IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-146

LOWER COURT CASE NO. CF90-224-2A1-XX

DAVID JOSEPH PITTMAN

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

INTRODUCTION[1]

_____This is a case of innocence.[2] Mr. Pittman did not commit the murders for which he stands convicted.[3] In constructing its case and presenting it to the jury, the State withheld from the defense a wealth of favorable information which would have impeached its witnesses and supported the theory of the defense. The wealth of undisclosed favorable information casts a whole new light on the case and undermines confidence in the reliability of the outcome. In addition to the wealth of undisclosed favorable information, Mr. Pittman presents newly discovered evidence which demonstrates his innocence. This new evidence, as law enforcement conceded at the evidentiary hearing, was and is

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[1]This proceeding involves the appeal of the denial of Mr. Pittman's motion for postconviction relief. The following abbreviations will be utilized to cite to the record in this appeal, with appropriate page number(s) following the abbreviation:

"R. __." – record on direct appeal to this Court;
"PC-R. __." – record on appeal from the denial of postconviction relief;
"PC-RE. __." - separately paginated record containing exhibits admitted during the evidentiary hearing.

Other references will be self-explanatory or explained herein.

[2]During the postconviction evidentiary hearing, the trial prosecutor, Hardy Pickard, testified that "where the defense went or was trying to show that Mr. Pittman's wife, or ex-wife [Barbara Marie Pittman], and her new husband [Allen Pridgen] could have committed the crime rather than him" (PC-R. 3972).

[3]Mr. Pittman testified on his own behalf. He not only asserted his innocence, but explained that his hysterical reaction when he first learned of the fire at his in-law's house was because he feared for his children - "my children, my kids, stayed at the Knowles' house, their grandmother and grandfather's house 95 percent of their lives" (R. 3842).

inconsistent with the State's theory of the case and with Mr. Pittman's guilt.[4] This new evidence which the State did not challenge or rebut, when considered cumulatively with the Brady material and other evidence developed in follow up investigation, shows that Mr. Pittman likely would have been acquitted had this new evidence and the withheld evidence been heard by the jury.

As the trial record shows, it was at or about 3:10 AM on May 15, 1990, that David Hess, a newspaper distributor, first saw a burst of red light in the distant sky while making his rounds delivering newspapers (R. 1144-5, 1152). He believed that it was the glow of a large fire.[5] He was later able to determine that he had been some distance from the fire, may be two miles.

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[4]This new evidence includes HRS records and testimony showing that Barbara Marie Pridgen, formerly Pittman, advised HRS officials in 1998 that Cindy Pittman, her daughter with Mr. Pittman, had witnessed the murder of "her grandmother by her uncle" (PC-R. 3460-62, 3471; PC-RE 681). The trial prosecutor acknowledged in his testimony that Cindy Pittman's presence at the scene and observation of her grandmother's murder was "inconsistent" with his theory of prosecution (PC-R. 3972).

The State did not contest the accuracy of the HRS records showing that Barbara Marie Pridgen had advised HRS officials that four-year old Cindy Pittman had witnessed her grandmother's murder. Even though Barbara Marie Pridgen was in the hallway waiting outside the courtroom, the State did not call her to dispute that she had in fact reported to HRS personnel that Cindy had witnessed her grandmother's murder (PC-R. 5266).

[5]Mr. Hess testified that he was "pretty sure it was right around ten minutes after three" that he first saw a flash of red light in the sky (R. 1152). On direct appeal, this Court noted that Mr. Hess saw the burst of flame "shortly after 3:00 a.m. on May 15, 1990." Pittman v. State, 646 So. 2d 167, 168 (Fla. 1994). Mr. Hess said that he was "[p]robably two miles or less" from the scene of the fire when he first noticed it (R. 1145). Mr. Hess "didn't stop to call or anything" because he assumed "some emergency vehicles would have been summoned" (R. 1145-6).

The Mulberry Fire Department was dispatched to the fire at 3:32 AM (R. 1263). They arrived at the scene of the fire at 3:46 AM (R. 1264).[6] At that time, "the living room area that was pretty much what we considered fully involved" (R. 1265).[7] A minute or two after the firefighters arrived "we encountered an explosion that took part of the living room roof down and blew out the front part of the wall" (R. 1267). Once the fire was under control, a search of the house began. During this search, three bodies were discovered (R. 1269-72). They were the remains of Clarence and Barbara Knowles and their 20-year old daughter, Bonnie.[8] All three were dead before the fire started (R. 1521).

After examining the scene that the fire, the state fire marshal's office determined that the fire was incendiary in nature. "A flammable liquid [was] poured on the floor" of the residence (R. 1462).[9] The length of time that the fire burned

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[6]The structure burning was located at 500 NE 4th Street in Mulberry (R. 1263). It was "a wood frame, single story, single family" residence (R. 1265).

[7]This Court noted on direct appeal that "[w]hen authorities investigated they found the home of Clarence and Barbara Knowles fully engulfed by fire." Pittman, 646 So. 2d at 168.

[8]David Pittman was at the time the estranged husband of the Knowles' older daughter, Barbara Marie. David and Barbara Marie were the parents of three young children who normally were living with their maternal grandparents, Clarence and Barbara Knowles at 500 NE 4th St. (R. 2074; PC-R. 3977; PC-RE. 850, 857). The children were Cindy Pittman - DOB 1/13/86, Robin Pittman - DOB 3/17/87, and Wendy Pittman - DOB 12/27/88 (PC-RE 678).

[9]A detective with the Polk County Sheriff's Office opined that a flammable liquid was poured throughout the living room and into a hallway (R. 1384). It was determined that there was a good "possibility" that the flammable liquid was poured on furniture in the living room (R. 1384). There was also a fire trail that

before it was visible in the night sky could not be determined. According to the deputy fire marshal who investigated, "[i]f the fire was started shortly before discovery, the amount of damage done would indicate there was a substantial amount of flammable liquid poured. If the fire was started a half hour before discovery, then there may have just been enough flammable liquid used to get the normal combustibles in the living room burning." (R. 1469).[10] Thus, the longer the time taken to obtain and pour a large quantity of the flammable liquid, the faster the fire. Conversely, the less time taken to obtain and the flammable liquid, the slower the fire progressed.

