taped session. (PC-R. 2517)

Nesmith stated that everything in his report about the interview of Mr. Hurst is correct, except for the sole fact that Mr. Hurst told him about going to Wal-Mart. (PC-R. 2520) Nesmith stated that his deposition testimony that he was with

Mr. Hurst for 6 or 7 hours and interviewed him for 3 or 4 hours is true. (PC-R. 2521)

On recall, David Rimmer testified that he has reviewed Nesmith's report. (PC-R. 2525) Rimmer interpreted the report as stating that Mr. Hurst told Nesmith about the Wal-Mart trip during the recorded interview. (PC-R. 2527) Rimmer conceded that Nesmith's deposition testimony that Mr. Hurst was interviewed for 3-4 hours implies that not everything Mr. Hurst said was in the recorded interview. (PC-R. 2528) Rimmer felt it was important to argue to the jury that Mr. Hurst did not mention Wal-Mart in the recorded statement. (PC-R. 2530) Rimmer did not feel constrained by the discrepancies because the report was "just an error." (PC-R. 2533)

On recall, John Sanderson testified that Nesmith's report, where it says Mr. Hurst told Nesmith he went to Wal-Mart, is consistent with Sanderson's own report. (PC-R. 2538)

On further recall, David Rimmer testified that he had no conversations with Lee-Lee about charging him in this case. (PC-R. 2586) Rimmer stated that he did not want to charge Lee-Lee in the beginning because it would "cause problems with his testimony." (PC-R. 2587) Rimmer was having problems with Lee-Lee cooperating. (Id.) Rimmer said he never had any conversations with Anthony Williams about his pending cases. (PC-R. 2588) When asked whether he is convinced jail witnesses

are telling the truth when they testify, Rimmer stated, “See, I don’t know about that. I leave that up to the jury.” (PC-R. 2592) When asked whether he had an obligation to put on truthful evidence, Rimmer added further:

> Well, you know, people look at it that way. And I put on a witness because, you know, I believe that witness’ testimony is consistent with other evidence. Usually, I – you know, I put them on because I believe them, but, you know, sometimes I just don’t know.

(PC-R. 2593) Rimmer went to Lee-Lee’s house prior to the Hurst trial and impressed upon him that he had to testify or be held in contempt. (PC-R. 2597) Lee-Lee’s mother was present. (Id.) Rimmer conceded that Lee-Lee may have been involved in the murder. (Id.) Rimmer believed Anthony Williams’ testimony would be helpful. (PC-R. 2609) Rimmer stated that testimony of a confession by a defendant helps the jury with their decision, particularly in a circumstantial case. (PC-R. 2621)

Glenn Arnold testified on cross-examination that he saw no need to have Mr. Hurst examined by a psychologist. (PC-R. 2630-31) Arnold claimed that Mr. Hurst and his mother did not want to utilize a psychologist. (PC-R. 2630-31) Mr. Hurst was mentally slow. (PC-R. 2631) Arnold stated that the Carter[6] case had not been decided at that point. (Id.) Arnold discussed Mr.

[6] Undersigned counsel believes the case Mr. Arnold referred to is Cater v. State, 706 So.2d 873 (Fla. 1997). This case was obviously decided before the crime in this case ever occurred.

Hurst's recorded statement with him. (PC-R. 2632) Arnold does not remember Mr. Hurst telling him that he told detectives that he went to Wal-Mart. (PC-R. 2633) The Wal-Mart trip fit into Arnold's time frame. (Id.) Arnold reiterated that Lee-Lee was a liar who was "puking out anything that he could that would help himself." (Id.) Arnold felt like he had won the case and "losing this case is the most aggravating thing I've had happen in 25 years." (PC-R. 2646)

Arnold did not tell Mr. Hurst that using a mental health expert was not a good idea. (PC-R. 2637) Arnold "didn't think that a shrink would find a mental problem." (Id.) Arnold suggested that part of the reason he did not utilize a mental health expert was because he did not want Mr. Hurst to be angry with him if he later decided to call Mr. Hurst to testify. (PC-R. 2638-39) Arnold did not have Mr. Hurst examined and the decision was "based on a lot of years of experience and my observations of him, period. That's all." (PC-R. 2640) As to mental health mitigation, Arnold stated that he "could have got some whore somewhere to lie", but he "didn't feel the boy was in trouble mentally." (PC-R. 2647)

Arnold does not remember discussing with Mr. Hurst the discrepancy between the recorded statement and the police reports regarding Wal-Mart. (PC-R. 2643) Arnold stated that his strategy was to ignore the recorded statement. (PC-R. 2644)

Arnold did not “think it significant” to cross-examine Nesmith and Sanderson on the discrepancy. (PC-R. 2645) Arnold did not think this would have impeached the argument that Mr. Hurst did not mention Wal-Mart. (PC-R. 2646)

David Kladitis testified that he was a trial witness in this case. (PC-R. 769) He remembers the morning of May 2, 1998. (Id.) Kladitis left his house that morning with his daughter. (PC-R. 770) They were going to Barnes Feed Store, but it was closed when they got there. (Id.) As a result, they went to Whataburger on Nine MileRoad and bought breakfast. (Id.) They parked in the parking lot behind Popeye’s and ate their breakfast. (Id.) Kladitis was 100-150 feet from Popeye’s. (Id.) A white vehicle with a couple of black males pulled up. (Id.) Their windows were down with the music playing loud. (Id.) The black males were 16-20 years old. (Id.) Then, another large blue vehicle pulled up with 2-3 more black males. (Id.) The black males were talking back and forth. (Id.) Kladitis was 50-75 feet from the boys. (PC-R. 771) Kladitis observed this for approximately 10 minutes. (Id.) Kladitis then went back to Barnes. (Id.) Later that afternoon, Kladitis saw a news report of the murder and called law enforcement. (PC-R. 772) A uniformed officer came to his house a short time later. (Id.) He told the officer everything he had seen that morning. (PC-R. 773) Kladitis talked with Detective Nesmith 1-2 weeks later at

his place of employment. (Id.) Nesmith "wasn't sure if anything would – was relevant or not, said he would get back with me." (Id.) Kladitis told Nesmith everything he had seen. (PC-R. 774) Kladitis told Nesmith his story, prior to deposition, 5-7 times. (Id.) Kladitis eventually spoke with prosecutor Rimmer. (Id.) Rimmer was not sure where Kladitis' testimony fit in and said he would get back with him. (Id.) Kladitis told Rimmer everything he had seen. (Id.) Kladitis spoke with Rimmer 4-6 times. (PC-R. 775) Kladitis never failed to tell Nesmith or Rimmer about what he saw at Popeye's, but "the questions from them did not start with in the morning. It started more with when I was at Barnes Feed and Seed with my daughter and I saw the young lady drive by. That's where they wanted to start each and every time." (Id.) Kladitis added:

> They told me that from -- I reviewed the whole story with them. 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 all they wanted me -- they said that's the only part of the testimony that they were concerned of, and that's what they wanted me to keep in my mind until the deposition and/or trial.

(PC-R. 776) When asked if he told the grand jury about what he saw at Popeye's, Kladitis stated, "I started from in the morning, and it was, no, they wanted -- they asked me questions directly about the car I saw -- the car I saw behind and the

time.” (PC-R. 776-77) Kladitis does not recall telling the grand jury about what he saw at Popeye’s. (PC-R. 777) Rimmer was asking the questions at the grand jury proceeding. (PC-R. 778) Other than deposition, Kladitis never spoke with representatives of Mr. Hurst. (Id.) At deposition, Kladitis was only asked about what he saw at Barnes. (Id.) When asked whether he felt that Detective Nesmith did not want him to mention what he saw at Popeye’s, Kladitis stated:

> He made a statement to me that he was not concerned over the morning. It was not relevant. It was not important to him. It was not something that he needed or wanted. He just wanted the timing of the vehicle and the vehicles I saw. And if and when I'm asked -- the questions that he is going to ask or Mr. Rimmer is going to ask me are going to be the time I saw the vehicle, her and the vehicle behind it, and that would be it.

(PC-R. 779)

On cross-examination, Kladitis stated that he testified truthfully at trial. (Id.) He believes Barnes opened at 7:00. (PC-R. 780) Kladitis saw the boys at Popeye’s prior to 7:00. (Id.) He thinks he left the Popeye’s parking lot at “6:30 to 6:45, something like that.” (Id.) At trial, Kladitis stated that Barnes opened at 7:30. (PC-R. 782) Based on that time, he thinks he saw the boys at Popeye’s around 7:00. (PC-R. 783) He believes he saw the victim ride by Barnes about “7:15 to 7:20.” (Id.) Neither Nesmith nor Rimmer ever specifically told him not

to tell anyone what he saw at Popeye's. (Id.) Every time he told his story, they told him to skip over what he saw at Popeye's. (PC-R. 785)

Carl Hess testified that he formerly lived in Pensacola and worked at the Nine Mile Road Wendy's in 1998. (PC-R. 786) Hess testified in this case at trial. (Id.) Hess never interviewed Mr. Hurst for a job at Wendy's. (Id.) He handed him an application. (Id.) Hess' prior testimony that he interviewed Mr. Hurst is not true. (PC-R. 787) Hess testified before the grand jury in this case. (Id.) Hess said the "interview" never came up at the grand jury. (Id.)

SUMMARY OF THE ARGUMENTS

ARGUMENT I: The state withheld evidence in violation of Brady. Witness David Kladitis witnessed several young, black males at the crime scene just prior to murder in this case. Trial counsel's theory at trial was that several young, black males other than Mr. Hurst committed the crime. Law enforcement and the state attorney knew about Kladitis' information and did not disclose the evidence to defense counsel. Witness Anthony Williams testified that he gave trial testimony with the expectation that he would be treated with leniency in his own cases in exchange for his testimony. The state attorney made this promise to him and, further, the exchange was not disclosed to defense counsel. Further, the prosecutor knowingly allowed Williams to testify at trial that there was no deal in violation of Giglio. Finally, Lee-Lee Smith, a crucial trial witness against Mr. Hurst, was told prior to trial by the prosecutor that he would be indicted in the case, a fact never disclosed to defense counsel.

ARGUMENT II: Newly discovered evidence reveals that trial witness Anthony Williams testified falsely that Mr. Hurst confessed to him. Williams recanted his trial testimony at the evidentiary hearing below. Newly discovered evidence reveals that Lee-Lee Smith was charged and sentenced in this case after Mr. Hurst's trial. The charge and sentence were miniscule,

especially compared with Mr. Hurst's sentence of death, a fact which certainly would have effected sentencing in this case. Finally, Witness Carl Hess admitted at the evidentiary hearing below that his trial testimony that he interviewed Mr. Hurst for a job, the basis for his identification of Mr. Hurst at the crime scene, was a flat lie. Hess' admission to perjury not only eviscerates his identification, but every other aspect of his testimony.

ARGUMENT III: Trial counsel, despite having knowledge of his existence, failed to interview Witness Andrew Salter. Salter was near the crime scene on the morning of the murder and could have provided testimony exculpating Mr. Hurst and impeaching the testimony of Witness Carl Hess. Further, trial counsel failed to utilize police reports to cross-examine and impeach law enforcement officers regarding whether Mr. Hurst told law enforcement that he went to Wal-Mart on the morning of the murder. The state used the fact that Mr. Hurst did not mention going to Wal-Mart in his taped statement to paint Mr. Hurst as a liar. The reports of law enforcement suggested strongly that Mr. Hurst did tell law enforcement about going to Wal-Mart and trial counsel's failure to utilize the reports was prejudicially deficient.

ARGUMENT IV: Trial counsel failed to utilize a mental-health expert at the penalty phase of trial. Mr. Hurst was never

examined by a mental-health expert. Had he been, trial counsel could have presented valuable, mental-health mitigation, establishing both non-statutory and statutory mitigation.

