IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1798

TIMOTHY HURST,

Appellant,

v.

STATE OF FLORIDA,

Appellee

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

REPLY BRIEF OF APPELLANT

Jeffrey M. Hazen
Florida Bar No. 0153060

Harry Brody
Florida Bar No. 0977860

Brody & Hazen, PA
P. O. Box 16515
Tallahassee, Florida 32317
(850) 942-0005
Counsel for Appellant

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Statement of the Case and Facts

Appellee quotes from this Court's opinion (Answer Brief at pages 4-6), emphasizing Carl Hess' identification of Appellant and the fact that Appellant did not mention going to Wal-Mart in his ***taped*** interview with police. First, Hess has now admitted, in post-conviction, that he lied at trial when testifying that he interviewed Appellant. (PC-R. 786-87) Further, evidence presented during post-conviction seriously contests the notion that Appellant did not tell law enforcement about going to Wal-Mart. The factual statement of this Court has been undermined by post-conviction evidence.

Appellee devotes a specific section of its factual statement to the "time of the murder." (Answer Brief 6-10) Several points made by Appellee merit elaboration. Carl Hess' trial testimony that he saw the victim arrive between 7:00-8:30 has been undermined by notes from Detective Nesmith indicating Hess originally told police that the victim arrived at 7:15. (PC-R. 812) Appellee attempts to ignore or minimize evidence that establishes the time when the victim was killed. Jeanette Hayes talked to the victim from 7:55 a.m. until 8:00. (TT. 288-89) Anthony Brown arrived for work about 8:05 a.m. and did not get a response to his knock at the door. (TT. 212-13) Brown was

not unsure of his arrival time. The parties stipulated that truck driver Raymond Curtis would testify that he arrived at 8:10 and received no response to his knock on the door. (TT. 158) There is no evidence to refute this time given by Curtis. Further, it is consistent with Brown's testimony that the truck driver arrived right after him. (TT. 209) Appellee also neglects to note Brown's testimony that the victim's car was in the parking lot and that Appellant's car was nowhere to be seen. (TT. 212) Thus, the ***state's*** evidence establishes that the victim was alive when talking to Jeanette Hayes on the phone and that she was dead by the time Brown and Curtis arrived to knock on the door. Appellee, despite a lot of ink committed to the subject, has pointed to nothing that refutes ***the evidence***.

Appellee asserts a dispute with Appellant's contention that this is a close case as to the question of Appellant's guilt. (Answer Brief at page 14) As to the asserted inculpatory evidence cited by Appellee, Davis Kladitis did not identify Appellant as the person driving the car. He only identified the car. Regarding the deposit slip with Appellant's fingerprint, the deposit slips were located in an open area of the restaurant where Appellant routinely worked. The witness who testified about the box cutter only stated that it resembled the one Appellant was seen with. (TT. 353) The witness stated clearly that it was not the same one that he saw Appellant with. (TT.

354-55) As to Lee-Lee Smith's testimony, his credibility has been thoroughly undermined throughout this case. As to Appellant's alleged concealment of the trip to Wal-Mart, that contention has been seriously undermined by post-conviction evidence. Appellee notes the locked doors of the restaurant as indicating an "inside job." (Answer Brief at page 14) However, Appellee neglects to note that the drive-thru window was wide open (TT. 226), indicating someone from outside used the window as access to the restaurant. Further, witness Tonya Crenshaw testified that Appellant could not have fit through the window. (TT. 227) As to Appellee's assertion of Carl Hess's identification of Appellant at the scene, Appellee neglects Hess' perjured testimony related to the identification. Thus, Appellee's assertion of clear, inculpatory evidence is much more in dispute than Appellee allows.

Argument I

Appellee again briefly discusses the "time of the murder." (Answer Brief at page 18) Appellee extrapolates, apparently from the fact of Appellant's conviction, that the time of the murder was litigated and "resolved to Appellant's detriment." (Id.) Appellee asserts no basis for which to come to such a conclusion. There is no logical basis on which to state that because the jury convicted Appellant, that they made any finding as to the time of the murder.

David Kladitis

Appellee suggests that Appellant's trial counsel was not interested in the actions of the black males that Kladitis saw. (Answer Brief at page 20) This is based on Kladitis' testimony that no one at his deposition was interested in the issue. (Id.) This presupposes a nonexistent fact. That is, that trial counsel ever knew about the information. As his testimony clearly demonstrated, Mr. Arnold had no knowledge of the information. (PC-R. 1936) Trial counsel could not have been uninterested in something that he did not know about. Further, Arnold stated that the information would have been "extremely important" and that he "certainly" would have used it. (Id.)

Appellant disputes Appellee's contention that there is "no evidence the black males were anywhere near the Popeye's at the time of the murder." (Answer Brief at page 21) Kladitis' testimony placed the persons there around 7:00 a.m. and he left the parking lot before these persons did. The murder happened, based on the evidence, sometime within the next hour. Thus, Appellee's suggestion that there was "no evidence" that the black males were "anywhere near" the murder scene is inaccurate.