A medical examiner examined the bodies and found that Bonnie Knowles had been fatally stabbed eight times. Six of the wounds were sufficiently serious to have caused death on their own. Together they caused massive bleeding and a rapid death (R. 1515-16). The burning of Bonnie's body occurred postmortem (R. 1511).

In his examination of Barbara Knowles' body, the medical examiner found three stab wounds - one to the neck and two in the chest. The two wounds to the chest "were fatal" (R. 1519). Death would have been fairly rapid, "maximum five minutes",

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came out of the residence (R. 1472). This trailer extended "[a]pproximately 15 feet" (R. 1400).

The bedroom in which Bonnie Knowles was found contained the heaviest damage (R. 1386). This was because "an automobile tire had been placed under the approximate center" of the bed (R. 1387). This caused the fire to burn very hot in that bedroom.

[10]The "half hour before discovery" reference by the deputy fire marshal would place the start of the fire at 2:40 AM.

because they hit the aorta (R. 1519). The burning of Barbara's body also occurred postmortem (R. 1517).

In his examination of Clarence's body, the medical examiner found five stab wounds (R. 1521). One wound was superficial; the other four penetrated the pleural cavity and were lethal (R. 1521). As with Barbara, Clarence would have died from massive bleeding "within minutes" (R. 1522). The burns to the body would have been postmortem because there was no "soot in his airways, and blood test was negative" (R. 1521).[11]

From his observations of the lividity in the bodies of Barbara and Clarence, the medical examiner was able to determine that the time of death was probably after 7:15 PM on May 14th (R. 1526). Barbara's stomach contents included semi-digested rice and green beans (R. 1558). The medical examiner indicated that the food found in Barbara's stomach was of the kind that should be digested within two to four hours of its consumption (R. 1558). So her death would have occurred within two to fours hours of the time that she ate the rice and green beans still identifiable in her stomach at the time of her death.

At trial, the witnesses called by the State established that Mr. Pittman was in the presence of others who could vouch for his whereabouts up until 2:30 AM on the morning of May 15, 1991.[12]

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[11]Since soot was not found in the victims' airways nor elevated levels of carbon monoxide detected, none of the victims were alive at the time of the fire (R. 1539). Each had stopped breathing by the time the fire was set. However, there was no way to determine how long they had been dead when the fire began.

[12]The State called Mr. Pittman's stepsister, Bobbie Jo Pittman, who testified that on May 14, 1990, the day before the homicides, she received a call from David Pittman some time before 3:00 PM

From 2:30 AM until 3:30 AM, no one was with David and able to vouch for his whereabouts.[13] It was in that one hour period that the State argued that Mr. Pittman committed the murders. Since

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(R. 2061). David asked her to pick him up at Bob Barker's house in Plant City, where he had been staying, so he could spend the night at his stepdad's residence. She picked him up and they got back to their dad's house in Mulberry at around "4:00 or 4:30" (R. 2063). Later, they went to a store to call Barker and invite him to "party" with them (R. 2033). They then went to a "Party Discount" store before returning to their dad's residence (R. 2033, 2064). Between 7:00 and 8:00, Tammy Davis joined Bobby Jo and David (R. 2065). Bobbie Jo and Tammy briefly left to get gas for Tammy's car (R. 2035). They left Bobbie Jo's baby with David who was talking on the phone with his girlfriend, Carrie (R. 2066). After they returned, Bobbie Jo, Tammy and David, sat around watching TV and drinking beer (R. 2035). Later, Bobbie Jo and David drove to the store to call Barker again (R. 2035). They couldn't reach him, so they went back to their dad's house. They along with Tammy then drove to Barker's house in Plant City (R. 2037). They arrived at around 9:30 (R. 2067). They stayed between 30 minutes and an hour (R. 2067). They drove around a bit before going home. They got back to the house a little after 11:00 PM (R. 2068). Bobbie Jo watched TV, while David and Tammy sat outside talking (R. 2038). When Tammy left, David went inside and tried to help Bobbie Jo get her baby to sleep (R. 2069). Once that was accomplished, she and David watched TV until 2:30 AM when she went to bed (R. 2039, 2070). She left David laying on the couch watching TV (R. 2039-40).

[13]Eugene Pittman, David's stepfather, was called by the State and testified that he left work at "about 25 till 3:00 that morning" (R. 2093). He got home around 3 AM. David was not on the couch at that time (R. 2094). The door to his bedroom was locked (R. 2113). Eugene did not knock or otherwise check to see if David was sleeping in the bedroom. Eugene went to his bedroom to sleep, but he lay awake (R. 2095). He heard noises - "It sounded like I heard somebody walking in the house so I got up to go look" (R. 2096). "Well, when I heard something I got up and walked into my living room and didn't see anything. I thought I saw something go by my window. I seen an image go by the window, you know" (R. 2096). Eugene then went back to bed. He again heard something "so I got up to look again" (R. 2097). But again, he did not see anything. So, he went back to bed. Then, he got up again and saw "David coming out of this back bedroom" (R. 2097). It was close to 3:30 AM (R. 2099). David looked tousled-up, like he was sleepy (R. 2116).

the red glow from the fire was seen two miles away at 3:10 AM, this left a forty minute window according to the State for Mr. Pittman to walk from his father's house to the Knowles' home, enter the house, stab three people to death, get a flammable liquid, pour it through the house, set the fire, and have it grow so large as to be visible two miles away.

Trial counsel focused on the virtual impossibility that Mr. Pittman could have committed the murders and set the fire in this narrow time window. In his closing, counsel argued:

> But even assuming that the killings occurred shortly before the fire started, there are a number of different events that would have occurred in order for that to have happened.
>
> The killings themselves would have taken time, the cutting of the phone wires would have taken time, getting to the area would have taken time. And when you start comparing how long the events that led up to the crime occurred, how long it took for the person to commit the crimes, their after-the-fact actions, common sense tells you this wasn't something that happened that quickly like that (demonstrating) instantaneously.
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> * * *
>
> If David had done it within the time period that you will see demonstrated over here on this side of the chart, he would have had from about 2:30 to 3:00 o'clock to do all the things I described. It takes 13 minutes to walk from the Pittman residence to the Knowles house.