ARGUMENT V: The trial court erred in summarily denying several claims. The notes of Detective Nesmith revealed several Brady claims involving new claims and supporting existing Brady claims. These notes revealed information that was exculpatory and impeaching and which the state obviously knew about. The trial court and the prosecutor engaged in an ex parte conversation regarding the charging of Lee-Lee Smith in this case. Carl Hess testified falsely before the grand jury in this case that he interviewed Mr. Hurst for a job, the basis for his alleged identification. Willie Griffin, who testified at trial that Mr. Hurst confessed to him, has recanted his trial testimony, and stated that he lied at trial. As to all of these claims, the trial court denied an evidentiary hearing. The court's ruling is in contravention of precedent and rule 3.851.

ARGUMENT VI: Mr. Hurst's trial proceedings were fraught with error, outlined at trial, on direct appeal, and in post-conviction, all of which combine to completely undermine the confidence in both the conviction and sentence in this case.

STANDARD OF REVIEW

The constitutional arguments advanced in this brief, present mixed questions of fact and law. As such, this Court is required to give deference to the factual conclusions of the lower court. The legal conclusions of the lower court are to be reviewed independently. See Ornelas v. U.S., 517 U.S. 690 (1996) and Stephens v. State, 748 So. 2d 1028 (Fla. 1999).

ARGUMENT I

MR. HURST WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND/OR EXCULPATORY IN NATURE AND PRESENTED INTENTIONALLY-FALSE AND/OR MISLEADING TESTIMONY. THE LOWER COURT ERRED IN DENYING APPELLANT RELIEF ON THIS BASIS.

A. Facts

Witness David Kladitis

David Kladitis was a trial witness in this case. (PC-R. 769) On the morning of May 2, 1998, he left his house with his daughter. (PC-R. 770) They were going to Barnes Feed Store, but it was closed when they got there. (Id.) As a result, they went to Whataburger on Nine Mile Road and bought breakfast. (Id.) They parked in the parking lot behind Popeye's and ate their breakfast. (Id.) Kladitis was 100-150 feet from Popeye's. (Id.) A white vehicle with a couple of black males, 16-20 years old, pulled up. (Id.) Then, another large blue vehicle pulled up with 2-3 more black males. (Id.) The black males were talking back and forth. (Id.) Kladitis was 50-75 feet from the boys. (PC-R. 771) Kladitis observed this for approximately 10 minutes. (Id.) Kladitis then went back to Barnes. (Id.) Later that afternoon, Kladitis called law enforcement. (PC-R. 772) He told a uniformed officer everything he had seen that morning.

(PC-R. 773) Kladitis talked with Detective Nesmith 1-2 weeks later. (Id.) Nesmith "wasn't sure if anything would – was relevant or not, said he would get back with me." (Id.) Kladitis told Nesmith everything he had seen, 5-7 times. (PC-R. 774) Kladitis eventually spoke with prosecutor Rimmer, 4-6 times, and told him everything he had seen. (Id.) Rimmer was not sure where Kladitis' testimony fit in and said he would get back with him. (Id.) Kladitis never failed to tell Nesmith or Rimmer about what he saw at Popeye's, but "the questions from them did not start with in the morning. It started more with when I was at Barnes Feed and Seed with my daughter and I saw the young lady drive by. That's where they wanted to start each and every time." (Id.) Kladitis added:

> They told me that from -- I reviewed the whole story with them. 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 all they wanted me -- they said that's the only part of the testimony that they were concerned of, and that's what they wanted me to keep in my mind until the deposition and/or trial.

(PC-R. 776) Kladitis did not tell the grand jury about what he saw at Popeye's. (PC-R. 777) Other than deposition, Kladitis never spoke with representatives of Hurst. (PC-R. 778) At deposition, Kladitis was only asked about what he saw at Barnes. (Id.) When asked whether he felt that Detective Nesmith did not

want him to mention what he saw at Popeye's, Kladitis stated that Nesmith was only concerned with Barnes.(PC-R. 779)

Kladitis believes Barnes opened at 7:00. (PC-R. 780) Kladitis saw the boys in the Popeye's prior to 7:00. (Id.) He thinks he left the Popeye's parking lot at "6:30 to 6:45, something like that." (Id.) At trial, Kladitis stated that Barnes opened at 7:30. (PC-R. 782) Based on that time, he thinks he saw the boys at Popeye's around 7:00. (PC-R. 783) He believes he saw the victim ride by Barnes about "7:15 to 7:20." (Id.) Neither Nesmith nor Rimmer ever specifically told him not to tell anyone what he saw at Popeye's. (Id.) Every time he told his story, they told him to skip over what he saw at Popeye's. (PC-R. 785)

In addition to Kladitis' testimony at the evidentiary hearing, Detective Nesmith's field notes, discovered at the evidentiary hearing, verify Kladitis' testimony.[7] (PC-R. 679) Nesmith's report has no mention of the information. (Defense Exhibit 1)

Glenn Arnold was not informed that David Kladitis had seen two cars and several black males outside Popeye's. (PC-R. 1936) This information would have been "extremely important" and he

[7] Notably, Nesmith's notes of his interview with Kladitis reveal that, at the time, Kladitis thought he saw the black males in the parking lot at approximately 7:30 a.m., even closer to the alleged time of the murder, approximately 8:00 a.m. (PC-R. 679)

"certainly" could have benefited from it. (Id.) Arnold's theory of the case was that others were involved in committing the murder, primarily Lee Smith and Michael Williams. (PC-R. 1931) Investigator Larry Smith was never informed that David Kladitis saw 3-4 black males outside Popeye's. (PC-R. 2234)

Witness Anthony Williams

Anthony Williams testified at Mr. Hurst's trial. (PC-R. 2188-89) Williams and Mr. Hurst were cellmates. (PC-R. 2189) Williams testified at trial that Mr. Hurst confessed to him. (PC-R. 2190) Williams recanted, testifying that Mr. Hurst never confessed to him. (Id.) Mr. Hurst never told Williams anything about his involvement in this case. (PC-R. 2191) The day before his trial testimony, Williams told Rimmer that he did not want to testify. (Id.) Rimmer told Williams to "do the right thing" and he would be taken care of in the long run. (Id.) Williams expected leniency when he testified. (Id.) Williams was looking for help on his case. (PC-R. 2192-93) Williams' direct appeal is still pending. (PC-R. 2134) Williams lied in his testimony at Mr. Hurst's trial and did so expecting leniency in his case. (Id.) Mr. Hurst's trial was before Williams was sentenced. (PC-R. 2198) Williams told David Rimmer before his testimony that he "couldn't do this." (PC-R. 2209)

David Rimmer denied at the evidentiary hearing that he ever promised Williams anything for his testimony against Mr. Hurst.

(PC-R. 2588)

Glenn Arnold believed that the snitches in the case were helpful to the state, given the circumstantial nature of the case. (PC-R. 1932) Arnold was never informed that Anthony Williams was given a deal for his testimony. (PC-R. 1933)

Lee-Lee Smith Indictment

Glenn Arnold believed Lee-Lee Smith committed the murder in this case. (PC-R. 1954) Lee-Lee had not been indicted with any charge at the time of the trial and denied so on the stand. (PC-R. 1955) The fact that Lee-Lee was ultimately charged and convicted of a crime in this case would have been important in attacking his credibility. (PC-R. 1956) Arnold was not informed prior to trial that Lee-Lee was going to be indicted, but would have expected to be if a decision to indict had been made. (Id.)

Lee-Lee testified at the trial in this matter and ultimately was charged as an accessory after the fact. (PC-R. 2252) Lee-Lee was informed and charged after Mr. Hurst's trial. (PC-R. 2253) At the time of Mr. Hurst's trial, the state had already told Lee-Lee that he would be charged. (PC-R. 2254) Lee-Lee then stated that the state told him he would be charged "after the trial or during the trial, I don't remember." (PC-R. 2255)

Eunice Smith was present when the state attorney came and spoke to her son about charging him. (PC-R. 2271) This was

before the Hurst trial. (Id.) Lee-Lee was charged with accessory after the fact and the charge was adjudicated in juvenile court. (Id.) Mr. Rimmer, “let us know that he was going to be charged.” (Id.) Both Eunice and Lee-Lee were present for this conversation. (PC-R. 2273)

David Rimmer testified that he had no conversations with Lee-Lee about charging him in this case. (PC-R. 2586)

B. Applicable Law

In order to prove a violation of Brady, a claimant must establish that the government possessed evidence that was suppressed, that the evidence was "exculpatory" or had "impeachment" value, and that this evidence was "material." United States v. Bagley, 473 U.S. 667 (1985); Kyles v. Whitley, 514 U.S. 419 (1995); Strickler v. Greene, 527 U.S. 263 (1999). Evidence is "material" and a new trial or sentencing is warranted "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” Kyles, 514 U.S. at 433-434; Mordenti v. State, 894 So. 2d 161 (Fla. 2004); Hoffman v. State, 800 So. 2d 174 (Fla. 2001); Rogers v. State, 782 So. 2d 373 (Fla. 2001); Young v. State, 739 So. 2d 553 (Fla. 1999). On the other hand, if Mr. Hurst’s counsel was or should have been aware of the information, his counsel was ineffective in failing to discover and utilize it, Strickland v. Washington, 466 U.S.

668 (1984), and this Court must still weigh the prejudice to Mr. Hurst due to counsel's failure. See Cardona v. State, 826 So. 2d 968, 971 (Fla. 2002); Trepal v. State, 836 So. 2d 405 (Fla. 2003) (same test used for prejudice or materiality in Brady and Strickland claims).

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

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

A criminal defendant is entitled to a fair trial. The prosecutor is required to disclose to the defense evidence "that is

both favorable to the accused and 'material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady at 87. In order "to ensure that a miscarriage of justice [did] not occur," Bagley, 473 U.S. at 675, it was essential for the jury to hear the facts outlined above. They did not.

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

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

Berger v. United States, 295 U.S. 78, 88 (1935). Accordingly, the court concluded that the Fourteenth Amendment “forbade the prosecution to engage in ‘a deliberate deception of court and jury.’” Gray v. Netherland, 518 U.S. 152, 165 (1996), quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935). If the prosecutor intentionally or knowingly presents false or misleading evidence or argument in order to obtain a conviction or sentence of death, due process is violated and the conviction, death sentence, or both must be set aside unless the error is harmless beyond a reasonable doubt. Kyles

v. Whitley, 514 U.S. 419, 433 n.7 (1995). The prosecution has a duty to alert the court, the defense, and the jury when a state witness gives false testimony. Napue v. Illinois, 360 U.S. 264 (1959). The prosecutor must refrain from the knowing deception of either the court or the jury during a criminal trial. Mooney. A prosecutor is constitutionally prohibited from knowingly relying upon false impressions to obtain a conviction. Alcorta v. Texas, 355 U.S. 28 (1957).

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

C. Analysis

Kladitis

The lower court denied Mr. Hurst's claim in this regard. (PC-R. 1404-06) The lower court acknowledged that law enforcement had the information from Kladitis, citing to Nesmith's notes. (PC-R. 1405) The lower court ruled that there

was no prejudice in the suppression of this information. (Id.) The lower court rests this conclusion on the fact that Kladitis saw the 3-4 black males in the Popeye's parking lot before the actual murder took place. (PC-R. 1406) The court also found it reasonable that law enforcement would not disclose this information to the defense because of its lack of relevancy. (Id.)

The lower court's findings ignore the facts of this case and the testimony. Kladitis' information was clearly known by Mr. Rimmer and Detective Nesmith.[8] Thus, this information was in the possession of law enforcement for purposes of Brady. In addition, the information was clearly withheld. Although it matters not whether the suppression was intentional for purposes of Brady, in this case the suppression was undoubtedly willful. Nesmith did not include the information in his report, Rimmer never asked about it at the grand jury or trial, and both Arnold and Smith were unaware of it. Further, Kladitis' testimony indicates that Nesmith and Rimmer, while not requesting that he suppress the information, clearly did not want Kladitis to reveal it.