Appellee asserts that the behavior of the black males seen by Kladitis was not indicative of criminality, demonstrating the lack of prejudice and the state's lack of obligation to disclose the information. (Answer Brief at page 21-22) Appellee cites the

fact that they were in a public parking lot, in plain sight of Kladitis, and not attempting to mask their identity. (Id.) In making this argument, Appellee ignores the state's own asserted case against Appellant. That is, the state argued that Appellant came to Popeye's in his own car, in broad daylight, wearing his work clothes, at his regularly scheduled work time, in view of Carl Hess and whoever else was in the parking lot, and banged loudly on the door before murdering the victim. When viewed with this juxtaposition against the state's own theory of the crime, Appellee's argument lacks relevance and merit.

Appellee's citation to Wright v. State, 857 So.2d 861 (Fla. 2003), is distinguishable. In Wright, the asserted withheld evidence involved police reports of criminal activity in the same neighborhood as the Wright murder wholly unrelated to that crime. Wright at 869. Appellee fails to recognize that the black males in this case were at the murder scene at or near the time of the murder and, additionally, fit perfectly into defense counsel's theory of alternate suspects. The police reports in Wright were completely attenuated from the Wright murder. That is not the case here. Appellee's citation to Carroll v. State, 815 So.2d 601 (Fla. 2002), neglects to note that the alternate suspect alleged to have been Brady evidence was cleared through DNA analysis which implicated Carroll. Carroll at 620. This is certainly a crucial distinguishing factor between Carroll and

the instant case. Finally, Appellee's citation to Tompkins v. State, 872 So.2d 230 (Fla. 2003), ignores the fact that there was no connection between the alternate suspect in Tompkins and the crime committed there. This fact, again, is distinguishable from Appellant's case. Appellee's other citations to Boyd v. State, 910 So.2d 167 (Fla. 2005) and Jimenez v. State, 2008 Fla. LEXIS 1107 (Fla. June 19, 2008) are similarly off point. In sum, none of the cases cited by Appellee have a connection to the actual crime that is involved here.

Appellant's case is more similar to Floyd v. State, 902 So.2d 775 (Fla. 2005). There, this Court reviewed a Brady claim involving a witness' statement to police that she had seen suspicious persons, other than the defendant, at or near the crime scene. Id. at 781. This Court concluded that the exculpatory nature of the evidence was apparent, "since the interviews present direct evidence of two other persons who may have committed the crime." Id. at 782. This was true in spite of the "potential weaknesses" in the witness's testimony. Id. at 785. The Court found there to be no question of the state's obligation to disclose the information. Id. at 782. In assessing materiality, this Court found that the case was not a particularly strong one in terms of conclusive inculpatory evidence. Id. at 784. Like the instant case, there was no forensic DNA evidence and the case relied on jailhouse snitch

testimony. Id. It must also be remembered that the eyewitness account of Carl Hess has been seriously undermined by his admittedly lying to the jury. Finally, in Floyd, this Court noted the cumulative effect of other post-conviction claims, including other Brady evidence regarding a jailhouse snitch. Id. at 784-86. In sum, Appellant's case is much more similar to Floyd, in terms of the type of evidence withheld and its' material affect, than the cases cited by Appellee. See also Rogers v. State, 782 So.2d 373 (Fla. 2001).

Appellee concludes his argument in this regard by stating that Appellant's claim is only speculation. (Answer Brief at page 25) This conclusion by Appellee ignores two points, one legal, one factual. First, Appellee implies in this argument that Appellant is somehow required under Brady to prove that these black males in fact committed the crime. (Answer Brief at page 25) There is simply no such burden on Appellant, either at trial or in post-conviction. Second, while this evidence may be "speculation" in the government's view, that view is contrasted by the testimonies of Kladitis and defense counsel Glenn Arnold. Kladitis was alarmed by what he saw at Popeye's that morning, viewed in the context of the murder that occurred there within minutes of what he observed. Further, Arnold was never made aware of this information, information that he considers extremely important and certainly worthy of presentation to the

jury. In the end, it was for the jury to decide whether this information is speculative or, rather, indicative of doubt about Appellant's guilt.

Anthony Williams

Appellee cites to the trial court's order which finds that Anthony Williams testimony was not credible. (Answer Brief at pages 26-28) The trial court's reasoning is flawed and unsupported by objective facts. The court first reasons that because Williams stated at trial that coming forward with the ostensible confession by Appellant was the "right thing to do," his later recantation is not credible. (Answer Brief at page 27) However, the trial court ignores the common sense notion that Williams had much more motive to lie at trial than he does now. At trial, Williams' liberty was at stake, as he was facing possible life in prison on robbery charges. Now, he has no motive to lie and the trial court articulated none. The trial court also noted that Williams lacked credibility because he did not come forward "until approximately two years after Defendant had been sentenced. . ." (Id.) In reality, Williams admitted that his trial testimony was perjured to the first post-conviction representative that he spoke with. This is in contrast to many post-conviction cases where witnesses recant many years after the trial. In fact, it is hard to imagine how Williams' recantation could have come any sooner. Finally, the

trial court found that Williams was “defensive and antagonistic,” indicating untruthfulness. However, Williams was, of course, being vigorously cross-examined by the state in a capital murder case. Thus, his demeanor was consistent with the context in which his testimony took place.