(R. 4052-54). Given the virtually impossible time parameters, the State's case came to rest upon the testimony of two jailhouse informants - David Pounds and Carl Hughes.[14]

[14]Robert Norgard, Mr. Pittman's trial counsel, testified in 2006 that but for Carl Hughes and David Pounds, the State's case was entirely circumstantial as there was no physical evidence tying Mr. Pittman to the homicides (PC-R. 4126).

David Pounds, age 29, was a habitual offender who testified that when he was in jail with Mr. Pittman, he heard him say, "the people that I killed," then changed it to "the people they say I killed" (R. 1895). He alleged that he heard Mr. Pittman admit to the crime but claimed that "they" could not "pin" it on him (R. 1897).[15] Pounds indicated that he was interviewed by the police on June 4, 1990, but provided no information. He merely inquired what benefit he might obtain (R. 1901-02). On June 5, 1990, Pounds left the county jail when the Department of Corrections took custody of him so that he could begin serving the life sentence that he had received (R. 1905). He then had his mother contact the police and let them know that he wanted to speak with them about Mr. Pittman (R. 1935). The police re-interviewed him on June 25, 1990, and Pounds gave a taped statement in which he claimed that Mr. Pittman had made a statement in which he used the phrase, "the people I killed" (R. 1935).

However, a wealth of significant impeaching information concerning Pounds was not disclosed to the defense.[16] This

[15]Mr. Pittman testified that he did not remember Pounds and did not think that he had ever spoken to him (R. 3889-90).

[16]An undisclosed PSI prepared in April of 1990 for Pounds' sentencing on May 9th, indicated that Pounds was suffering from visual and auditory hallucinations. Reference was made to the fact that Pounds "heard voices talking to him" (PC-RE. 1002). The PSI indicated that as a result Pounds was receiving psychotropic medications - Vistaril, Tifferal, and Thorazine (PC-RE. 1002). The PSI indicated that Pounds was in need of mental health treatment which he would receive in prison. The DOC medical file for Pounds included notes from mental health interviews on June 12 and June 26, 1990. These notes reflected Pounds' fragile mental condition in June of 1990(PC-RE. 1092-93). Pounds had suffered a relapse of a major depression that included psychotic features (PC-R. 4053). It was also noted that Pounds

undisclosed information clearly shows that Pounds was totally unbelievable, and that the State investigated and learned during Mr. Pittman's trial that a significant detail Pounds included in his June 25th statement was not true.

At the time of trial, Carl Hughes was an inmate at a New York federal penitentiary.[17] He testified that he shared a cell with Mr. Pittman at the Polk County Jail from June 20-27, 1990

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had been secretly spitting out the psychotropic medication that he had been receiving in county jail (PC-RE. 1093).

Also undisclosed were a police officer's handwritten notes of an interview that he conducted of Pounds on June 19, 1990, at 9:07 AM (PC-R. 3486; PC-RE. 729). This conflicted with Pounds' trial testimony that he was interviewed just twice, on June 4th and June 25th. It was clear from Pounds' trial testimony that between his June 4th statement and his June 25th statement, his story had substantially changed. The existence of an undisclosed interview on June 19th provided Pounds with a time and date to obtain the information he included in his June 25th statement.

The existence of an undisclosed June 19th interview also dovetails with additional information that was kept from the defense. In the June 25th taped statement, Pounds identified Carl Hughes as another individual that shared the same pod in jail with himself and Mr. Pittman. However, jail records obtained by the State in the middle of Mr. Pittman's trial showed that Pounds was only in the same pod as Mr. Pittman between May 18th and 21st (PC-RE. 869). The records also show that Pounds and Hughes were never together and did not share a pod with Mr. Pittman at the same time (PC-R. 3912-14). Pounds left the jail on June 5th. Hughes was not placed with Mr. Pittman until June 20th (R. 2359). The name Carl Hughes could have been provided to Pounds on June 19th to include in his June 25th statement to justify the June 26th interview of Hughes regarding Mr. Pittman. Otherwise, there is no explanation for why Pounds indicated that Hughes was present.

[17]Carl Hughes had been the director of operations for the Lakeland Housing Authority and served on the Southeast Council for Public Housing representing the State of Florida (R. 2247). In connection with his work he was charged in federal and state courts with numerous counts of bribery and grand theft (R. 2246). Hughes described his legal difficulties as "white collar crime, I wasn't out here with drug charges or murder charges, there was basically no victims except an agency" (R. 2286).

(R. 1895).[18] He claimed that he was first contacted by law enforcement on June 26, 1990, after he had his wife, Kathie Anders, contact Randy Dey, an FDLE agent, on his behalf.[19] Hughes said that he had called his wife and "asked her if she had heard anything about [Pittman's murder case] and she said no. So

[18]Hughes had been convicted in federal court of bribery and falsifying a firearms application. He pled guilty in federal court as part of a plea agreement on May 23, 1990 (R. 2305). The federal sentencing occurred on August 3, 1990 (R. 2321). At the federal sentencing, Randy Dey, an FDLE agent, spoke to the presiding judge at a side bar and advised the judge that Hughes "had been cooperating" (R. 2321). However, Hughes claimed he [did]n't know the whole extent of what was said there" (R. 2321). He was also convicted in Polk County of seventeen counts of bribery and grand theft (R. 2286-2294). After facing an 85-year sentence, he received eighteen months in federal prison to be served concurrently with 4 1/2 years in state prison (R. 2247, 2286). The state court sentencing occurred on September 26, 1990 (R. 2323). On October 6, 1990, Hughes wrote the state prosecutor a letter and thanked him. As Hughes explained at trial, "I was quite aware that David Bergdoll [the state court prosecutor] had done a reversal in the extent that [the sentence] wasn't 85 years" (R. 2324). However, Hughes was adamant in his testimony at Mr. Pittman's trial that he had not received any consideration for his testimony against Mr. Pittman - "never was there any treatment, fair treatment not fair - - not any downward departures of my sentence given me" (R. 2333). In fact, he claimed that he received harsher treatment and a worse sentence than he otherwise would have received "to give the State credibility so that I could get on this stand today and you not be successful in convincing the jury that I did this for a motive" (R. 2334). Hughes told the jury that "[v]ery simply, I will end up doing three - - I've already done twice what anybody else would do. I'm going to end up doing three times that amount" (R. 2335).