In addition to being possessed by the state and suppressed,

[8] At the evidentiary hearing below, the state called neither Nesmith nor Rimmer to refute Kladitis' testimony. Further, the lower court did not find Kladitis' testimony incredible in any way. Additionally, Nesmith's notes of his interview with Kladitis confirm Kladitis' testimony. (PC-R. 679)

the information was exculpatory. At trial, Mr. Hurst's defense was that someone else committed the crime, a fact underscored by Mr. Arnold's testimony. Mr. Hurst's mother testified that he was in bed until approximately 7:45 a.m., a fact never rebutted. Kladitis saw the black males approximately 7- 7:30 a.m. As Mr. Arnold stated, this information, that Kladitis likely saw the killers of Cynthia Harrison, was "extremely important."

This information suppressed by the state is also important to another aspect of Mr. Hurst's trial defense. Mr. Arnold asserted that multiple perpetrators committed the Popeye's murder. According to the state's case, the murder of Cynthia Harrison involved, at a minimum, a robbery of significant amounts of cash from a safe and cash register, the binding of the victim's hands, feet, and mouth, the stabbing of the victim over sixty (60) times, moving the body of the victim into the restaurant freezer, and the cleaning of the scene prior to leaving. Further, that this was all accomplished in a maximum of ten (likely closer to five) minutes.[9] That Mr. Hurst alone did all of these things is simply not believable. Had trial

[9] Witness Jeanette Hayes testified that she talked to the victim on the phone from 7:55 a.m. until 8 a.m. (TT. 288-89) Witness Anthony Brown testified that he believed he arrived for work at approximately 8:05 a.m. and received no response to his knock on the door. (TT. 212-13) The parties at trial entered a stipulation that truck driver Raymond Curtis arrived at the Popeye's store for his delivery at 8:10 a.m. and received no response from inside the store.

counsel been able to point to the 4-5 individuals seen outside Popeye's by Kladitis, he would have been able to do more than just suggest an alternative scenario for the murder. Rather, he would have been able to point to hard, physical evidence of the perpetrators existence at the crime scene just prior to the murder. Given the nature of the evidence, it was clearly exculpatory. Further, given the powerful exculpatory nature of the evidence, its materiality has been demonstrated. Again, this case is a close one in terms of guilt or innocence. This additional evidence would have put this trial in an entirely different light. The trial court's finding as to prejudice is erroneous.

Anthony Willaims

The lower court denied Mr. Hurst's claim in this regard. (PC-R. 1402-04) The court found that Williams' testimony was "not credible." (PC-R. 1403) The court cited to the fact that Williams recantation came "two years after the defendant had been sentenced to death." (PC-R. 1404) The court also found Rimmer's testimony credible. (Id.)

Anthony Williams testified that David Rimmer promised him that he would be taken care of and that he, in turn, testified with that expectation. Thus, the state possessed information which was suppressed from the defense. Additionally, the evidence of promised leniency is clearly impeaching and, as Mr.

Arnold testified, is something the defense would want to know about. The impeaching nature of the evidence is evident. Further, the evidence of promised leniency is material. Certainly, the state would not desire to use the testimony of a witness like Anthony Williams unless his testimony is critical. As Mr. Arnold testified, snitch testimony can be critical in a circumstantial case. The promise of leniency certainly would suggest a clear motive to lie on Williams' part. Considered individually and cumulatively with other evidence, the suppressed promise of leniency undermines confidence in the verdict and sentence in this case.

In addition to the Brady violation, the prosecutor's argument during guilt phase closing violated the dictates of Giglio. Mr. Rimmer clearly argued to the jury that there were no promises of leniency. (TT. 893) As Giglio and its precedent hold, if there is *any reasonable likelihood* that the false evidence may have affected the outcome of trial, the conviction must be overturned. Given the prevailing nature of the suppressed promise of leniency, as argued herein, a Giglio violation has been proven.

The lower court's primary basis for denying this claim is Williams' lack of veracity. One factor to consider here is Williams motivation to lie at trial. Appellant would suggest that Williams motivation to lie was much greater at trial. At

that point, as Williams testimony demonstrated, he had been charged with multiple life felonies, but had not been sentenced. His motivation to lie was salvaging his own life. Now, Williams has been sentenced to multiple life sentences and will, in all likelihood, die in prison. By testifying to the truth about his trial testimony, Williams gains nothing. In fact, he arguably loses any slight chance that state authorities would ever help him. The lower court never explains why Williams would be more motivated to lie now than at trial. In sum, from the standpoint of motivation, Williams' evidentiary hearing testimony is more credible.

The lower court also questions Williams' credibility because his evidentiary hearing testimony was based on a statement given "two years" after the trial. Unless he had told the truth at trial, it is not clear how much sooner Williams could have done so. Williams recanted his trial testimony to the first post-conviction representative that ever came to talk to him. Compared with many post-conviction cases where testimony is recanted many years later, Williams' testimony appears to be an exception, making his recantation more credible, not less so.

The lower court also failed to give consideration to Mr. Rimmer's revealing testimony. As outlined, Rimmer testified that when presenting the testimony of a jailhouse witness like Williams, ***he does not know if they are telling the truth***. If

the prosecuting authority in a death penalty case, whose duty is to seek justice, cannot be reasonably sure that a witness is telling the truth, how can he possibly ask the jury and the court to accept such testimony? The fact is that Mr. Rimmer's duty to determine the veracity of one of his witnesses should be enhanced when dealing with snitch testimony. The lower court failed to consider this frankly astonishing testimony.

In addition to Rimmer's testimony on this point, the lower court failed to acknowledge Rimmer's questionable testimony regarding the ex parte conversation with Judge Tarbuck. See Argument V infra. If Judge Tarbuck's testimony is to be credited, it is hard to accept Rimmer's veracity on that point. The lower court's finding that Mr. Rimmer was more credible than Williams ignores Rimmer's own testimony.

Lee-Lee Smith Indictment

The lower court denied Mr. Hurst's claim in this regard. (PC-R. 1410-19) In doing so, the lower court credited Rimmer's testimony that he did not decide to charge Lee-Lee until after the trial. (PC-R. 1412)

The testimony and evidence presented as to the indictment of Lee-Lee in this matter supports Mr. Hurst's Brady claim. Lee Lee's testimony at the evidentiary hearing was, like his trial testimony, unworthy of any credence. However, Lee-Lee's mother, Eunice, testified credibly and persuasively that Mr. Rimmer

informed her prior to Mr. Hurst's trial that her son would be charged in this case. Mrs. Smith would have no conceivable reason to lie about Mr. Rimmer's statement in this regard and the state did not demonstrate any such motive. The lower court does not address or account for Mrs. Smith's testimony. Mrs. Smith was certain in her testimony. There was no demonstration or even suggestion that she was confused about what was said.

Although Rimmer testified to rebut the claim, and the lower court credited him, two points must be made that undercut Rimmer's credibility. First, Rimmer never denied having a conversation with Mrs. Smith informing her he would be charging her son. Rimmer only testified that he did not have such a conversation with Lee-Lee. Second, Rimmer supported his contention that no decision was made to prosecute Lee-Lee until after the Hurst trial by alleging a conversation with Judge Tarbuck where charging Lee-Lee was contemplated. However, Judge Tarbuck was deposed and testified if such a conversation occurred it definitely did not occur during Mr. Hurst's trial, as Rimmer suggested. (PC-R. 1112, 1116-17) Thus, Defendant would suggest, Judge Tarbuck's testimony, if credited, seriously damages Mr. Rimmer's credibility on this point and in all other respects.

The evidence presented demonstrates that the state possessed information that was both impeaching of Lee-Lee's

testimony and arguably exculpatory in that it demonstrated the prosecution's own belief that Lee-Lee committed a crime in this case. Lee-Lee was not, as the state argued, Mr. Hurst's "boy" who would do anything Mr. Hurst wanted. Further, the state suppressed this information, information that was, in a case where Lee-Lee was a critical witness against Mr. Hurst, hyper-material. A Brady violation occurred.

D. Conclusion

The state suppressed exculpatory and impeaching evidence in this case. The information from Kladitis would have supported, in hard fact, Mr. Hurst's trial defense that other young, black males committed this crime. Evidence that Anthony Williams testified expecting leniency in his own case by testifying against Mr. Hurst would have undermined a critical snitch witness. Further, the testimony and argument that there was no promise of leniency was false and knowingly made. The exclusion of the planned indictment of Lee-Lee Smith allowed the state to present Lee-Lee as Mr. Hurst's youthful dupe, rather than the implicated co-defendant that he actually was. Lee-Lee's testimony at trial contrary to this was false and knowingly presented. The suppression of evidence and presentation of false evidence undermines confidence in the outcome of the trial in this case.

ARGUMENT II

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. HURST'S CONVICTION AND SENTENCE WERE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE LOWER COURT ERRED IN DENYING APPELLANT RELIEF ON THAT BASIS.

A. Facts

Witness Anthony Williams

Anthony Williams testified at trial that Mr. Hurst confessed to him. (PC-R. 2188-90) Williams testified at the evidentiary hearing that Mr. Hurst never confessed to him and never said anything about his involvement in this case. (PC-R. 2190-91) Williams' direct appeal is still pending. (PC-R. 2194) Williams lied in his testimony at Mr. Hurst's trial and did so expecting leniency in his case. (Id.) Mr. Hurst's trial was before Williams was sentenced. (PC-R. 2198) Williams testified that he committed perjury at trial and is testifying truthfully now because he "can't go through life knowing [he] committed wrongs against others." (PC-R. 2207) Williams told David Rimmer before his testimony that he "couldn't do this." (PC-R. 2209)

Lee Smith Indictment and Sentence

Lee-Lee Smith was indicted in Escambia County case 00-2078. (PC-R. 1429) The lower court took judicial notice of the court file in Lee-Lee's case. (PC-R. 2253) The lower court found in its' order denying relief that Lee-Lee had been charged as an accessory after the fact, entered a plea as a juvenile delinquent, and was

adjudicated guilty. (PC-R. 1429)

Witness Carl Hess

Carl Hess formerly lived in Pensacola and worked at the Nine Mile Road Wendy's in 1998. (PC-R. 786) Hess testified in this case at trial. (Id.) Hess never interviewed Mr. Hurst for a job at Wendy's. (Id.) He handed him an application. (Id.) Hess' prior testimony that he interviewed Mr. Hurst is not true. (PC-R. 787) Hess testified before the grand jury in this case. (Id.) Hess said the "interview" never came up at the grand jury. (Id.)

Glenn Arnold believes that Carl Hess "was a liar." (PC-R. 1957) Hess misidentified both Mr. Hurst's car and clothing. (PC-R. 1957-58) Hess lied about being a general manager at Wendy's and interviewing prospective employees. (PC-R. 1959) The fact that Hess has now admitted he never interviewed Mr. Hurst for a job is important and confirms what Arnold believed he established. (PC-R. 1960)

B. Applicable Law

The legal standard for newly discovered evidence is that set forth in Jones v. State, 591 So. 2d 911 (Fla. 1991). The standard is a "probability standard" and does not require conclusive proof undermining the conviction. Under the Jones standard, a defendant must prove that the asserted facts were unknown by the trial court, by the party, or by counsel at the

time of trial. Further, it must appear that neither the defendant nor counsel could have known of the asserted facts through the use of due diligence. Id. at 916. Finally, it must be shown that the asserted facts *probably* would produce an acquittal on retrial. Id. at 915.

Impeachment evidence may qualify under Jones v. State as evidence of innocence that may establish a basis for post-conviction relief. State v. Mills, 788 So. 2d 249 (Fla. 2001). In deciding whether in fact a new trial is warranted, the evidence, which qualifies under Jones as a basis for granting a new trial, must be considered cumulatively with evidence that the jury did not hear because either the prosecutor or the defense attorney breached their constitutional obligations. State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

C. Analysis

Anthony Williams

The lower court denied Mr. Hurst's claim in this regard. (PC-R. 1427-29) The court found Williams' testimony not credible and, further, found that his testimony would not have changed the outcome of the trial. (PC-R. 1428)

Again, as to Williams' credibility, it must be remembered that at the time of his evidentiary hearing testimony, Williams had already been sentenced to life imprisonment. In contrast, at trial, he had much to gain; his whole life was at stake. The

common sense question must be asked. When would Williams have more motivation to lie, now or at trial? Certainly, common sense dictates that he was much more motivated to lie at trial. Further, the court's conclusion that Williams' credibility is reduced because he waited "two years" to recant ignores a comparison with most recantations and the fact that Williams recanted to the first post-conviction representative he spoke with.