Appellee’s citation to Ventura v. State, 794 So.2d 553 (Fla. 2001) is distinguishable. Here, the promise made to Williams that he would be taken care of was not ambiguous or loose. Williams testified that he understood Mr. Rimmer’s promise to be that if he testified as expected, he would receive leniency on his sentences. (PC-R. 2191-92) Thus, Williams was very clear about what was being promised to him. There was no misunderstanding or ambiguity.

Finally, in arguing against the prejudice of this claim, Appellee notes the fact that Williams’ trial testimony was not mentioned in this Court’s factual summary of the case. (Answer Brief at page 32) We do not know that the omission of Williams’ testimony is based on its’ lack of importance. Further, even if this Court questioned its’ importance, for whatever reason, this does not mean that the jury in Appellant’s case deemed it unimportant.

Lee-Lee Smith

As to Appellee’s suggestion that the prosecutor denied having a conversation with Eunice Smith about charging her son

(Answer Brief at pages 35-36), the record is clear that he did not. Even the quoted portion of transcript verifies this. (Id.) The point being made by Appellant here is that Mr. Rimmer's testimony stops short of rebutting Eunice Smith's testimony.

The prosecutor here did not, as Appellee argues, disclose Smith's culpability in this crime. Mr. Rimmer never told the jury that Smith committed a crime in this case. In reality, what Rimmer did was portray Smith to the jury as the scared, helpless dupe of Appellant, forced into helping him conceal the crime. Mr. Rimmer argued that Smith was Appellant's "boy" and that Lee-Lee did whatever Appellant told him to do. (TT. 841) This is a far cry from disclosing to the jury that Lee-Lee committed a criminal act in this case. Thus, the prosecutor's argument to the jury does not negate the prejudice here.

Appellee argues that defense counsel for Appelant tactically utilized the fact that Lee-Lee had not been charged at the time of Appellant's trial. (Answer Brief at page 36) This ignores two important points. First, Mr. Arnold was left with no other option than using the fact that Smith had not been charged. Trial lawyers have to deal with the facts they have, not the facts that they prefer. Second, Appellee neglects to acknowledge Mr. Arnold's evidentiary hearing testimony that he would have preferred to use the fact that Smith was going to be charged (PC-R. 1955-56) and felt it would have been more

effective than the alternative argument he was forced to make. (Id.)

Argument II

Anthony Williams

Appellant adopts the arguments he made as to Argument I. Additionally, Appellant would specifically reiterate his arguments made as to the trial court's conclusions on Anthony Williams' credibility.

Lee-Lee Smith

Appellee seems to assert that Appellant is arguing disparate sentencing between himself and Smith. (Answer Brief at page 42, citing Scott v. Dugger, 604 So.2d 465 (Fla. 1992)) Appellant is not making such an argument as Appellant and Smith were convicted of vastly different charges. Rather, what Appellant argues is that Smith's conviction occurred after Appellant's trial, a fact not known to the jury. Thus, Smith's conviction is new evidence which, if presented to the jury, would have affected Appellant's conviction and sentence.

Again, simply because the jury was advised that Smith allegedly, if one makes the fantastical leap of assuming Smith testified truthfully, had some small role in covering up the crime, this does not equate to the jury being advised that the prosecutor charged Smith with criminality. This is especially

true were the prosecutor argued throughout that Smith was intimidated into assisting Appellant in concealing the crime.

Carl Hess

Appellee simply fails to acknowledge that Hess admitted to perjury during the post-conviction evidentiary hearing. Hess never, as he testified to at trial (TT. 310-11), interviewed Appellant for a job. Under the cross-examination that Appellee contends "aired out" Hess' lack of veracity, Hess stood his ground and continued to lie. Hess testified at the evidentiary hearing that his trial testimony was untrue. He lied to the jury deciding Appellant's fate about a hyper-critical point of fact. That is, the basis for his identification of Appellant at the scene. The fact that Hess was cross-examined about the issue lacks relevance when the examination never succeeded in getting Hess to admit he did not interview Appellant. Also, the fact that Hess' boss testified that Hess had no interview authority does not change the fact that Hess testified that he did, authority or not.

Appellee argues that despite Hess' perjury, there is no prejudice because Hess could have identified Appellant from the fact that the two worked at restaurants adjacent to each other. (Answer Brief at page 45) However, this ignores the fact that Hess maintained that he interviewed Appellant. Further, it too

easily dismisses the stain which Hess' admitted lie places on his entire testimony.

Appellee's assertion that the term "interview" may have been a "semantical 'issue'" (Answer Brief at page 46, footnote 5) does not comport with the evidence. Hess testified in his deposition and at trial that he interviewed Appellant. (TT. 310-11) In post-conviction, Hess admitted that he never interviewed Appellant and that his trial testimony on this point was not true. (PC-R. 86-87) Hess did not assert a "semantical" explanation for the difference. Rather, he simply admitted that he lied. The "semantical" explanation is provided wholly by Appellee.