[19]Hughes was first put in the pod on June 20th. Thereafter, he began talking with Mr. Pittman. On the second day of these alleged conversations, Hughes claimed to have asked his wife to contact Randy Dey, an FDLE officer, and relay the facts of the Pittman murder in order to confirm that they were accurate. However, it was not until "the third night that he woke me up ... and was crying and told me to sit up, that we needed to talk" (R. 2258). It was then that he admitted the crime.

I asked her to contact Randy Dey, ask him in fact was there any murders like this occurred" (R. 2261-2). When Hughes called his wife back three hours later, Kathie said that she had related the information about these murders to Dey, and Dey responded that he would "be very interested in talking to Carl about it" (R. 2338). Soon thereafter on June 26th, Dey, along with Tom Cosper, a police officer, came to see Hughes in the jail (R. 2263). According to Hughes, this was his first meeting with law enforcement to discuss the Pittman case. Hughes refused to consent to tape recording the interview.[20] According to Hughes, his next contact with law enforcement concerning Mr. Pittman occurred on September 11, 1990, when he gave a taped statement to Agent Dey and Det. Cosper (PC-R. 4164).[21] According to Hughes'

[20]According to Hughes' trial testimony, Mr. Pittman told him that he called Bonnie Knowles to see if she would talk with her parents about him seeing his children (R. 2252). He knocked on her bedroom window and she let him in. He pulled up a chair "and started talking about the problems he was having" (R. 2253). They then talked about mental problems. They then talked about having sex but Bonnie was "on her period." They discussed oral sex. She "hollered" and he tried to shut her up. He "lost it," cut her throat and stabbed her (R. 2252-3, 2261). Hughes testified that Bonnie's mother ran to the bedroom door and Mr. Pittman stabbed her and then grabbed her father, who was on the phone, knocked him down and killed him in the hall (R. 2253-4). He then went to the shed, got gasoline and poured some on Bonnie's bed. He put a tire under her bed to make the fire burn hotter. Hughes told the jury that Pittman spread gasoline all over the house. After spreading the gasoline around, he then took the time to clean up in the bathroom before lighting the fire (R. 2254). Because he had a lot of blood on himself, he washed blood off himself and his clothes. He then found Bonnie's car keys and put the gas can in her car and then drove off in it. Hughes said that Mr. Pittman drove to his father's house and parked Bonnie's car and entered the house by the back door at 2:30 or 3:00 a.m. (R. 2254-5).

[21]The September 11th taped statement occurred after Hughes wrote a letter to the state court judge on September 7th advising him of

trial testimony, between the June 26th statement (not on tape) and the September 11th taped statement he did not provide information regarding Mr. Pittman, but was only negotiating whether he would ("Q. You were giving him information, correct? A. No, sir, we were negotiating giving information")(R. 2300).

At trial, Hughes testified that he had not received any rewards for his testimony. He swore: "I was given no favors as a result even up to the day of sentencing of doing that, contrary to what you're trying to lead them to believe. It didn't happen that way." (R. 2336-37). During the cross, he challenged Mr. Pittman's counsel: "So I haven't got any rewards that you're going to be able to convince this jury I got. I haven't got any incentives to sit here today and do this." (R. 2336).[22]

However, both the State and Hughes withheld critical information from the defense and the jury. Kathleen Anders, Hughes' wife, testified in 2006 (PC-R. 3539). She was married to Hughes between 1980 and 1994, and had three children with him (PC-R. 3540-1). She recalled that after he went to jail in late 1989, she often spoke to him. During one call, Hughes wanted to get money. When she balked, "he became very angry and told [her] that he was trying to keep me from being arrested along with him

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"cooperation that I had given or attempted to give" (R. 2322). In the letter, Hughes made reference to the David Pittman case (R. 2322). The September 26th sentencing occurred after the September 11th taped statement, and the prosecutor advised the judge that Hughes was cooperating on a murder case (R. 2323).

[22]Hughes further asserted that because the State did not what to create an appearance that he received any benefit, he was treated worse by the State than "everybody else" (R. 2357).

and that he had been asked by FDLE to obtain information regarding this case that had been in the newspapers, which, in fact, was Mr. Pittman's case" (PC-R. 3542). Hughes told her that "the FDLE had [her] and the house under surveillance and that they were watching [her] coming and going" (PC-R. 3543).[23] In order to protect her and their three young children, Hughes said, "He was to - - the way it was told to me is that he was to gather information for them by way of befriending Mr. Pittman while they were both incarcerated" (PC-R. 3543).[24] When asked if she had a clear recollection of this, Ms. Anders responded: "Absolutely, That I know, because it involved me specifically being arrested, so, yes, I do" (PC-R. 3549).[25] She explained:

> He told me that he had kept me from being arrested. And I asked him how could that be, I didn't have anything to do with anything he had done. And he said that he - - they had surveillance on me and the house and they were watching me, and in order to keep me from being arrested and charged along with him for what I assumed at the time was the state charges about the HUD thing, that he had to agree to obtain information regarding the Pittman case.

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[23]Ms. Anders testified that she was interviewed by the prosecutor on her husband's case, David Bergdoll (PC-R. 3545). Bergdoll asked her "to come in and they asked me, you know, how I paid the bills and financial things like that" (PC-R. 3549). A polygraph examination was even administered (PC-R. 3549). She found the experience very frightening (PC-R. 3549).

[24]As Ms. Anders remembered it, Hughes was sent in as an agent for the State to get evidence from Mr. Pittman. Had this been disclosed, Hughes' testimony would obviously have been inadmissible.

[25]Ms. Anders' testimony revealed that Hughes lied at Mr. Pittman's trial when he claimed to have no incentive to gather evidence against Mr. Pittman and testify for the State.

(PC-R. 3549-50).[26]

Ms. Anders also explained that Hughes "was always concerned about how much time he would have to spend in jail, if any. He was pretty much, as related to me by him, that if he did certain things, that they could, in fact, possibly lower that time in jail. He was going to do some time in jail, but it wouldn't be as much if during this time he cooperated doing other things" (PC-R. 3546). According to Ms. Anders, Hughes' involvement in the Pittman case was in order to reduce the amount of time that he, Hughes, faced in prison, and to protect Ms. Anders, who had custody of his three young children, from prosecution.