Williams' recantation of his trial testimony and admission to perjury was clearly unknown by Mr. Hurst or his counsel at the time of trial. The new testimony is diametrically opposed to the trial testimony. Williams was diligently cross-examined at trial and the new testimony could not have been discovered with due diligence. Williams' recantation obviously occurred post-trial. Finally, the testimony would probably produce an acquittal upon retrial. As argued in Argument I, supra, this was a case where jailhouse testimony was essential. There would be no other reason for the state to even consider using them. This was a difficult, circumstantial case where the state felt compelled to use a purported jailhouse confession. Given the critical nature of Williams testimony, the probability of an acquittal is greatly increased.

Lee-Lee Smith's Indictment, Conviction, and Sentence

The lower court denied Mr. Hurst's claim in this regard. (PC-R. 1429-30) The lower court concluded that evidence of Smith's conviction and sentence in this case would not have changed the outcome at trial. (PC-R. 1430)

Lee-Lee Smith's indictment and conviction in this matter are newly discovered evidence that would, at a minimum, warrant a new sentencing proceeding for Mr. Hurst. Lee-Lee testified to extremely prejudicial facts against Mr. Hurst. These facts included an alleged confession and connections to physical evidence. Additionally, testimony from Lee-Lee served to contradict the sworn statement given by Mr. Hurst to law enforcement on May 2, 1998. Thus, Lee-Lee was a brutally prejudicial witness against Mr. Hurst. Further, the jury was led to believe that Smith lacked culpability and that he was, rather than an active participant in the crime, Mr. Hurst's youthful dupe. This new evidence would have allowed the jury to engage in an altogether different assessment of Mr. Hurst's culpability. It must be remembered that Mr. Hurst's trial counsel sought to persuade the jury that Lee-Lee and others had committed this murder. As this Court has recognized, the post-trial sentence of a co-defendant is newly discovered evidence to be analyzed under Jones. Scott v. Dugger, 604 So. 2d 465 (Fla. 1992). In Mr. Hurst's case, it is also extremely relevant to

the conviction where the co-defendant, who has been subsequently charged, previously denied culpability, testified to inculpating facts against Mr. Hurst, and was also the target of the defense theory at trial, is sentenced to such an inconsequential penalty. There is simply no way to deny the potential impact that the indictment and conviction of Lee-Lee would have had on the jury. The lower court erred in dismissing the impact of Lee-Lee's indictment and sentence.

Carl Hess

The lower court denied Mr. Hurst's claim in this regard. (PC-R. 1430-31) The lower court held that this claim is not "newly discovered" because "[t]rial counsel for Defendant fully explored during trial Hess' 'manager trainee' position at Wendy's and his limited role concerning interviewing job applicants." (PC-R. 1430)

The lower court's conclusion glaringly ignores the fact that Hess admitted to lying at trial. Further, the court does not account for the fact that, despite trial counsel's cross-examination, Hess stood firm when asked if he interviewed Mr. Hurst for a job, his basis for identifying Mr. Hurst on the morning of the murder.

Hess, a critically important witness for the state, is crippled in his credibility by this new evidence. Had the jury known that Mr. Hess had no basis upon which to recognize and

thus identify Mr. Hurst from the photo array, it would have rejected his testimony completely. Hess's identification of Mr. Hurst is the sum and substance of his testimony. Without it he is worthless as a witness. Hess was the only witness to place Mr. Hurst at the crime scene. In addition to the specific point of Hess' identification of Mr. Hurst, his concession that he never interviewed Mr. Hurst taints every other aspect of his testimony. Had the jury known that Hess was untruthful about the interview, certainly it would have rejected the identification. This evidence was unknown by Mr. Hurst or his counsel at the time of trial. Because Hess has only admitted the fabrication post-trial, the new evidence could not have been known heretofore. The bottom line is that Carl Hess, the only person to place Mr. Hurst at the crime scene, is an admitted perjurer. Hess blatantly lied about interviewing Mr. Hurst for a job. The "interview" was a complete fabrication by Hess. Hess' entire testimony is unworthy of belief. The lower court, in finding that Hess was sufficiently cross-examined as to minimize the perjury admission, ignores the impact of Hess' admission. Without Hess' testimony, the verdict against Mr. Hurst would have been different.

D Conclusion

This newly discovered evidence, combined with other evidence, would probably have produced an acquittal. Anthony

Williams was a crucial witness who has now admitted lying about a confession from Mr. Hurst. The confession was exceptionally critical in such a circumstantial case. Likewise, crucial witness Carl Hess, the only witness to identify Mr. Hurst at the crime scene, has now stated that his basis for identification was a lie. In sum, both Williams and Hess have admitted to crucially perjuring themselves. Additionally, Lee-Lee's post-trial conviction and sentence would have caused the jury to reconsider its' verdict and sentence recommendation.

ARGUMENT III

MR. HURST WAS DEPRIVED OF HIS CONSTITUTIONALLY GUARANTEED RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL TRIAL WHEN HIS ASSIGNED ATTORNEY FAILED TO ADEQUATELY INVESTIGATE AND/OR PRESENT EXCULPATORY AND IMPEACHMENT EVIDENCE AND TESTIMONY, AND FAILED TO ADEQUATELY PREPARE FOR AND CHALLENGE THE EVIDENCE PRESENTED BY THE STATE. AS A RESULT, CONFIDENCE IN THE JURY'S VERDICT IS UNDERMINED. THE LOWER COURT ERRED IN DENYING THIS CLAIM AFTER AN EVIDENTIARY HEARING.

A. Facts

Andrew Salter

Andrew Salter lived in Pensacola in 1998. (PC-R. 2257) He was in the area of Popeye's on the morning the murder happened. (PC-R. 2258) Salter woke up that morning around 5:30 and walked to Wendy's, which was directly across from Popeye's, where he was to meet a man he was supposed to work for. (Id.) He waited there for an unknown amount of time. (Id.) He eventually went to Winn-Dixie, which is in the same parking lot. (Id.) Salter did not see any cars in the Popeye's parking lot, but did recall seeing the delivery truck. (PC-R. 2259) He saw the delivery driver after he had gone home and come back to Winn-Dixie. (Id.) When Salter came back out of Winn-Dixie, law enforcement was on the scene. (Id.) Salter told an officer he had been there at 5:30. (Id.) He was in the parking lot for 1½ to 2 hours. (PC-R. 2260) Salter did not see any Popeye's employees. (Id.) Salter

was ultimately questioned by law enforcement about his presence in the area. (Id.) He gave them prints. (PC-R. 2261) Salter did not see Timothy Hurst or a large blue Marquis there that morning. (Id.) Salter saw the man who takes out the trash at Wendy's. (Id.) No one representing Mr. Hurst talked to Salter at the time of trial. (Id.) Salter was in Winn-Dixie less than 10-15 minutes. (Id.) Salter did not recall seeing the delivery driver when he went into Winn-Dixie. (PC-R. 2264) Salter was not sure of the exact time he was waiting on the man he was to work for. (PC-R. 2265)

Glenn Arnold recalled a suspicious black male being observed and possibly detained at the scene, but never identified who the person was. (PC-R. 1962) Arnold doubts he made any attempts to interview Andrew Salter. (PC-R. 1964) Arnold did not feel he should have attempted to speak with Salter. (PC-R. 1965) Larry Smith recalled a report of an unidentified black male being at the scene. (PC-R. 2237) Smith never spoke with him. (PC-R. 2238)

Wal-Mart Statement

Glenn Arnold recalled the prosecutor arguing that Mr. Hurst did not mention going to Wal-Mart in his taped statement. (PC-R. 1940) Arnold had the reports of Buddy Nesmith and John Sanderson. (Id.) Arnold agreed that Nesmith's report reflects that Mr. Hurst told him that he went to Wal-Mart. (PC-R. 1950)

Arnold stated that he did not use the reports because the prosecutor argued that Mr. Hurst did not mention Wal-Mart *on the tape*. (PC-R. 1951) Also, Arnold stated that he "didn't want to go into it in detail, and I didn't want to go into the fact that Rimmer was trying to make that argument." (PC-R. 1952) He also did not want to emphasize Mr. Hurst's use of his car. (Id.) The Wal-Mart trip fit into Arnold's time frame. (PC-R. 2633) The detectives learned from someone that Mr. Hurst went to Wal-Mart. (PC-R. 2634)

John Sanderson assisted in the investigation of the Hurst case. (PC-R. 2282) Sanderson wrote in his report that he learned from Nesmith that Mr. Hurst went to Wal-Mart on the morning of the murder. (PC-R. 2283) According to his report, Nesmith got the information "from Timothy Hurst." (PC-R. 2285) Sanderson does not "necessarily" believe there is anything inaccurate in his report. (PC-R. 2305) In his pre-trial deposition, Sanderson stated that Nesmith told him that Mr. Hurst went to Wal-Mart prior to going to the pawn shop. (PC-R. 2308) In the deposition, unlike his report, Sanderson did not specify where Nesmith got this information. (Id.) The report was made within a couple days of the conversation with Nesmith. (Id.) Nesmith suggested that the Wal-Mart information came from Lee-Lee. (PC-R. 2332) Sanderson stated that the first time he heard that Mr. Hurst went to Wal-Mart was on May 5, 1998. (PC-R.

2349)

David Rimmer told the jury that Mr. Hurst did not mention Wal-Mart during the taped interview. (PC-R. 2357) Rimmer asserted that Nesmith's statement to Sanderson that Mr. Hurst said he went to Wal-Mart "was an error." (PC-R. 2358) Rimmer was aware of Sanderson's report. (Id.) Rimmer stated that he was under no obligation to correct the "error." (PC-R. 2361) Rimmer agreed that Nesmith's report says that Mr. Hurst told him that he went to Wal-Mart. (PC-R. 2366) This was "erroneous" so Rimmer ignored it. (PC-R. 2368) Mr. Hurst's recorded statement was taken at 2:58 p.m., but he was at the sheriff's office for seven hours according to Nesmith's testimony. (PC-R. 2271) Rimmer conceded that Nesmith may have told Sanderson that Mr. Hurst told him that he went to Wal-Mart. (PC-R. 2372) Rimmer acknowledged Nesmith's deposition wherein he said that he interviewed Mr. Hurst about his whereabouts prior to the taped interview. (PC-R. 2383) Rimmer was aware that Mr. Hurst was with Nesmith for approximately seven hours the day of the taped interview. (PC-R. 2284) Rimmer never spoke with Nesmith, prior to trial, regarding the "error" in his report. (PC-R. 2392) Rimmer testified that he was unaware of any statement where Mr. Hurst said he went to Wal-Mart. (PC-R. 2401) Rimmer did not feel duty-bound to disclose discrepancies in either police reports or depositions. (PC-R. 2404) He did not feel there was

any conflicting information regarding the Wal-Mart statement and if there was, defense counsel would point it out. (Id.)