Appellee takes issue with Appellant's statement in his brief that Hess misidentified the color of the pants Appellant was wearing and the kind of car Appellant drove. (Answer Brief at page 46, footnote 6) Appellee asserts that Appellant is basing these facts only on "defense counsel's post-conviction opinion." (Id.) To the contrary, Hess stated at trial that he misidentified the color of Appellant's pants. (TT. 312) Further, Hess identified Appellant's car to the police as a light blue Ford Taurus. (TT. 313) In fact, Appellant's car was a large, dark blue Mercury Grand Marquis. (TT. 293-94) Thus, the trial record supports Appellant's contention that, in addition to

outright lying about critical facts, Hess was simply wrong, at best, about other facts.

Argument III

In the introduction to this issue, Appellee asserts that Appellant's "burden is weightier due to his trial counsel's experience." (Answer Brief at page 48) First, Appellee cites no authority, and Appellant is aware of none under Strickland v. Washington, 466 U.S. 668 (1984) or its progeny, for this proposition. Second, if Appellant must recognize such experience, as he does, Appellee must also recognize and respect Mr. Arnold's opinions in regards to David Kladitis, Carl Hess, and Lee-Lee Smith, as well as Arnold's informed opinion about the strength of the state's case against Appellant.

Andrew Salter

Appellee cites to the trial court's order denying relief. (Answer Brief at pages 49-50) The trial court's conclusion and Appellee's accompanying argument, that Salter did not see Carl Hess in the parking lot, is inaccurate. In fact, Salter stated that he could not be sure, but he thought he saw the guy who takes out the trash at Wendy's. (PC-R. 2261) At trial, Hess testified that he was the guy who opens Wendy's and does the lot check picking up trash. (TT. 300-02) Thus, there is certainly arguable evidence that Andrew Salter saw Hess in the parking lot.

Appellant disagrees with Appellee's statement that trial counsel made "serious efforts" to discover who Salter was. Neither Mr. Arnold nor his investigator Larry Smith testified to anything that they actually did to find Salter. Mr. Arnold's actual testimony makes it clear that he was satisfied with Salter being an unknown black male in the parking lot. (Answer Brief at 1664-65) He did not want to know who Salter was and he made no effort to find out. In fact, Arnold testified at the evidentiary hearing that he doubts he made any attempt to interview Salter and does not feel that he should have attempted to speak with him. (Id.) There was no effort by trial counsel, serious or otherwise, to locate him.

Wal-Mart

Appellant strenuously disagrees with Appellee's characterization of this claim as hindsight second-guessing. (Answer Brief at page 54) As the record demonstrates, trial counsel could have rebutted the state's contention at trial that Appellant did not mention, during his meeting with detectives, going to Wal-Mart on the morning of the crime. Further, trial counsel offered no coherent or sensible explanation for not doing so.

Appellee cites to the trial court's order finding that trial counsel made a reasonable, strategic decision not to utilize the police reports to rebut the state's case vis-à-vis

Wal-Mart. (Answer Brief at page 55) However, the trial court provides no analysis whatsoever as to why trial counsel's decision here was reasonable or strategic. The court's entire, conclusory treatment of the issue is contained in one paragraph. At the evidentiary hearing, trial counsel testified that the fact of Appellant going to Wal-Mart ***helped*** his case. (PC-R. 2633) Arnold also agreed that the police reports indicated that Appellant told the police that he went to Wal-Mart. (PC-R. 1950) Arnold's asserted basis for not using the reports is two-fold. First, he makes a confusing statement about not wanting to emphasize Appellant's use of his car. (PC-R. 1952) This rationalization makes no sense because Appellant talks at length on the tape about driving his car to other places that day. Use of the car was an unavoidable fact. There was no reason to avoid evidence that Appellant drove to Wal-Mart. Appellant had admitted driving his car and, as trial counsel said, Appellant going to Wal-Mart was helpful. Trial counsel's other stated reason for not utilizing the police reports was that Appellant, in fact, did not mention Wal-Mart on the tape. (PC-R. 1951) This statement by trial counsel avoids what was clearly the state's broader contention in emphasizing that Wal-Mart is not mentioned on the tape. That is, that Appellant did not mention Wal-Mart because he was allegedly trying to conceal these facts. The police reports would have demonstrated that Appellant was not

trying to conceal the fact that he went to Wal-Mart. Because Wal-Mart was not mentioned ***on the tape*** does not mean that Appellant attempted to conceal this from the detectives. The police reports demonstrate this. Not surprisingly, neither the trial court, nor Appellee in its' brief, point to trial counsel's actual statements about his "strategy." That is because neither element of the asserted strategy makes sense. Trial counsel's representation on this point was neither strategic nor reasonable. The trial court's conclusion otherwise is without support.