Also withheld from the defense and from the jury was the fact that Hughes was interviewed regarding Mr. Pittman on July 6, 1990 at 9:20 AM (PC-R. 3507).[27] Former Polk County Sheriff Det. Tom Cosper testified in 2006. He identified his handwritten notes from the July 6th interview of Hughes (PC-RE. 866-7).[28]

[26]Ms. Anders frequently relayed messages back and forth between Dey and Hughes while he was incarcerated in 1990. However, she did not remember that any of these messages were related to Mr. Pittman's case (PC-R. 3544). She remembered that Hughes asked her to find out from Dey if he could stay in the State of Florida. Occasionally, he would tell her to tell Dey that he needed to talk to him about paperwork he had received (PC-R. 3544). From what he told his wife, Hughes was in frequent direct contact with Dey (PC-R. 3550).

[27]The fact that Hughes met with the police on July 6th and discussed Mr. Pittman's supposed confession demonstrates that he lied when he testified at Mr. Pittman's trial that between June 26th and September 11th he gave the police no information, but was merely negotiating as to whether he would.

[28]Det. Cosper was subpoenaed to appear before the grand jury on July 12, 1990, a few days after his July 6th interview of Hughes (PC-R. 3510; PC-RE. 868). Hughes was not called as a witness (PC-R. 3904). Mr. Pittman was indicted on July 12, 1990.

The purpose of the notes was to memorialize what Hughes related to Cosper during the interview (PC-R. 3508). Det. Cosper testified that he would not have knowingly written anything down that was incorrect; the notes reflect what he was told (PC-R. 3527). Written in the portion of the notes discussing Hughes' description of the sequence of events following the murders, were the words "real off on time of occurrence" (PC-R. 3509).[29]

Beside the undisclosed exculpatory evidence that eviscerated the credibility of the State's witnesses, Mr. Pittman presented newly discovered evidence of innocence in his Rule 3.851 motion. Carlos Battles testified in 2006 that in 1998, he had been employed by the Department of Children and Family Services as a child protector investigator (PC-R. 3466). He identified a case file reporting on an investigation as to the living conditions for Cindy Pittman which was introduced into evidence (PC-RE. 671-726). In the course of the investigation, Battles was told by Cindy Pittman's mother, Barbara Marie Pridgen, that Cindy's difficulties stemmed from her having witnessed her grandmother's murder (PC-R. 3460)("Mom states child Cindy needs counseling for the sexual abuse and states the child witnessed her grandmother being killed by her bother-in-law"). Elsewhere in the file, reference was made to Cindy witnessing her grandmother murdered by her uncle (PC-RE. 681). Battles was not sure why "uncle" was used in one place and "brother-in-law" in another (PC-R. 3462).

[29]This handwritten notation clearly shows that as of July 6th, Hughes' story was not holding together because his time line was all wrong. More definitive impeachment that Mr. Pittman had confessed sometime before that interview is hard to imagine.

But while testifying, Battles indicated that he had an independent recollection of "that being said to me. That stood out in my mind that the child witnessed a murder" (PC-R. 3460, 3471).[30]

Mr. Pittman also presented the testimony of Chastity Eagan. She indicated that in 1990 when she was 13 years old, her mother lived with Barbara Marie and Allen Pridgen (PC-R. 4987-89). At that time, she spent weekends with her mother (PC-R. 4989). Ms. Eagan saw Barbara Marie using methamphetamine "[e]very time I went over there" (PC-R. 4995). In this time period, Ms. Eagan heard Barbara Marie discussing the deaths of her parents and her sister (PC-R. 4990). Ms. Eagan did not know their names; she just knew them as "the Knowles" (PC-R. 4996). Barbara Marie "didn't act upset" over their deaths; Ms. Eagan heard her say that "she was glad her parents were dead" (PC-R. 4991). Ms. Eagan understood that "HRS had been working with her parents to take her children" before their deaths (PC-R. 4991).[31] After the murders, Barbara Marie "went on a spending spree" (PC-R. 4992).

Ms. Eagan testified that she knew David Pridgen, Allen's brother, and Barbara Marie's brother-in-law (PC-R. 4993). When she was fifteen Ms. Eagan briefly dated David Pridgen who told

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[30]From the birth date appearing in the file (1/13/86), it is apparent that Cindy was a little over four years old at the time that her grandmother was murdered.

[31]John Van Shuman who was called by the State testified that he also remembered hearing something about HRS trying to take Barbara Marie's children away from her (PC-R. 5046). He also confirmed that in May of 1990 money was tight for Barbara Marie (PC-R. 5045). And, he recalled that after her parents died, Barbara Marie came into money (PC-R. 5041-42).

her he had killed three people (PC-R. 4993-4).[32] She believed this (the conversation) occurred at a Halloween party in 1992 and that others may have heard the statement (PC-R. 5002, 5006).

In light of the withheld Brady material, in light of the new evidence indicating that Cindy Pittman saw her grandmother murdered, and in light of the new evidence that David Pridgen in 1992 said that he had killed three people, a new trial is required.

STATEMENT OF THE CASE

[32]The State called David Pridgen. He did not dispute talking to Ms. Eagan about killing people, he just did not recall saying that he had killed three people. Pridgen explained: "I may have been talking about the war, but I didn't - - I don't remember specifically saying that I killed three people. I was talking about the killing and how it upset me." (PC-R. 5023, 5030). Pridgen did deny any involvement with the murders of the Knowles (PC-R. 5024). He claimed that on May 15, 1990, he was in the military and stationed at Fort Bragg, North Carolina (PC-R. 5022). He remembered because he had broken his foot in April and was recovering from that injury. However, Pridgen had no military records to support his claim (PC-R. 5026-27). The State had asked him to get military records to corroborate his claim. He said he tried: "I called, you know, and I haven't gotten anything back yet." (PC-R. 5027). Accordingly, he had no documentation to back up his testimony showing his whereabouts in April and May of 1990 (PC-R. 5032).

However, the State's very next witness contradicted Pridgen. John Van Shuman, the boyfriend of Chastity Eagan's mother, testified that David Pridgen was staying in his mom's house in May of 1990 (PC-R. 5045). Shuman also indicated that Pridgen was Cindy Pittman's uncle (PC-R. 5046).

As to overhearing Pridgen's conversation with Chastity about killing people, Shuman said he did not recall such a discussion (PC-R. 5037). However, Shuman testified that starting in the late 80's he began using "meth" (PC-R. 5044). He was doing "meth" when he was with Chastity's mother (PC-R. 5043). Because of his "meth" use, he had gaps in his memory. As a result, Shuman had no reason to question Chastity's memory as to such a conversation occurring in the early 90's, even though he did not remember it (PC-R. 5044).