Detective Nesmith conceded that his report states that Mr. Hurst told him he went to Wal-Mart. (PC-R. 2427) Nesmith was with Mr. Hurst for 7-8 hours on May 2, 1998. (PC-R. 2431) Nesmith conceded that his deposition says the interview of Mr. Hurst lasted 3-4 hours. (PC-R. 2432-33) Nesmith went through Mr. Hurst's story with him prior to the taped interview. (PC-R. 2433) The taped interview lasted 14 minutes. (PC-R. 2436) The tape does not include all of the conversations that Nesmith had with Mr. Hurst. (Id.) Nesmith claimed that Sanderson's report is wrong. (PC-R. 2438) Nesmith stated this information came from Lee-Lee. (Id.) Nesmith took no steps to correct the alleged error. (PC-R. 2439) Nesmith prepared his report on June 23, 1998. (PC-R. 2440) The discrepancy was never clarified. (PC-R. 2465) When asked why he did not clarify it, Nesmith stated that he "did not catch it." (PC-R. 2466) Nesmith stated that Mr. Hurst never told him about going to Wal-Mart. (PC-R. 2510) Nesmith claimed that there was no further interview of Mr. Hurst after the taped session. (PC-R. 2517) Nesmith stated that everything in his report about the interview of Mr. Hurst is correct, except for the sole fact that Mr. Hurst told him about going to Wal-Mart. (PC-R. 2520) Nesmith stated that his deposition testimony is correct. (PC-R. 2521)

B. Applicable Law

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court explained that under the Sixth Amendment:

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

466 U.S. 668, 685 (1984). In order to insure that a constitutionally adequate adversarial testing, and hence a fair trial, occurs, defense counsel must provide the accused with effective assistance. Accordingly, defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 685. Where defense counsel renders deficient performance, a new trial is required if confidence is undermined in the outcome. Therefore, Strickland requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice.

C. Analysis

Andrew Salter

The lower court denied Mr. Hurst's claim in this regard.(PC-R. 1435-37) The court found that Salter's testimony was not exculpatory and that trial counsel made a reasonably

strategic decision in not interviewing Salter. (PC-R. 1437) The court erred on both points.

First, Andrew Salter's testimony was, contrary to the lower court's conclusion, exculpatory. Salter's testimony revealed that he was at the scene of the crime on the morning in question, obviously in a position to make relevant observations. Importantly, he testified that after he had gone back to the house where he was staying, he eventually went to Winn-Dixie. When he went in the Winn-Dixie, the delivery driver was not there at Popeye's. After remaining in Winn-Dixie for 10-15 minutes, he came out and saw the delivery driver. Further, at no time did Salter see Timothy Hurst or his vehicle. At the time Salter went in Winn-Dixie, this would have been when the murder was taking place.[10] Thus, Salter would have, at a minimum, seen Mr. Hurst's vehicle, parked at Popeye's where Carl Hess claimed at trial he saw it. Further, Salter's testimony that he saw the Wendy's trash person[11], coupled with the fact that he did not see Mr. Hurst, undercuts Hess' identification. Thus, Salter's testimony was exculpatory, negating Mr. Hurst's presence at the scene and undercutting Hess' identification.

[10] It must be remembered that Janette Hayes talked to the victim from 7:55 to 8:00 and the delivery driver arrived at 8:10.
[11] Hess testified at trial that he was picking up litter outside Wendy's when he saw Mr. Hurst that morning. (TT. 319)

Additionally, the lower court's conclusion that Mr. Arnold's failure to utilize Salter was strategic is erroneous. Mr. Arnold conceded that he knew of Salter's presence generally, but made no serious attempt to talk to him. Rather, he preferred to have him as the suspicious black man wandering around. Given the exculpatory nature of Salter's testimony, Arnold's failure to even explore what information he had is prejudicially deficient. Arnold's strategy cannot be reasonable given that he never spoke with Salter. Further, the prejudice is demonstrated by the information that could have been obtained had Arnold spoken to him.

Wal-Mart Statement

The lower court found that trial counsel made a strategic decision not to impeach the evidence and argument that Mr. Hurst never mentioned going to Wal-Mart. (PC-R. 1434-35) The court found that the purported strategy was reasonable. (PC-R. 1435)

The reports of Detectives Nesmith and Sanderson clearly indicate that Mr. Hurst told Nesmith about going to Wal-Mart on May 2, 1998. Nesmith, Sanderson, and Rimmer all agreed that the reports show the information came from Mr. Hurst, although Nesmith and Rimmer characterized it as an error. The "error" exists in ***both*** reports. It may be plausible that such a fact could exist, in error, in one report. However, it is not plausible that the same fact would be in one report, written May

5, 1998, and in the same exact form in a report written, by another officer, June 23, 1998. The reports reflect the truth that Mr. Hurst told Nesmith about going to Wal-Mart on May 2, 1998. Mr. Rimmer's contrary argument was a distortion of the actual facts.

Mr. Arnold was ineffective in failing to rebut the suggestion that Mr. Hurst did not tell Nesmith about going to Wal-Mart on May 2, 1998. Mr. Arnold had the reports and, as he testified, was clearly aware that the recorded statement does not mention going to Wal-Mart. Mr. Arnold stated that the fact of Mr. Hurst going to Wal-Mart helped, not hurt, his case. It fit his timeline. Arnold stated no reason for failing to impeach the state's suggestion other than a less than clear statement about not wanting Mr. Hurst driving his car all over the place. Arnold had no clear strategy for failing to utilize the reports. Mr. Arnold could have established that the actual words in both reports, written independently of each other, state unambiguously that Mr. Hurst told Nesmith about going to Wal-Mart. There is no dispute about that. Mr. Arnold could have equally suggested the implausibility of the error existing in both reports. There was simply no reason not to rebut the state's suggestion regarding the recorded statement. Failing to do so allowed Mr. Rimmer to make the critical, and false, argument that Mr. Hurst was a liar. Such deficient performance

undermines the reliability of the verdict and sentence in this particular case.

D. Conclusion

Andrew Salter was an available witness who could have provided exculpatory evidence. Salter could have established that Mr. Hurst was not at the scene at the critical time on the morning of the murder. Further, he would have disputed and neutralized the clearly disreputable testimony of Carl Hess. Further, trial counsel failed to utilize the reports of law enforcement to dispute the evidence and argument that Mr. Hurst failed to mention going to Wal-Mart and, thus, was a liar. Trial counsel had no legitimate strategy in either instance. The lower court's contrary finding is erroneous.

ARGUMENT IV

MR. HURST WAS DENIED AN ADEQUATE ADVERSARIAL TESTING AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE MENTAL HEALTH MITIGATING EVIDENCE AND TO ADEQUATELY CHALLENGE THE STATE'S CASE FOR DEATH. AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE. THE LOWER COURT ERRED IN DENYING THIS CLAIM AFTER AN EVIDENTIARY HEARING.

A. Facts

Glenn Arnold's theory at penalty phase was that Tim was a good boy who was slow, but who helped in the community and at church. (PC-R. 1980) Arnold did not have "very much" mitigation. (PC-R. 1982) Arnold stated that Mr. Hurst did not want to be examined by a psychologist and, coupled with the fact that Arnold "hadn't seen anything," Arnold told Judge Tarbuck that a mental-health expert was not necessary. (PC-R. 1983) Arnold did not talk to a psychologist about the case or have Mr. Hurst examined. (PC-R. 1985) Arnold did not recall his specific conversation with Mr. Hurst, but "under today's law" he would have filed a motion to have Mr. Hurst examined. (Id.) In hindsight, Arnold feels like Mr. Hurst should have been examined. (PC-R. 1986) Arnold felt like presenting psychological testimony would have hurt his credibility with the jury, given the theory of defense at guilt phase. (Id.) Arnold suggested that a memo of the conversation about not using a

psychologist should be in his file.[12] (PC-R. 1991) Arnold did not think Mr. Hurst was mentally ill. (PC-R. 1994) Arnold is "almost certain' that he had a conversation with Larry Smith about Mr. Hurst not wanting to use a psychologist and believes Smith wrote him a memo to that effect.[13] (PC-R. 1995) Arnold does not recall being aware of the fact that Mr. Hurst's mother was 15-years old when she gave birth to him. (PC-R. 1999) However, Arnold stated that "we pretty much weeded out that stuff and went with the good stuff." (PC-R. 2001) Arnold was not aware that Mr. Hurst's mother had abused alcohol when she was pregnant. (PC-R. 2002) Arnold was not aware that Mr. Hurst had been taken as a child by HRS. (PC-R. 2003) Arnold stated that he "could have got some whore somewhere to lie", but he "didn't feel the boy was in trouble mentally." (PC-R. 2647)

[12] Undersigned counsel stated to the lower court, and the parties stipulated to the fact, that there was no such memo in Arnold's file. (EHT. 74-76) The state did not stipulate that such a memo never existed.

[13] Smith had lengthy conversations with Mr. Hurst about mitigation, but did not recall having any conversations with Mr. Hurst about a psychologist. (PC-R. 2238-39)

Dr. Valerie McClain conducted an evaluation of Mr. Hurst, including a psycho-social interview. (PC-R. 2019-20) Mr. Hurst was a below average student who was placed in special education. (PC-R. 2021) Mr. Hurst reads at a 4th grade level and spells and does arithmetic at a 5th grade level. (PC-R. 2022) Mr. Hurst was not malingering. (PC-R. 2023) Mr. Hurst's I.Q. score was at 70, with a confidence range of 67 to 75, in the borderline range of intellectual functioning. (PC-R. 2024) Mr. Hurst exhibited memory deficits and deficits in verbal fluency. (PC-R. 2025) Dr. McClain interviewed Mr. Hurst's mother, father, and sister. (PC-R. 2027) Mr. Hurst had academic problems and had been placed in special education. (Id.) Mr. Hurst's mother drank heavily during her pregnancy. (Id.) His sister said that Tim was a follower, rather than a leader. (PC-R. 2028) Mr. Hurst has below average adaptive functioning skills. (PC-R. 2029) This may have been the result of speech and language problems, and possibly fetal-alcohol syndrome. (PC-R. 2030) Mr. Hurst's neuro-psychological tests suggested brain damage, which is consistent with fetal-alcohol syndrome. (PC-R. 2031) Mr. Hurst suffers from depression. (PC-R. 2032) Mr. Hurst is in the mentally-deficient-to-borderline range of intelligence, with a significantly below average I.Q. (PC-R. 2033-35) Mr. Hurst only completed the 10th grade, repeating the grade twice. (PC-R. 2036) Mr. Hurst has difficulties in verbal and reasoning skills and

has a learning disorder. (PC-R. 2039) Mr. Hurst suffers from a cognitive disorder. (Id.) In Dr. McClain's opinion, the brain damage is a result of Mr. Hurst's mother's drug and alcohol use at gestation. (PC-R. 2040) The substantial impairment and duress statutory mitigating circumstances apply to Mr. Hurst. (PC-R. 2043-44)

Dr. James Larson found that Mr. Hurst scored a verbal I.Q. of 78 and a performance I.Q. of 83. (PC-R. 2084-85) The full-scale I.Q. is 78, in the borderline range of intelligence. (PC-R. 2086) Mr. Hurst's academic records demonstrated him to be below average. (PC-R. 2122) Dr. Larson was aware that Mr. Hurst's mother drank and used drugs while pregnant with him. (PC-R. 2169) This could cause brain damage and fetal alcohol syndrome. (Id.) Dr. Larson agreed that Mr. Hurst is slow and has mental problems. (PC-R. 2170) Dr. Larson's history noted that Mr. Hurst's mother drank too much. (PC-R. 2177)

B. Applicable Law

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). Strickland requires a defendant to plead and demonstrate (1) unreasonable attorney performance, and (2) prejudice.

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

State and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to **investigate** and **prepare** available mitigating evidence for the sentencer's consideration. See Phillips v. State, 608 So. 2d 778 (Fla. 1992); State v. Lara, 581 So. 2d 1288 (Fla. 1991); O'Callaghan v. State, 461 So. 2d 1154, 1155-56 (Fla. 1984). See also Eutzy v. Dugger, 746 F. Supp. 1492 (N.D. Fla. 1989), aff'd, No. 89-4014 (11th Cir. 1990); Harris v. Dugger, 874 F. 2d 756 (11th Cir. 1989); Middleton v. Dugger, 849 F. 2d 491 (11th Cir. 1988); Blake v. Kemp, 758 F. 2d 523 (11th Cir. 1985); Tyler v. Kemp, 755 F. 2d 741 (11th Cir. 1985).