Appellee's argument that this claim was insufficiently pled (Answer Brief at pages 56-57) is meritless. The claim was pled as an IAC claim under Strickland in the post-conviction motion. (PC-R. 285-86) The facts underlying the claim, including the state's argument regarding Wal-Mart and the content of the police reports, were asserted in the motion. (Id.) The trial court granted a hearing on the issue. Doorbal v. State, 983 So.2d 464 (Fla. 2008) is inapposite. There, the defendant merely alleged that trial counsel was ineffective because of death and illness to his family, with no specific acts of ineffectiveness asserted. Id. at 483. Here, Appellant alleged that counsel was ineffective because trial counsel failed to utilize specific police reports to rebut the state's specific argument that Appellant did not mention Wal-Mart. There is no common ground

between Doorbal and the instant case. Appellant has not "re-cast" the claim after an evidentiary hearing. The claim is unchanged despite Appellee's meritless assertion otherwise.

Appellee disputes Appellant's statement that the police reports were "written independently of each other." (Answer Brief at page 58, footnote 7) In doing so, Appellee implies that Sanderson simply relied on a mistake that Nesmith made in his report. However, Sanderson's testimony is clear that he did not rely on Nesmith's report in making his own. Rather, Sanderson got this information from Nesmith during a conversation between the two, not from Nesmith's allegedly erroneous report. (PC-R. 2283, Defense Exhibit 7) This was not a case of a transfer of erroneous information from one report to another.

Finally, Appellee continues to reiterate the point that Appellant did not mention going to Wal-Mart ***on the tape*** and that there was nothing counsel could do about this. (Answer Brief at page 58-60) To be clear, Appellant has not argued that he mentioned Wal-Mart on the tape. Clearly, he did not. Appellee attempts to obfuscate the argument Appellant has made. First, the state's objective in emphasizing the neglect to mention Wal-Mart on the tape was to paint Appellant as a liar attempting to conceal his guilt. Second, the police reports, available to counsel, provided a very credible argument, without any downside, that Appellant told Nesmith that he went to Wal-Mart

sometime during the 6-7 hours he spent at the sheriff's office. Thus, the failure to mention Wal-Mart on the tape was rebuttable. Certainly it would not make sense, as trial counsel testified, to "keep bringing up the tape," if you had no counter or rebuttal evidence. However, there was a viable alternative in the police reports. Neither trial counsel, the trial court, nor Appellee has articulated a reasonable argument as to why the reports should not have been utilized.

Argument IV

Mental Health

Appellee cites to the trial court's order denying relief on this issue. (Answer Brief at pages 62-63) Several points in the order merit discussion. The trial court notes that trial counsel, at a hearing on the motion to appoint a mental health expert (filed by his predecessor public defender counsel), told the trial judge that the appointment was unnecessary. Mr. Arnold stated that this was based on he and his investigator's observations of Appellant. (R. 311-12) Mr. Arnold mentioned ***nothing*** to the trial court about Appellant and his mother not wanting to use a mental health expert, something he asserted only at the evidentiary hearing. What Mr. Arnold told the trial court is that he observed Appellant and made a decision, without the assistance of a mental health expert, that no evaluation was

needed. This is inconsistent with his evidentiary hearing testimony that Appellant did not want a mental health expert.

The trial court order also cites Mr. Arnold's evidentiary hearing testimony that he felt he would lose credibility with the jury if he presented mental health evidence after arguing Appellant's innocence at trial. Mr. Arnold's testimony in this regard completely ignores the fact that he was unaware of what mental health evidence could be presented. The mental health evidence presented in post-conviction mainly focused on Appellant's intellectual deficits. In reality, the testimony regarding Appellant's intellectual deficits compliments the trial defense theory by supporting the notion that Appellant did not have the intellectual capacity to complete this crime.

The trial court's order denying relief also cites to trial counsel's testimony that his decision not to use mental health testimony was "based upon the case law in existence at the time." (Answer Brief at page 63) This refers to trial counsel's testimony that if "Carter" had been decided at the the time of Appellant's trial, he would have insisted that an evaluation be done. (PC-R. 1985) This testimony refers to Carter v. State, 706 So.2d 873 (Fla. 1997). The date of the opinion in Carter is November 13, 1997 (rehearing denied March 12, 1998). Thus, the Carter case was in effect over two years before the trial in this case occurred. This Court held in Carter that a competency

hearing should be held in a post-conviction matter where there are factual matters at issue which require the defendant's assistance and that counsel may file a motion to determine competency to proceed in post-conviction without the defendant's signature. Id. at 875-76. Carter would not appear to be relevant to the issue at hand. Finally, any possible utilization of Carter seems to be inconsistent with Mr. Arnold's statement that Appellant was not "in trouble mentally."