On May 15, 1990, an information was filed charging Mr. Pittman with one count of grand theft and one count of arson. On July 12, 1990, Mr. Pittman was indicted on three counts of first-degree murder, two counts of arson, and one count each of burglary and grand theft (R. 4836-40). Trial commenced on March 18, 1991 (R. 5200). The jury returned a guilty verdict, finding Mr. Pittman guilty of three counts of first degree murder, two counts of arson, and one count of grand theft on April 19, 1991 (R. 5108-11, 5113-14). The jury found Mr. Pittman not guilty of the burglary charged in count five of the indictment (R. 5112).[33] On April, 23, 1991, the jury returned a death recommendation by a nine to three vote (R. 5165-7). On April 25, 1991, Mr. Pittman was sentenced to death (R. 5175-82, 5185-7).[34] He received fifteen years for each arson count and five years for grand theft, to be served concurrently (R. 5168, 5170).

On direct appeal, this Court affirmed. Pittman v. State, 646 So. 2d 167 (Fla. 1994). Mr. Pittman timely filed a Rule 3.851 motion in circuit court. This motion was amended a number of times. On January 25, 2006, the circuit court granting an evidentiary hearing on Claims I, II, III, and VII of the Rule 3.851 motion. The evidentiary hearing was held on May 8-11, 2006, February 15, 2007, and July 27, 2007.

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[33]The acquittal of the burglary count suggests that the jury believed Hughes' testimony that Mr. Pittman obtained access to the house when he knocked on Bonnie's window and she let him.

[34]The judge found two aggravators- prior conviction of a violent felony and heinous, atrocious and cruel (R. 5175-78). The judge did not find any mitigating factors (R. 5178-81).

On November 5, 2007, the circuit court denied relief. Mr. Pittman's motion for rehearing was denied, and he then filed a timely notice of appeal on January 25, 2008 (PC-R. 5489).

STATEMENT OF FACTS

THE TRIAL

At 3:10 AM on May 15, 1990, a newspaper distributor saw a burst of fire in the sky some two miles away (R. 1144-6, 1152). The fire was at the Knowles residence in Mulberry. Firemen were dispatched to the fire at 3:32 AM and arrived at 3:46 AM (R. 1264). When they arrived, the grass was burning from the front door easterly in a circular motion - like a "fire trail" and the living room area was fully involved with the fire (R. 1265, 1278). A minute or two after they arrived, they "encountered an explosion that took part of the living room roof down and blew out the front part of the wall" (R. 1267).

Police found the three victims dead inside the burned house. Clarence Knowles was found in the hallway between the kitchen and the bedroom. Barbara Knowles was found in the hall between two bedrooms. Their daughter, Bonnie Knowles, was found in the bedroom on the northwest side of the house (R. 1269-71). The medical examiner found that each had been stabbed. Bonnie had been stabbed eight times; five of the wounds would have been fatal (R. 1513-6). Barbara had been stabbed three times; two of the wounds would have been fatal (R. 1518-9). Clarence had been stabbed five times; four of the wounds would have been fatal (R. 1520-2). All three were dead before the fire started (R. 1521).

There was a burn pattern on the living room floor where a flammable liquid had been poured (R. 1381-2). The fire spread out from the living room. In Bonnie's bedroom, a tire under the bed caused the fire to burn hotter there (R. 1386-7). A burn trail extended from the front of the house to a side yard (R. 1385). Two days after the fire, police found that a phone wire had been cut apparently by wire cutters (R. 1391-3, 3347, 3354). A murder weapon was never located (R. 1430-1, 1435).

A brown Toyota car was missing from the Knowles' yard (R. 1237). The car was found on Prairie Mine Road on fire. Evidence of gasoline was found in the car, and it was determined that the fire was incendiary (R. 1500-1, 2727-31).[35]

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[35]James Gardner testified that the car was not present on Prairie Mine Road at 3:26 AM, but he did see it there at 5:00 AM (R. 1296-9). James Troup noticed the car on his way to work at 6:30 AM on May 15, 1990 (R. 1282-6). He saw an orange glow in the back window, so he stopped. He walked up to the car and saw no smoke coming from the car. He looked inside and saw no one there or in the area. The interior of the car was filling up with smoke. He got a floor mat from his own car and tried to beat the small interior fire out. Because melted plastic on the seat was burning, his use of the floor mat just caused the burning plastic to fly around, so he gave up. He called the fire department on his two-way radio and left. Dennis Waters also noticed the car in a ditch on his way to work at about 6:25 AM (R. 1647-8). He later saw a homemade wrecker pull into his jobsite, back out and go down the road towards the car (R. 1648-50). Five to seven minutes later he saw smoke (R. 1651-2).

Barbara Davis lived in the apartments on Prairie Mine Road next to where the car was burning (R. 1699-1700). Davis first saw the vehicle "between 6:35 or 6:40" when she noticed some black smoke in the sky (R. 1702-3). When she saw the smoke she could not see where it was coming from and thought "maybe it was an apartment on fire" (R. 1703). She went around the corner of the apartment building in order to see the car that was on fire. She went to tell her husband, and then ran back to where she could see the fire. It was then that she saw a man coming up the embankment who she later identified as Mr. Pittman.

A police dog was used on the morning of May 15th to track a suspect on Prairie Mine Road (R. 1942, 1956). The dog picked up a scent about fifty feet away from the car and tracked it for two or three blocks. The scent paralleled 3rd Street where Eugene Pittman lived angling toward a wooded area about 50 feet from a creek where the dog lost the scent (R. 1959-60, 1986-7). The dog did not pick up a scent at Eugene Pittman's home (R. 1961).

The State called Bobbie Jo Pittman, David Pittman's step-sister who testified that before 3:00 PM on May 14, 1990, David called her (R. 2061). He asked her to come pick him up in Plant City, where he had been staying, so he could spend the night at his step-dad's house in Mulberry where she stayed. She picked him up and they got back to their dad's house at around "4:00 or 4:30" (R. 2063). Later, they went to a Majik Market to call Barker and invite him to "party" with them (R. 2033).[36] Between 7:00 and 8:00, Tammy Davis arrived (R. 2065). The threesome were together until Tammy left at around midnight (R. 3156). Then, David went inside to help Bobbie Jo get her baby to sleep (R. 2069). After the baby was asleep, Bobby Jo and David watched TV until 2:30 AM.