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

In Lockett v. Ohio, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the [sentencer] receiving accurate information regarding the defendant. Without that information, a [sentencer] cannot make the life/death decision in a rational and individualized manner. Here the [sentencer] was given no information to aid [him] in the penalty phase. The death penalty that resulted was thus robbed of the reliability essential to confidence in that decision. Id. at 743 (citations omitted).

Counsel's highest duty is the duty to investigate and prepare. In Wiggins v. Smith, 123 S.Ct. 2527 (2003), the United States Supreme Court expanded on the duties of counsel to conduct a "reasonable investigation." Wiggins involved a decision by trial counsel to limit the scope of investigation. Id. at 2533. In rejecting counsel's decision in Wiggins not to present significant evidence, the Court, citing its opinion in Williams v. Taylor, 529 U.S. 362 (2000), held that before counsel may limit the presentation of evidence, counsel must fulfill the obligation to *conduct a thorough investigation*. Id.

at 2535. Wiggins further held that a limitation on the scope of investigation must be reasonable in order to be considered legitimately strategic. Id at 2536.

Subsequent to Wiggins the Court held that:

> 'It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.' 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.).

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

No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see Brewer v. Aiken, 935 F. 2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. See Kenley v. Armontrout, 937 F. 2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986).

C. Analysis

The lower court denied Mr. Hurst's claim in this regard. (PC-R. 1445-50) The court found that trial counsel made a reasonably strategic decision to present only the non-statutory mitigation that he did. (PC-R. 1446-47) As to mental-health mitigation, the lower court found that trial counsel followed

the wishes of Mr. Hurst in not utilizing a mental-health expert. (PC-R. 1450) Further, the court found that the mental-health evidence testified to by Dr. McClain was not sufficient to establish prejudice. (Id.)

Mr. Arnold, Defendant's trial counsel presented no mental-health mitigation. Mr. Arnold never hired or consulted with a mental-health expert in this case. In fact, Mr. Arnold withdrew the public defender's previous motion for appointment of a mental-health expert. (R. 311-12) The evidence at the hearing in this matter demonstrates deficient performance and prejudice required under Strickland. Mr. Arnold simply never had Mr. Hurst evaluated for mental-health evidence. The testimony from Mr. Arnold confirms that. Despite Mr. Arnold's various asserted reasons for not utilizing a mental-health expert[14], Mr. Arnold's on-record exchange with Judge Tarbuck, ***at the time of trial***, is the best evidence of why a mental-health expert was not employed. The exchange is as follows:

> THE COURT: Motion for psychiatric examination of defendant prior to penalty phase. And I think we've already gone into this. You don't have to examine every

[14] Mr. Arnold at various times asserted that Mr. Hurst and his mother did not want a psychologist, that under today's law he would have had Mr. Hurst evaluated (despite the fact that the case he cited, Carter v. State, 706 So. 2d 873 (Fla. 1997), was decided before the crime in this case was committed), that he did not want to damage credibility with the jury by putting on mental-health evidence, and the "could have got some whore somewhere to lie", but apparently did not want to do that.

> defendant just because they're being tried for murder. There's got to be some sound basis – relevant reasonable basis for it. And you've not indicated any basis for it. And you've not indicated any basis for examination by a mental health expert.
>
> MR. ARNOLD: I agree, Judge. We discussed this during our status conference the other day. I personally have not observed anything that would require an examination by an expert. I've talked extensively with my investigator, who has also spent considerable time with the defendant, and he has found nothing that he thinks needs to be dealt with by an expert.
>
> THE COURT: Motion for psychiatric examination of defendant prior to penalty phase is denied.

(R. 311-12)

As the exchange demonstrates, Mr. Arnold's basis for not investigating mental health was his personal opinion that Mr. Hurst had no mental health problems and Larry Smith's observations. Smith of course, had no discussions with Mr. Hurst about mental health although he certainly observed him. It is simply not credible that Mr. Arnold's non-use of a mental health expert was based on Mr. Hurst's resistance. Had it been so, this reason would have been expressed to the court.

Mr. Arnold suggested at various points in his testimony that he did not want to use a mental health expert because it would be inconsistent with his guilt-phase defense. However, the mitigation presented through Dr. McClain was not offered as

an “excuse” for committing murder. In fact, Dr. McClain never testified that she even discussed the facts of the case with Mr. Hurst. Her testimony focused on Mr. Hurst’s intellectual limitations, something consistent with the theory that Mr. Hurst was duped, used, and framed by people he knew and who actually committed the murder. The mental health mitigation presented in post-conviction did not even remotely suggest a concession of involvement in the crime.

Even accepting Mr. Arnold’s testimony in full, the fact is that whatever decision he made was not informed by a reasonable investigation. Mr. Arnold never investigated mental health evidence in order to determine what he may be foregoing in favor of an alternative theory of mitigation. To simply abandon a mental health investigation in a capital case before it ever ensues is unreasonable. Mr. Arnold’s performance in failing to investigate was deficient.

As to prejudice, Dr. McClain’s testimony regarding mental health mitigation, both statutory and non-statutory, was extensive, persuasive, and unrebutted. To recount, Dr. McClain testified that Mr. Hurst has borderline intellectual functioning, a learning disorder, likely brain damage and fetal alcohol syndrome, and depression. She also testified to two statutory mental health mitigators. Dr. Larson, the state’s expert, did not dispute any of these findings. In contrast, at

trial there was no mental health mitigation presented. It should be remembered that this is a case where Mr. Hurst was a young man (19 years old) with no prior criminal history and in which there was a close case of guilt or innocence with an objective likelihood that other persons were involved in the murder. The presentation of this strong mental health mitigation would have likely made the difference between life and death.

D. Conclusion

In this case, Mr. Arnold failed to adequately investigate mental health evidence. Although Mr. Arnold gave various reasons for his failure to do so, the reason expressed to the trial court pre-trial, that he simply had not seen anything that would require a mental health expert, remains the most credible explanation. Had Mr. Arnold done what any objectively reasonable attorney would do and had a qualified mental health expert examine Mr. Hurst, he would have been able to establish the critical statutory and non-statutory mitigating evidence presented at the evidentiary hearing. The failure to have Mr. Hurst examined by a qualified mental health expert was prejudicially deficient.

ARGUMENT V

THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. HURST'S CLAIMS OF BRADY AND GIGLIO VIOLATIONS AND NEWLY DISCOVERED EVIDENCE. THESE VIOLATIONS DENIED MR. HURST HIS RIGHTS UNDER THE FIFT SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS WELL AS THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. THE FILES AND RECORDS DO NOT REFUTE THE CLAIMS AND THE TRIAL COURT ERRED IN NOT GRANTING AN EVIDENTIARY HEARING.[15]

A. Facts

Detective Nesmith Notes

During the testimony of Detective Donald Nesmith at the evidentiary hearing in this case, Nesmith brought his field notes to the stand with him. Nesmith stated that he reviewed the notes in preparation for the hearing. (PC-R. 2443) The notes were admitted as an exhibit. (PC-R. 2443) At the conclusion of the evidentiary hearing, Mr. Hurst was given a fixed amount of time in which to file an amended post-conviction motion with any claims emanating from the notes. (PC-R. 800-01) On September 30, 2003, Mr. Hurst filed a supplemental 3.851 motion with claims related to Nesmith's notes. (PC-R. 802-24) In the motion, Mr. Hurst alleged several Brady/Giglio claims.

[15] As part of this argument, Mr. Hurst also expressly appeals the denial of his motion to perpetuate the testimony of witness Willie Griffin or, alternatively, compel the state to assist in procuring his presence. As fully explained infra, Mr. Hurst's claim involving Griffin was summarily denied after the court initially granted a hearing and then denied the motion to perpetuate or compel.

In the motion, Mr. Hurst alleged that Detective Nesmith's notes supported the previous Brady claim made regarding witness David Kladitis. (PC-R. 810) Specifically, that Nesmith's notes reflect that Kladitis told him about seeing the 3-4 young black males in the Popeye's parking lot prior to the murder. (Id.) Further, Mr. Hurst alleged that Nesmith's suppression of the information exhibited the prejudicial nature of the information. (Id.)

Regarding witness Carl Hess, Mr. Hurst alleged that Nesmith's notes reflect that Hess told him that he saw the victim at Popeye's at 7:15, at time which conflicts with Hess' trial testimony and also with Kladitis' trial testimony that he saw the victim being followed at 7:30 in front Barnes. (PC-R. 812) Additionally, it was alleged that the notes also support the claim that Hess recanted his testimony that he interviewed Mr. Hurst for a job, the notes indicating that he only saw Mr. Hurst "apply for a job." Again, it was averred that the suppression of this information demonstrates prejudice under Brady. (PC-R. 812-13) It was also asserted that these notes reveal knowledge by the state of Hess' false trial testimony, demonstrating a Giglio violation. (PC-R. 813)

As to witness Lee-Lee Smith, Mr. Hurst alleged that the notes reflect that Lee-Lee told Nesmith that he (Lee-Lee) got rid of the weapon used to commit the murder and, further, that

the weapon was disposed in a dumpster behind Popeye's. (PC-R. 814) It was alleged that this information demonstrated Lee-Lee's culpability in the murder and, additionally, that the theory of the murder weapon, that it was a box cutter found inside the restaurant, was flawed. (Id.) It was averred that the information could have been used to inculpate Lee-Lee in the murder or impeach him with a prior inconsistent statement. (PC-R. 814-15)

Further, it was alleged in the motion that Nesmith's notes reflect an interview with witness Laura Ussery.[16] (PC-R. 815) Ussery worked with witness Michael Williams who testified at trial. Williams testified that Mr. Hurst confessed to him and, further, laughed about committing the murder. (Id.) According to Nesmith's notes, it was alleged, Ussery said Williams told her that "his friend didn't do it. The person arrested didn't do it." (PC-R. 816) It was further alleged that the notes indicate that Williams, prior to the murder, told Ussery of plans to participate in a robbery and murder at Popeye's. (Id.)

As to Nesmith's notes of interviews with Michael Williams, it was asserted that the notes indicate Mr. Hurst told Williams the night before the crime that "I need to get my car fixed." (PC-R. 818) This statement was alleged to support Mr. Hurst's

[16] Ussery did not testify at trial and Mr. Hurst was not aware of her until the disclosure Nesmith's notes.

contention that he was having car problems on the morning of the crime, the reason he did not go to work. (Id.) It was also alleged that the notes reflect that Williams told Nesmith that "Tim would always do what Lee-Lee wanted." (Id.) This was asserted as proof of Smith's culpability and Mr. Hurst's reduced culpability. (PC-R. 819) Finally, the notes reflect that Williams told Nesmith that Smith stated, on May 2, 1998, "***We*** got that motherfucker." (PC-R. 819-20) (emphasis added)

Ex Parte Communication

In the same supplemental 3.851 containing the claim Nesmith notes allegations, Mr. Hurst included a claim that the prosecutor and trial judge engaged in an improper ex parte conversation. (PC-R. 820-22) Ultimately, after deposing the prosecutor and trial judge, Mr. Hurst amended this claim in a motion dated September 29, 2005. (PC-R. 1082-21) In the motions, Mr. Hurst asserted that, based on testimony from Mr. Rimmer at the 2004 evidentiary hearing, Rimmer and the trial judge engaged in a conversation discussing the potential indictment of Lee-Lee Smith. (PC-R. 822) This conversation took place during the Hurst case, during a break or recess, according to Rimmer's deposition. (PC-R. 1086, Rimmer deposition at 5-7) The conversation was between Rimmer and Judge Tarbuck only and was not on the record. (PC-R. 1086, Rimmer deposition at 8) Judge Tarbuck's inquiry indicated to Rimmer that he felt Lee-Lee

should be charged. (PC-R. 1087, Rimmer deposition at 9) Judge Tarbuck stated in his deposition that he does not recall Lee-Lee and does not recall the conversation with Rimmer. (Id., Tarbuck deposition at 5-6) Judge Tarbuck allowed that the conversation may have occurred, but stated unequivocally that it would not have occurred until after the Hurst case was completed, including sentencing. (Id., Tarbuck deposition at 6, 10-11) Judge Tarbuck added that if Rimmer stated that such a conversation took place before final conclusion of the Hurst case, Rimmer's testimony is not true. (PC-R. 1087-88, Tarbuck deposition at 7)[17]

Carl Hess' Grand Jury Testimony

In a second supplemental 3.851 filed January 24, 2005, Mr. Hurst asserted that witness Carl Hess perjured himself before the grand jury in this case. (PC-R. 919-33) As stated supra, Hess testified at the evidentiary hearing in this case that he did not interview Mr. Hurst for a job. (PC-R. 786) Hess stated

[17] Timothy Hurst was convicted by the jury in his case on March 23, 2000. (R. 448) The same jury recommended a sentence of death on the same date.(R. 450) Lee-Lee Smith was indicted on April 13, 2000.(PC-R. 1121) The sentencing hearing in Hurst's case was held on April 17, 2000.(R. 466-67) Hurst was sentenced to death on April 26, 2000. (R. 482-89) As any conversation about the future indictment of Lee-Lee must have occurred prior to both Mr. Hurst's sentencing hearing and ultimate sentencing, Judge Tarbuck's and Mr. Rimmer's testimonies are clearly at odds. A conversation about whether or not to indict Lee-Lee could not and would not have occurred after the conclusion of Mr. Hurst's case.

in his deposition that he testified before the grand jury that he interviewed Mr. Hurst for a job. (PC-R. 894-95) Thus, Mr. Hurst averred, Hess lied not only to the trial jury about interviewing Mr. Hurst, but to the grand jury as well.