Appellee cites to Schriro v. Landrigan, 127 S.Ct. 1933 (2007). Landrigan is distinguishable. First, Landrigan involved a decision by the federal district court denying an evidentiary hearing and the Ninth Circuit's reversal of that decision. Id. at 1938-39. The Court noted with some emphasis that the trial judge in Landrigan was the same judge that presided in post-conviction, making her "ideally situated" to assess the claims made. Id. at 1941. In the instant case, the trial judge and the post-conviction judge were not the same. As the record demonstrates, Judge Joseph Tarbuck presided over the trial and Judge Linda Nobles presided over the post-conviction proceedings. Also in Landrigan, the Supreme Court found that the proposed mitigation was cumulative to that proffered by trial counsel at the time mitigation was waived. Id. at 1943. In the instant matter, Dr. McClain's testimony is not cumulative, as there was no mental health evidence developed or presented at

trial. The Supreme Court also noted that Landrigan did not raise his claim before the Arizona state courts, raising it for the first time in a motion for rehearing after the denial of his post-conviction motion. Id. at 1943. In contrast, Appellant presented his claims in this regard in his initial post-conviction motion in circuit court. Additionally, the Supreme Court, in reversing the Court of Appeals and restoring the district court's finding of no prejudice in Landrigan, noted the weakness of Landrigan's proposed mitigation. Id. 1943-44. The instant case involves powerful mitigation that was not presented. Finally, Landrigan involved an on record waiver of mitigation at trial. There was no such waiver here.

To the extent that Appellee suggests Landrigan erects a per se bar to ineffective assistance claims by a defendant who has ostensibly waived mitigation (Answer Brief at page 65), Appellant rejects the suggestion. The holding in Landrigan involved a consideration of trial counsel's investigation and the nature of the mitigation proposed in post-conviction in order to evaluate the claim vis-a-vis Strickland. Thus, even in the face of an ostensible waiver of mitigation, this does not prevent, per se, a Strickland claim in post-conviction.

Appellee's citation to Jones v. State, 528 So.2d 1171 (Fla. 1988) is distinguishable. In Jones, the proposed mental health

mitigation involved contending that Jones committed the crime because he was paranoid. Id. at 1175. Again, in this case, Dr. McClain's testimony was in harmony with the mitigation that Mr. Arnold did present. Also, Dr. McClain's testimony, primarily involving Appellant's intellectual deficits, was not inconsistent with Mr. Arnold's contention that Appellant did not commit the crime. Also, Dr. McClain's testimony did not involve an admission to committing the crime. Finally, it is certainly notable that in Jones, the trial attorney actually hired a mental health expert to evaluate Jones before making the decision not to utilize him. Id.

In attacking Dr. McClain's testimony while arguing a lack of prejudice, Appellee points to Dr. McClain's testimony that she did not review Appellant's taped statement to law enforcement. (Answer Brief at page 69-70) However, as Dr. McClain testified, she was aware that Appellant made the statement. (PC-R. 2044) Appellee also points out that Dr. McClain did not interview trial counsel. (Answer Brief at page 70) The problem with this is that Appellee articulates no way in which Dr. McClain's testimony suffers or is undercut by these facts. Appellee asserts that "apparently [Dr. McClain] did not have the benefit of the family provided facts that Hurst initiated work and that he was in charge of the family when his parents were not in the house. . ." (Answer Brief at page 70)

Appellee cites to nothing in the record to support this assumption. There is no basis for it. Appellee's "contrast" of Dr. Larson's testimony with that of Dr. McClain (Answer Brief at page 71), in order to demonstrate that Dr. Larson was more credible, is based on the foregoing irrelevancies and assumptions. Therefore, the contrast fails in that it is based on an erroneous foundation.

Argument V

The trial court summarily denied all of the sub-claims contained in this argument. Appellee's suggestion otherwise is less than straightforward. That there were some possible overlapping witnesses (Kladitis, Hess, Lee-Lee Smith, etc.) is irrelevant. The sub-claims here were summarily denied and should be reviewed by this Court in that context.

Detective Nesmith's notes

Appellee asserts that Appellant's claims regarding the notes are purely speculation. (Answer Brief at page 74) This is Appellee's characterization. The claims made herein are very specific regarding the notes of the lead detective. The claims are connected to the trial evidence. To characterize these claims as "conjecture" is off-base in the extreme.

The claim as to the notes regarding Kladitis is not a "fishing expedition." (Id.) Appellant specifically alleged that the notes, in addition to verifying Kladitis' testimony, which the state has never conceded is credible, would prove the state's knowledge and its recognition of the importance of the information. It must be remembered that the state has maintained that this information was so unimportant that it need not have been disclosed to the defense. The fact that Detective Nesmith detailed these facts in his notes shows that he believed the information was important, contradicting the state's position.

Appellee's argument that the notes regarding Hess fail to state any new information is blatantly inaccurate. (Answer Brief at page 75) The notes demonstrate that Hess initially told Nesmith that he saw the victim around 7:15, a much different time frame than his trial testimony. This information is new. The notes also verify that Hess never interviewed Appellant and that ***the state knew about it***. This information is new. The notes also demonstrate for the first time that Hess was not even certain what color Appellant's car was. This information is new. All of this information is Brady/Giglio material heretofore unknown. Contrary to Appellee's suggestion, Appellant never had an opportunity to develop this information at the evidentiary hearing.