Eugene Pittman, David's stepfather, testified that he got home from work at about 3:00 AM on May 15th (R. 2087-8). He did

[36]It was 1/2 mile (a 13 minute walk) from the Pittman's to the Knowles' (R. 2179). From Eugene Pittman's house to where Bonnie Knowles' car was abandoned was 1/10 of a mile (a 4 minute walk) (R. 2180). It was three miles from Prairie Mine Road to the Majik Market (a 4 minute drive). The Majik Market was seven miles (or 8 minutes) from Barker's. From the Knowles house to Prairie Mine Road was a 4 to 6 minute drive (R. 2696-9).

not see David (R. 2094). The door to the bedroom where David was staying was locked (R. 2113). Eugene did not knock or otherwise check to see if David was in the bedroom. Eugene went to bed, but he was unable to sleep (R. 2095). He kept hearing noises in the house. At about 3:30 AM, he got up and saw "David coming out of this back bedroom" (R. 2097, 2099). David looked tousled-up, like he had been asleep (R. 2116). David said that he had an upset stomach, and Eugene went back to bed (R. 2099).

Soon thereafter, fire "sirens went off" (R. 2118). Then, he heard the phone ringing, so he got up. David was on the phone in the kitchen (R. 2101). Carmen Alton had called and was telling David that the Knowles' house was on fire (R. 3841). David screamed: "Oh, no" (R. 2120). When he hung up, he told Eugene that the Knowles' house was on fire. David then woke his sister at 4:00 or 4:30 AM (R. 2041). As she explained, "He just come in there yelling at me" (R. 2073). David was crying and upset and wanted Bobby Jo to "find out if his kids were okay" (R. 2074). As Bobby Jo noted, this was because his kids usually stayed at the Knowles' (R. 2074).[37] David then asked her to take him back to Bob Barker's, telling her that he was afraid of being blamed for the fire (R. 2041).[38] He was wearing the same blue clothes

[37]Bobby Jo's mom, Francis Pittman, called after learning of the fire. She was upset and crying because she was also afraid that David's kids were in the house (R. 2075). Francis indicated that she would go to the Knowles' house and "see if the kids were in the fire" (R. 2076). Francis testified that David's kids lived with their grandparents (Barbara and Clarence Knowles) "90 percent of the time" (R. 3191).

[38]David was afraid that there were warrants out for his arrest in connection with an ongoing investigation of Barker's scrap metal business (R, 3843).

he wore earlier (R. 2073). After dropping a distraught David off at Barker's place,[39] Bobbie Jo drove to Lakeland to tell David's ex-wife, Barbara Marie, that her parents' house was on fire and to check to see if David's children were there (R. 2079).[40]

Deputy Thomas Lindsay went to Eugene Pittman's house at about 7:00 or 7:30 a.m. looking for David Pittman (R. 3125, 3128). Thereafter, David talked with his mother and agreed to turn himself in (R. 2083). David's mother went to Plant City to get him and told him the Knowles family died in the fire—he cried (R. 3199-3201). David's mother contacted Officer Lindsey and arranged for David to turn himself in (R. 3131-2). David met him in the parking lot of the Bartow Police Department (R. 3134).

No physical evidence linking David Pittman to the crime scene or to Bonnie's Toyota was found. His fingerprints did not match the latent prints recovered from Bonnie Knowles' car (R. 3766-70). Mr. Pittman's prints were not found anywhere in the Knowles' house (R. 2707). Mr. Pittman's clothes did not have any burns on them nor was there blood on his pants, shirt, socks, shoes or pocketknife (R. 3345, 3357-8, 3361, 3364).

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[39]Bobbie Joe dropped David off at Barker's house at 5:00 AM (R. 1573). David ran in the house "[w]et, nervous, hysterical, saying something or other about his babies was dead" (R. 1574). Barker suggested he call the fire and police departments to find out about his kids. David made about six calls (R. 1575-8). When Bobbie Jo called to report that the children were safe, Barker went back to bed (R. 1575-8).

[40]At the time, Barbara Marie was living with Allen Pridgen. Bobbie Jo had tried calling first, but their "phone had been disconnected" (R. 2079). When she got to their house at 5:30 AM, David's three kids were there (R. 2045).

David Pounds, age 29, a habitual offender, testified that he was in jail with Mr. Pittman while Mr. Pittman awaited trial (R. 1892-4). Pounds testified that he heard Mr. Pittman say, "the people that I killed," then changed it to "the people they say I killed" (R. 1895). He said that he heard Mr. Pittman admit the crime but say that "they" could not "pin" it on him (R. 1897).

Carl Hughes had shared a cell with Mr. Pittman at the Polk County Jail from June 20-27, 1990 (R. 1895).[41] According to Hughes, Mr. Pittman told him that he committed the murders and set the house on fire.[42]

Hughes testified that while he was incarcerated with Mr. Pittman, he called his wife, Kathie Anders, and "asked her if she

[41]At the time of trial, Hughes was in the federal penitentiary for falsifying a firearms application and bribery. He also had been convicted in Polk County of seventeen counts of bribery and grand theft. He was sentenced to eighteen months in federal prison to be served concurrently with 4 1/2 years in state prison.