Recanted Testimony of Witness Willie Griffin

In a third supplemental 3.851 dated May 23, 2005, Mr. Hurst averred that trial witness Willie Griffin, who testified at trial that Mr. Hurst confessed the murder to him, has now recanted his trial testimony. (PC-R. 1008-15) The trial court originally scheduled the matter for an evidentiary hearing in an order dated February 6, 2006. (PC-R. 1171-72) In a subsequent status conference on February 10, undersigned counsel advised the court that he was having difficulty securing the presence of witness Griffin who was a federal prisoner at Ft. Dix, New Jersey. (PC-R. 1175-92) The lower court advised undersigned counsel to make additional efforts to secure the witness' presence. (Id.) In a further status conference on February 17, undersigned counsel advised the court that he had spoken with personnel at Ft. Dix, the Florida Department of Corrections, the Escambia County Sheriff's Office, and the Florida Department of Financial Services. (PC-R. 1193-1214, 1273) The sum and substance of all of these conversations was that the witness' presence could only be secured with an Interstate Agreement on Detainers (IAD) form. (PC-R. 1196-97, 1273-74) This document,

as undersigned counsel explained to the lower court, can only be executed by the prosecuting authority. (Id.) Undersigned counsel stated to the court that if the state was unwilling to assist in securing the witness, he would be forced to file a motion to perpetuate Griffin's testimony. (PC-R. 1193) The lower court asked the state if it would agree to assist and the state refused.[18] (PC-R. 1198-1203) After being given leave to file a motion to perpetuate the witness' testimony, Mr. Hurst did so. (PC-R. 1215-21) The motion was denied (PC-R. 1257) and Mr. Hurst was given leave to decide whether or not to go forward with the hearing without Griffin's testimony.[19] (Id.) The court subsequently, on a motion from the state, agreed to reconsider whether an evidentiary hearing was necessary. (PC-R. 1266-68) The court ultimately summarily denied the motion. (PC-R. 1300-1303)

B. Applicable Law

The lower court's summary denials are in direct contravention of this Court's longstanding preference for holding evidentiary hearings on fact-based claims. The Court

[18] The state asserted that it was not their duty to assist in transporting the witness and actually argued that the witness created the situation of "his own doing." (PC-R. 1274)

[19] Mr. Hurst submitted a witness list, including undersigned counsel and his private investigator, and also submitted a written proffer of evidence, including the affidavit of Willie Griffin. (PC-R. 1259-60, 1291-99)

recently considered the summary denial of such claims in Rivera v. State, 2008 WL 2369219 (Fla.). There, Brady, Giglio, and newly discovered evidence claims were summarily denied. This Court remanded for an evidentiary hearing. In doing so, the Court noted:

> Although Rivera's motion was initially filed under 3.850, our current rule 3.851, governing capital postconviction motions, articulates this Court's longtime policy establishing a presumption in favor of holding evidentiary hearings. Even though evidentiary hearings on claims raised in a successive rule 3.851 motion are not automatically required, we have encouraged courts to liberally allow such hearings on timely raised claims that are factually based and commonly require a hearing. *See Amendments to Fla. Rules of Criminal Procedure 3.851, 3.852, & 3.993 & Fla. Rule of Judicial Admin. 2.050,* 797 So.2d 1213 (Fla. 2001)

Rivera at 5 (fn. 2). In contrast to Rivera, the claims involved here were not successor claims and, further, Mr. Hurst's motion was filed under 3.851. As such, the claims required a "factual determination" under Fla. R.Crim. P. 3.851 (f)(5)(A)(i). The lower court erred.

C. Analysis

Detective Nesmith's Notes

The lower court summarily denied Mr. Hurst's claim in this regard in an order dated August 17, 2005. (PC-R. 1016-77) As to the notes regarding David Kladitis, the court found that a further evidentiary hearing, in addition to the July 9, 2004

hearing, was unnecessary to resolve the claim. (PC-R. 1019) As to Carl Hess, the court found that there was no false testimony as to the time he saw the victim and the identification of Mr. Hurst's car. (PC-R. 1019) As to the falsity of Hess' statement that he interviewed Mr. Hurst, the court found that the "material effect" of Hess' lie was neutralized by trial counsel's cross-examination. (PC-R. 1022) The court also found that trial counsel knew "the scope of Hess' true responsibilities." (Id.) Regarding Lee-Lee, the court found that "he" in the notes "obviously refers to defendant and not Mr. Smith or some other unnamed third party." (Id.) As to the note regarding disposal of the weapon, the court found "as a matter of law" that there was no prejudice because Lee-Lee was effectively cross-examined by trial counsel. (PC-R. 1028) As to the interview of Laura Ussery, the court found that "no reasonable interpretation of the notes" indicated Michael Williams intent to participate in the crime. (PC-R. 1029) Regarding Williams statement that Mr. Hurst did not commit the crime, the court found that the statement would have been inadmissible and fails to demonstrate prejudice. (PC-R. 1029-30) As to the notes of the Michael Williams interview, the court found that the notes failed to demonstrate prejudice or were not withheld. (PC-R. 1030-31)

As to Kladitis, the court's refusal to conduct an

evidentiary hearing deprived Mr. Hurst of further evidence to support the original claim. Had Mr. Hurst been afforded an opportunity, he would have likely called Detective Nesmith to testify. Having the benefit of his notes, which so obviously validate Kladitis' testimony, Nesmith could have been questioned as to why the information was not disclosed and who else knew about it. Further, given the notes, Mr. Rimmer could have been called to question about the notes, the substance of which could not then be denied, their importance, his knowledge thereof, and the reason they were not disclosed. Nesmith's and Rimmer's testimony may have provided the prejudice element the lower court found lacking in the original claim. The difficulty is that we simply do not know, given the summary denial.

Regarding Hess, the lower court is simply incorrect that there is no discrepancy between the notes and Hess' trial testimony regarding when he saw the victim and Mr. Hurst arrive at Popeye's. Hess testified at trial that he saw the arrival between 7:00 and 8:30. (TT. 300) Nesmith's notes reveal that Hess told him that he saw the victim arrive at 7:15. (PC-R. 812) The court's finding that there was no discrepancy is plainly unsupported by the record. As to the notes reflection that there was no interview, the lower court's finding, again, fails to acknowledge that despite being cross-examined on the point, Hess never receded from his testimony that he interviewed Mr. Hurst.

The court also fails to acknowledge that the notes demonstrate the state's knowledge that Hess' trial testimony was false. The factual underpinnings for the court's summary denial are unsupported by the record.

As to the notes of Nesmith's interview of Lee-Lee, the lower court dismissal of the notes as "obvious[ly]" referring to Mr. Hurst is unsupported. An examination of the notes reveals no such obvious reference. Clearly, an evidentiary should have been held to resolve such a factual question. The court implicitly assumes the "he" refers to Mr. Hurst because of Lee-Lee's later trial testimony fingering Mr. Hurst as the perpetrator. Given Lee-Lee's woeful credibility, such an assumption is both a credibility leap and legally unsupportable as a summary denial. Regarding the note referring to the knife disposal, the lower court's finding that Lee-Lee was effectively cross-examined completely ignores the conflict between the notes and the state's theory of the murder weapon. The notes' contention that the weapon was disposed of and the state's trial theory that the knife was found in open view inside the restaurant are irreconcilable by far. The lower court's ruling ignores the point being made. Summary denial was in error.

The lower court's resolution of the Ussery note reflecting Michael Williams intent to participate in the crime ignores the content of the note. The note reflects that Williams "Said

Popeye's was going to get robbed, And someone would end up dead. And Taco Bell too. Said going to rob both stores the same day." (PC-R. 707) Although there is a later reference to his friends, differing interpretations can be made and, certainly, a valid argument could have been made by Mr. Arnold suggesting Williams' involvement, had he had this note. At any rate, a summary denial was not justified as the note on its face does not refute the claim.

The court's ruling as to Ussery's statement that Michael Williams' said "his friend didn't do it" is erroneous in both regards. First, the court's ruling that the statement was inadmissible hearsay ignores clearly established law. This Court has held that impeachment evidence may be established through inconsistent statements and, in fact, such statements are not hearsay. Fitzpatrick v. State, 900 So. 2d 495, 515 (Fla. 2005) (also holding that impeachment evidence may be admitted pursuant to section 90.806(1), Florida Statutes) Williams' statement to Ussery that Mr. Hurst did not commit the crime in question is utterly inconsistent with his trial testimony implicating Mr. Hurst. The court's reasoning for summary denial in this regard is erroneous. The court additionally held that Williams' statement to Ussery does not demonstrate prejudice. The court's ruling here is one, devoid of analysis, and two, made, obviously, without any evidentiary foundation. Mr. Hurst was not

afforded a hearing in which he could call Williams, Ussery, or even Linda Shouse (Williams and Ussery's boss also indicated in the notes) to demonstrate the credibility and value of the statement. However, simply looking at the statement on its face, and considered in conjunction with other post-conviction evidence, the court's finding of no prejudice is erroneous.

The court's finding of no prejudice regarding the statements made by Michael Williams to Nesmith ignores the content of the statements made. Regarding the statement Mr. Hurst made to Williams that he "needed to get his car fixed", the court concludes that evidence was presented on this point. However, the court ignores the fact that the other testimony as to the car was from family members of Mr. Hurst. Williams, not a family member of Mr. Hurst, and thus a more objective witness, would have solidified the fact that Mr. Hurst was having car trouble that morning. The statement was also made before the fact (the night before) and there is no indication from the notes that the statement was some sort of ruse. The court's summary denial of Williams' statement that "Tim would always do what Lee-Lee wanted" ignores the overarching dynamic of Mr. Hurst's trial. That is, it was contended by the state that Mr. Hurst alone committed this crime and afterwards coerced and forced his "boy" Lee-Lee to assist in concealing it. Further, Lee-Lee was the essential witness against Mr. Hurst. The

statement made by Williams is super-relevant, both impeaching of Lee-Lee and exculpatory as to Mr. Hurst. Finally, and again regarding Lee-Lee's participation in this crime, the court ignores the prejudice of Lee-Lee's statement to Williams that "we got that motherfucker." Again, the court's summary denial on prejudice grounds ignores the whole fabric of this case, the question of Lee-Lee's involvement versus that of Mr. Hurst.