Regarding the notes on Lee-Lee Smith, Appellee egregiously mischaracterizes Appellant's claim as one requesting to "explore a matter." (Answer Brief at page 76) Appellant never made such a request and that is not the basis of the claim. Appellee's claim that Appellant has not asserted that the notation of "he" meant anyone other than himself (Appellant)," is simply untrue. (Answer Brief at pages 76-78) Appellant asserted in his motion below and in his initial brief that the notation "he" refers to either Smith or Appellant. Further, Appellee neglects to note Appellant's clear argument that if the "he" is referring to Appellant, the information contained in the note impeaches the state's theory of the murder weapon. That is, if the weapon was disposed of in the dumpster behind Popeye's, it is certainly not the box cutter found by Dr. Berkland on the baker's rack inside the restaurant and the state's theory is wrong.

Incredibly, Appellee argues that the sub-claim as to the Laura Ussery notes is "speculation." (Answer Brief at page 79) To reiterate, the claim is that witness Michael Williams, who testified at trial that Appellant unremorsefully confessed to the murder, told Ussery that Appellant did not commit the crime and had been wrongly arrested. There is nothing speculative about this. This is suppressed evidence that would have impeached Williams' critical testimony.

Appellee also states that Williams did not "designate Hurst" as the person he was talking about. (Answer Brief at pages 79-80) Two points must be made. First, Appellant was the only person arrested for this murder when these notes were made. Lee-Lee Smith was charged, and then only with accessory, some two years later. Appellant is the only person that the note could have referred to. Second, if an evidentiary hearing had been conducted on the allegation (the allegation being clear that the note refers to Appellant), maybe there would be even more clarity as to who the note refers to. By making such an argument, Appellee undercuts its' contention that the summary denial was appropriate. Appellee ignores the fact that Appellant has alleged the person referred to is Appellant. A prima facie case has been made.

Appellee attempts to recast Appellant's claim as asserting that Williams' statement to Ussery was an opinion. (Answer Brief at page 80) To be clear, Appellant has alleged that Williams' statement was fact. There is nothing about the allegation that remotely implied that the statement was an opinion. Appellee continues an attempt to develop theories without the benefit of facts, a problem born, in part, of an erroneous summary denial.

As to Appellee's argument that the notes of Detective Nesmith are hearsay, Appellant would point out that he is not

asking to admit the notes. Appellant, in a claim supported by the notes, asked for an evidentiary hearing. At the hearing, Appellant would have called Ussery, Williams, and Nesmith to testify. Nowhere in the motion does Appellant assert the notes as admissible evidence. Ussery's testimony certainly would be admissible to impeach Williams. Further, Williams' testimony on the subject would be admissible as well. The claim is not, as Appellee suggests, founded on admission of the notes. Finally, by suggesting that Appellant should have listed witnesses in the motion, Appellee attempts to create a pleading requirement that does not exist.

Regarding the notes of Nesmith's interview of Michael Williams, Appellee makes much of its' contention that negative aspects of the interview would have come out had the notes been disclosed. (Answer Brief at 81-82) However, what Appellee ignores is that the negative evidence he cites was already part of the trial. For example, Williams testified at trial that Appellant planned the murder. (TT. 322) Williams also testified that Appellant was laughing when he admitted the crime. (Id.) Appellee also ignores that the state was in possession of these notes at trial and could have introduced, through Williams, any admissible information contained therein.

Appellee challenges Williams' statement that Appellant told him he needed to get his car fixed. (Answer Brief at page 82) First, this was a statement made to a witness unsympathetic to Appellant. Coming from Williams, the evidence would have had more weight than coming from Appellant's relatives, as the trial evidence did. Second, the notes reveal that Appellant told Williams about this prior to the day of the crime and, further, the notes do not reveal that the statement was some sort of ruse as the state theorized at trial. Thus, Williams' statement that Appellant needed to get his car fixed was critical.

Williams statement to Nesmith that "Tim would always do what Lee-Lee wanted" is not "speculation." (Answer Brief at page 82) It is not prefaced by "maybe" or "I think," or any other qualifier that would indicate speculation. There is nothing speculative about the statement and Appellee has not articulated how it is speculative.

As to Williams statement that Lee-Lee said "We got that motherfucker," Appellee asserts that it is not clear that Lee-Lee was talking about his participation in the murder. (Answer Brief at page 83) First, given that Nesmith was questioning Williams about the murder in this case, it is unclear what else he could have possibly been talking about. Also, Appellee's suggestion that Lee-Lee's admission of participation in the

murder does not benefit Appellant ignores the nature of the state's proof at trial. Smith was the state's crucial witness, implicating Appellant in the extreme, denying any participation in the murder, and testifying that Appellant essentially forced him to help in a cover-up. Smith's trial testimony before the jury was diametrically opposed to the statement "We got that motherfucker."

Hess' Grand Jury testimony

Again, Appellant has not asserted that Hess recanted his identification of Appellant. Appellee implies that this is an issue (Answer Brief at page 87) when it is not. Rather, Appellant has asserted, and Hess has admitted, that he lied at trial about interviewing Appellant for a job.

Appellee's argument that this claim should have been raised on direct appeal (Answer Brief at page 88) ignores the facts. Carl Hess never admitted, until the post-conviction evidentiary hearing, that he lied about interviewing Appellant. Appellee provides no explanation how trial or appellate counsel could have proceeded with an argument founded on a fact which was not known to them. At trial, Hess maintained that he interviewed Appellant for a job. That was the state of the record. Making a claim, at trial or on appeal, that Hess lied to the grand jury would have been unsupportable. The claim is not procedurally

barred. Appellee's citation to Evans v. State, 808 So.2d 92 (Fla. 2001), and the citation therein to Brookings v. State 495 So.2d 135 (Fla. 1986), ignores the crucial fact of this claim. That is, neither Evans nor Brookings involved admitted perjury that the state was aware of.

Willie Griffin

Briefly, Appellee's further assertion of the inculpatory evidence (Answer Brief at pages 90-91) is, again, countered by facts indicating the evidence is less than what Appellee asserts. The deposit slip was in plain view in an open area. Derrick Clarke stated that the box cutter at trial was not the one he saw Appellant with. There was available evidence that Appellant did not conceal going to Wal-Mart. Carl Hess, an admitted perjurer, is the only person to place Appellant at Popeye's that morning and, further, his perjury was regarding the identification. The fact that Appellant had electrical tape in his car similar to that found at the scene is of limited relevance. First, there was no testimony that it was the same tape. Second, electrical tape is a fairly homogeneous product. Thus, Griffin's testimony is more important than Appellee allows.

Appellee notes that Griffin's affidavit "while denying that Hurst said 'I did that swine,' states that Hurst said 'Fuck that

swine.’” (Answer Brief at page 91) Appellee implies that there is no difference between the statements. First, the latter statement, unlike the first, does not admit any complicity in the murder whatsoever. Second, because the latter statement does not admit any involvement in the murder, it would never have been admissible at trial. There is no possible basis upon which it could have been admissible and Appellee has asserted none. Further, Appellee’s assertion that Griffin’s affidavit did not recant his trial testimony (Id.), after conceding that he did in the same paragraph, is simply untrue. Griffin’s affidavit clearly states that he fabricated the crucial statement “I did that swine.” This was the only statement allegedly made by Appellant to Griffin admitting guilt. (TT. 365)

Appellee cites to the trial court’s order. (Answer Brief at pages 92-93) The trial court wrote that perpetuation of Griffin’s testimony was not justified based on the “speculative nature of Defendant’s pleading.” (Id. at 93) The court’s finding that Appellant had not specifically alleged the content of Griffin’s testimony is wholly unsupportable. Appellant alleged that Griffin has recanted his trial testimony implicating Appellant. Further, Appellant ultimately submitted an affidavit in which Griffin recants his testimony. The trial court is also incorrect that perjury charges would not be applicable against Griffin. As Appellee candidly notes, Griffin would have been at

least “subject to” a perjury charge based on conflicting statements in his trial testimony and affidavit. See Wickham v. State, 2008 WL 4346321 (Fla.) The court’s finding that Griffin would not have been subject to potential perjury charges is legally incorrect.

Appellee’s separation of powers argument is meritless. Appellee cites to State v. Cotton, 769 So.2d 345 (Fla. 2000) and Office of the State Attorney v. Parrotino, 628 So.2d 1097 (Fla. 1993). Both of these cases deal with prosecutorial discretion to charge crimes or, in Cotton, to seek enhanced sentencing. These are solely executive functions to be sure. However, the cases have no connection whatsoever to the issue at hand. The issue here involves assuming the logistics of moving a prisoner from one state to another and housing him, something the state does on a fairly frequent basis.

It is also worthy to note that the trial court’s order never accounts for the question of how Appellant is supposed to obtain due process here. This is a situation where Appellant and undersigned counsel did everything within their power to secure the witness’ testimony. The end result of Appellant’s efforts was that Griffin could only be secured as a witness before the court with the state’s assistance. As an alternative to testimony before the court, Appellant suggested perpetuation by

deposition or telephonic or video testimony. The court refused to compel the state to provide the ***required*** assistance and denied the alternatives suggested by Appellant. This is an issue for which an evidentiary hearing is clearly required and for which the court initially granted a hearing. Appellant agrees with the trial court's conclusion that it "has nothing but the bare allegations of Defendant to support this claim." That is not Appellant's fault. Due process has been denied.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, and the arguments made in the Initial Brief, Appellant prays that this Court reverse the lower court and either vacate Appellant's conviction and sentence or remand this matter for further proceedings.

Respectfully submitted,

_____

Jeffrey M. Hazen
Fla. Bar No. 0153060
Attorney for Appellant

CERTIFICATE OF FONT SIZE AND SERVICE

Below signed counsel certifies that this reply brief was generated in Courier New 12 point font pursuant to Fla. R. App. P. 9.210 and served by U.S. mail on Assistant Attorney General Stephen R. White, Capital Appeals, PL-01, The Capitol, Tallahassee, FL 32399 by first-class U.S. mail on this _____ day of November, 2008.

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Jeffrey M. Hazen
Fla. Bar No. 0153060

Harry Brody
Fla. Bar No. 0977860

Brody & Hazen, PA
P. O. Box 16515
Tallahassee, FL 32317
(850) 942-0005

Counsel for Appellant