Ex Parte Communication

The court summarily denied Mr. Hurst's claim in this regard. (PC-R. 1453-57) The court held that Mr. Hurst was not denied a "neutral, detached judge" and that the communication here was limited to "matters concerning Lee-Lee Smith and had no bearing on the judge's treatment of Defendant. . ."[20] (PC-R. 1457)

The lower court's summary denial here minimizes the import of the conversation that took place. The conversation, apparently limited to whether Lee-Lee would be indicted, was not limited to matters concerning Lee-Lee. It is not possible, given the extent to which Lee-Lee was inextricably linked to Mr. Hurst and his trial, to separate the matters so easily. The conversation took place at Mr. Hurst's trial. It concerned whether his ultimate co-defendant would be tried for the same

[20] The lower court implicitly finds that the conversation in fact occurred.

murder that Mr. Hurst was tried for.

Hess' Grand Jury Testimony

The court summarily denied Mr. Hurst's claim in this regard. (PC-R. 1457-59) The court concluded that the claim does not demonstrate that the state knowingly presented false testimony to the grand jury. (PC-R. 1458) Further, the court found that Hess' testimony at the evidentiary hearing that the interview issue "never came up" in front of the grand jury, disproves the claim. (PC-R. 1458-59)

The court's summary denial of this claim ignores evidence in the record. At trial, Hess told the jury that he interviewed Mr. Hurst for a job. At the evidentiary hearing in this case, Hess recanted that testimony and admitted that there never was an interview and that his trial testimony was false. While Hess stated at the evidentiary hearing that the interview "never came up" at the grand jury, his pre-trial deposition disproves this. In his deposition, the following exchange occurred:

> Q (defense counsel): How long was your interview with the gentleman you chose not to recommend?
>
> A (Hess): About twenty minutes, half an hour.
>
> Q: When the police asked you about him, did they ask you whether there was any paperwork that he might have filled out?
>
> A: No ma'am.

> Q: Did you think of the possibility that there might have been some paperwork and whether to retrieve it or not?
>
> A: No, they didn't ask me about that. ***Actually, I didn't tell them I interviewed him until I was in front of the grand jury. You know, I said I knew him personally.***

(PC-R. 894-95) (emphasis added) Hess' deposition testimony unequivocally refutes his testimony at the evidentiary hearing. The court's summary denial of this claim ignores Hess' under oath deposition. The court's resolution of this claim without an evidentiary hearing is in error. Rather than refuting the claim, the record supports it. At a minimum, the deposition, which is contrast with the evidentiary hearing testimony, is more credible given its timing in relation the actual grand jury proceeding. Had the court conducted an evidentiary hearing, Hess could have been called as a witness and explained the differing testimony. Perhaps the state attorney could have been called to explain his recollection of the grand jury or, further, provided a transcript of the proceeding to refute the claim. The state attorney could have been confronted with Detective Nesmith's notes which reflect the state knew early on that no interview occurred. Summary denial was in error.

Willie Griffin Recantation

The court summarily denied Mr. Hurst's claim in this regard. (PC-R. 1431-33) The court also denied Mr. Hurst's alternative motion to perpetuate Griffin's testimony or compel

the state to assist in procuring his testimony before the court. (Id.) The court further found that perpetuation was not justified given the "speculative nature" of Griffin's testimony. (PC-R. 32) As to the motion to compel the state's assistance, the court agreed with the state that it "should not have to be responsible for retrieving Defendant's witnesses." (Id.) The court further denied a hearing on the claim because, absent Griffin, there was no "reliable admissible evidence" supporting the recantation. (PC-R. 1433)

First, it is evident that this claim should be the subject of an evidentiary hearing. The lower court's initial granting of an evidentiary hearing seems to make this clear. The real dispute here is the court's resolution of Mr. Hurst's difficulty in procuring Griffin's presence at the hearing.

In the proceedings below, undersigned counsel made it clear to the court that all efforts had been made to secure Griffin for the hearing. Undersigned counsel explained the logistics of the transport to the court, as best he understood them. The bottom line was that the federal authorities would not release Griffin for transport to Pensacola without the IAD form, a form which had to be executed by the prosecuting authority. The state below acknowledged this in their response to Mr. Hurst's motion

to perpetuate or compel[21] (PC-R. 1228-29, footnote 5) and implicitly so at the hearing on the issue (PC-R. 1273-75). In sum, there is no dispute that Griffin's presence in Pensacola could not be secured without the prosecution's assistance. Further, the record is clear that the state refused to voluntarily exercise the authority required.

The court denied Mr. Hurst's subsequent motion to perpetuate Griffin's testimony because Mr. Hurst allegedly "failed to specifically allege, or attach documentation, regarding the purported content of Griffin's testimony." (PC-R. 1432) The court also did not feel that Griffin could be held responsible for his testimony. (Id.)

Florida Rule of Criminal Procedure 3.190 (j)(1) requires that in order for perpetuated testimony to be appropriate, "a prospective witness resides beyond the territorial jurisdiction of the court or may be unable to attend or be prevented from attending a trial or hearing, that the witness's testimony is material, and that it is necessary to take the deposition to prevent a failure of justice." F.R.C.P. 3.190 (j)(1). Although there is certainly a preference for in-court testimony, Harrell v. State, 709 So.2d 1364 (Fla. 1998); Palmieri v. State, 411 So.

[21] Counsel for the Attorney General wrote that she had spoken with a staff attorney at the Bureau of Prisons and that the attorney had confirmed that the IAD certification that necessarily accompanies a writ of habeas ad testificandum "would require completion by the state prosecuting authority." (PC-R. 1229)

2d 985 (Fla.3rd DCA 1982), where the requirements of the rule have been met, perpetuation of testimony via deposition is appropriate. Whether to grant the motion to perpetuate testimony via deposition is within the sound discretion of the trial court. Cherry v. State, 781 So. 2d 1040 (Fla. 2000); Montoya-Navia v. State, 691 So. 2d 1144 (Fla.3rd DCA 1997).

In this case, the requirements of the 3.190 (j)(1) have been met. Griffin is a federal prisoner in the State of New Jersey and was clearly beyond the territorial jurisdiction of the lower court. As to materiality, the lower court, by granting an evidentiary hearing on the issue of Griffin's recanted testimony, implicitly found the averred testimony to be material.[22] To deny Mr. Hurst the testimony of such a material witness would be a failure of justice. It must be remembered that the allegation is one of recanted testimony from a witness who testified to a confession by Mr. Hurst.

Precedent construing 3.190 also appears to require the use of due diligence in securing the witness's testimony. Pope v. State, 441 So. 2d 1073 (Fla. 1983); Palmieri. Here, undersigned counsel engaged in various efforts to determine the proper

[22] As to materiality, the allegation is material not just to Mr. Hurst's guilt, but also as to sentence. Griffin testified that Mr. Hurst said he "did that swine", a statement both prejudicial and legally objectionable as one reflecting lack of remorse.

mechanism for securing Griffin's attendance in Escambia County. The end result was that Griffin's attendance could be procured with a Writ from the Court and the appropriate IAD forms filed with the prosecutor's assistance. The state has not asserted that the procedure is otherwise, but simply asserts it does not intend to set a precedent of assisting the defense in securing the attendance of witnesses.

This Court recently decided Reichmann v. State, 966 So. 2d 298 (Fla. 2007). There, the Court affirmed the lower court's denial of a motion to perpetuate. In Reichmann, post-conviction counsel sought to take the deposition of a witness for introduction at an upcoming evidentiary hearing. Id. at 309. There, the witness was somewhere in the United Arab Emirates, although his specific location was unknown by counsel. The lower court in Reichmann denied the motion because "there was no witness available at that point." Id. at 310. This court affirmed the lower court's ruling in Reichmann. In affirming, this Court cited several factors. First, the Court found that the motion to perpetuate was not under oath or accompanied by sworn affidavits. Id. In contrast, undersigned counsel's motion was sworn as required by the rule. (PC-R. 1215-21) This Court also found it troubling in Reichmann that there was no assertion as to where the witness actually was. In the instant case, Willie Griffin's location (Ft. Dix federal prison) was well

known by all parties and the court. The Court also noted that there were problems with the reliability of the proposed testimony in Reichmann, given that the witness would be testifying by phone from a foreign country without any extradition treaty with the United States. No such problem existed in the instant case. Here, undersigned counsel proposed taking an in-person, under oath deposition at Ft. Dix, New Jersey.[23] The reliability problems identified in Reichmann were not present. Thus, the factors leading to the denial of perpetuation in Reichmann are simply not present in the instant case.

The lower court's ruling on the motion to compel the state to assist in securing Griffin ignores a crucial, obvious point. By finding that the state "should not have to be responsible" for securing defense witnesses, the court fails to recognize that undersigned counsel was not asking the state to do something he was unwilling to do himself. Undersigned counsel was not asking the state to do his work for him. Rather, the state was simply being asked to provide a security function

[23] The state below made some argument that a perjury charge would be unenforceable against Griffin from an out-of-state deposition. The state cited no authority for this contention. Further, it must be remembered that if the state was that concerned about perjury, they could have easily executed the IAD form and Griffin would have testified *in Florida*. It was somewhat disingenuous for the state to refuse to assist in securing the witness's presence and then complain that it could not charge him with perjury based on an out-of-state deposition.

which it apparently does on a somewhat routine basis. The lower court's construction of the facts otherwise is erroneous.

D. Conclusion

The lower court erred in summarily denying these claims. All of the claims here were fact-based, asserted under Rule 3.851, and were part of the initial post-conviction motion, not successive. The lower court's summary rulings ignore this court's precedent as to fact-based claims and, further, the difficulty in resolving these claims without evidentiary development. The files and records in no way refute the claims made. The lower court erred.

ARGUMENT VI

MR. HURST'S TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMEND-MENTS. THE LOWER COURT ERRED IN DENYING APPELLANT'S CLAIM IN THIS REGARD.

Mr. Hurst contends that he did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F. 2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F. 2d 605 (5th Cir. 1991). It is Mr. Hurst's contention that the process itself failed him because the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the verdict and sentence that he would receive. State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

The United States Supreme Court has recognized that, though a Brady violation may be comprised of individual instances of non-disclosure, proper constitutional analysis requires consideration of the cumulative effect of the individual non-disclosures. Kyles v. Whitley, 115 S.Ct. 1555 (1995). The reason, as explained by the United States Supreme Court, is in order to insure that the criminal defendant re-ceives "a fair trial, understood as a trial resulting in a ver-dict worthy of confidence." Kyles, 115 S. Ct. at 1566.

Moreover, this Court in Jones v. State, 709 So. 2d 512 (Fla. 1998), made it clear that the cumulative analysis discussed in Gunsby is in fact the legally required analysis where a Brady claim, an ineffective assistance claim, and/or a newly discovered evidence claim are presented in a post-conviction motion. In Gunsby, this Court ordered a new trial in Rule 3.850 proceedings because of the cumulative effects of Brady violations, ineffective assistance of counsel, and/or newly discovered evidence of innocence. State v. Gunsby, 670 So. 2d 920, 923-24 (Fla. 1996). See Young v. State, 739 So. 2d 553 (Fla. 1999). Mr. Hurst's claims require cumulative consideration. If considering the claims cumulatively results in a loss of confidence in the reliability of the outcome, relief is warranted. Young v. State; Kyles v. Whitley. The numerous flaws in the system which convicted Mr. Hurst have been pointed out throughout this pleading and in Mr. Hurst's direct appeal. While there are means for addressing each individual error, the fact remains that addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death sentence -- safeguards which are required by the Constitution. These errors cannot be harmless. The results of the trial and sentencing are not reliable. The lower court erred in denying this claim.

CONCLUSION AND RELIEF SOUGHT

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

Counsel for Mr. Hurst certifies that Stephen R. White, Assistant Attorney General, Capital Appeals, PL-01, The Capitol, Tallahassee, FL 32399, was served with a true copy of this Initial Brief of Appellant on this _____ day of June 2008, by U.S. Mail.

CERTIFICATE OF TYPE SIZE AND STYLE

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

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