[42]Hughes said that Mr. Pittman had called Bonnie Knowles to see if she would talk with her parents about him seeing his children. He knocked on her bedroom window and she let him in. They talked for a while. They talked about having sex but Bonnie was "on her period." They discussed oral sex. She "hollered" and he tried to shut her up. He "lost it," cut her throat and stabbed her (R. 2252-3, 2261). According to Hughes Mr. Pittman told him that Bonnie's mother ran to the bedroom door and Pittman stabbed her and then grabbed her father, who was on the phone, knocked him down and killed him in the hall (R. 2253-4). He then went to the shed, got gasoline and poured some on Bonnie's bed. He put a tire under her bed to make the fire burn hotter. Hughes testified that Mr. Pittman spread gasoline all over the house. He then washed up in the bathroom before starting the fire. He then got Bonnie's car keys, put the gas can in Bonnie's car, and drove to his father's house. He parked the car and went inside at 2:30 or 3:00 AM (R. 2254-5). Hughes stated that Pittman told him that he later returned to the abandoned car, sat in his wrecker and watched the police find the burning car before returning to Bob Barker's (R. 2255).

had heard anything about [the murders] and she said no. So I asked her to contact Randy Dey, ask him in fact was there any murders like this occurred" (R. 2261-2). Hughes called his wife back three hours later. She said that she had related the information about these murders to Dey who said that he would "be very interested in talking to Carl about it" (R. 2338).[43] On June 26th, Dey, along with Tom Cosper, a police officer, came to see Hughes in the jail (R. 2263). Hughes refused to consent to tape recording the interview.[44]

Hughes was sentenced on August 3, 1990, in federal court. Randy Dey spoke to the judge on Hughes behalf at a side bar during the sentencing (R. 2321). On September 7, 1990, Hughes wrote to the state court judge again, telling him of his cooperation in David Pittman's case (R. 2322). On September 11, 1990, Hughes gave the police a taped statement regarding his

[43]Dey was uncertain as to how he learned that Hughes had information about the Pittman case. Dey stated "I was contacted I believe by his wife and also by Mr. Hughes" (R. 2408).

[44]After talking with Hughes about Mr. Pittman, Hughes was sent back into the jail pod he shared with Mr. Pittman. Hughes claimed that he was attacked by Mr. Pittman and another inmate, John Schneider. Hughes testified that Mr. Pittman had a homemade razor blade in a toothbrush and said, "You're a dead son of a bitch, snitching motherfucker" (R. 2265). Three officers stood outside the cell and watched the hitting and kicking, which lasted about five minutes (R. 2266). However, Hughes' testimony conflicted with testimony from Corrections Officers who witnessed the incident (R. 3080). Officers Meyers and Evans did not see any weapons, nor did they hear anything said (R. 2400-1, 3112). Further, several officers testified that the entire incident consisted of "some shoving" and lasted fifteen to thirty seconds (R. 3075-9, 3112-3). A nurse examined Hughes and found a slight redness in the clavicle area (R. 3070).

conversations with Mr. Pittman. Hughes was sentenced on September 26, 1990, in state court (R. 2323).[45]

Hughes testified that he received no rewards for his testimony against Mr. Pittman. He swore: "I was given no favors as a result even up to the day of sentencing of doing that, contrary to what you're trying to lead them to believe. It didn't happen that way." (R. 2336-37). During the cross, he challenged Mr. Pittman's counsel: "So I haven't got any rewards that you're going to be able to convince this jury I got. I haven't got any incentives to sit here today and do this." (R. 2336). Hughes asserted that because the State did not what to create an appearance that he received any benefit, he was treated worse by the State than "everybody else" (R. 2357).[46]

Barbara Marie Pridgen, Mr. Pittman's ex-wife, testified that Mr. Pittman had in the past made threats against her and her family (R. 2548-9, 2561, 2906, 3792-4). Barbara Marie and David Pittman had married on June 8, 1985 (R. 2525). However, they were separated when the homicides occurred and Barbara Marie was living with Allen Pridgen at that time (R. 2525, 2564). She had filed for a divorce from David in October of 1989 (R. 2528, 2564).[47] Mr. Pittman had not seen Barbara Marie's parents since

[45]Prosecutor David Bergdoll backed away from his earlier demands that Hughes receive an 85 year sentence as a career criminal, and instead sought a 6 year sentence (R. 3007-8).

[46]At one point prior to Mr. Pittman's trial, Hughes balked at testifying. Mr. Pittman's prosecutor threatened to seek a six-month contempt sentence against him if he refused to testify (R. 2359). Ultimately, Hughes relented and testified.

[47]Although he was opposed to the divorce, David filed a response to the petition and agreed the marriage was irretrievably broken

November of 1988 (R. 3800). Barbara Marie did not get along well with her mother.[48] Mr. Pittman had called Barbara Marie's parents twice in February of 1990 in order to talk about Barbara Marie and the children (R. 3820). He had last seen Barbara Marie at a custody hearing when they had paternity tests and they sat on the courthouse steps and spoke cordially for 45 minutes (R. 3821-2).

In early 1990, David Pittman was investigated for a sexual assault or battery allegedly committed upon Bonnie Knowles (R. 2777-8). The offense allegedly occurred on an unknown date in June, 1985 (R. 2778). The State was unable to prosecute due to the statute of limitations (R. 2780). A "no bill" was entered March 21, 1990, but the alleged victim's name was not shown (R. 2781). David received the "no bill" but did not know who made the charges (R. 3803).

In his testimony, Mr. Pittman indicated that he had stayed at his father's the evening of May 14, 1990, because Barker had charges pending against him in federal court related to allegedly stolen heavy equipment and was concerned that the "federal law" would be coming. Federal authorities had also questioned Mr. Pittman about the charges. Mr. Pittman stayed up for five or ten

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(R. 2529, 2565). He told her he wanted to remain friends (R. 2577-8).

[48]Marie testified that her mother abused her physically as a child (R. 2894). The older she became, the worse the abuse. Her father, who was never home when the abuse occurred, generally took her mother's side and refused to believe that her mother abused her. Bonnie was favored by her mother and was not abused (R. 2894-6). At age sixteen or seventeen, Marie ran away from home (R. 2894-8).

minutes after Bobbie Jo went to bed about 2:30 AM, but nothing interesting was on TV, so went to bed in the spare room. He saw the headlights when his father returned, but did not get up (R. 3836-8). Later, he got up to drink some milk (R. 3838). He had not eaten anything since breakfast on May 14th and only had a couple of beers on an empty stomach.

When Carmen Alton called, she told David that the Knowles' house was on fire. He went "all to pieces" because his kids stayed at the Knowles' about 95% of the time and he felt certain they were there (R. 3841-2). Because he was afraid that the federal agents had a warrant for him, he did not want to go to the scene of the fire. He was also concerned that he might be blamed for the fire, so he asked Bobbie Jo to take him back to Plant City (R. 3844). Later he talked with his mother and decided he should go to the sheriff's office to answer their questions (R. 3856-7).

Mr. Pittman testified that he had nothing to do with the offenses charged nor did he tell anyone that he committed the homicides (R. 3868).

THE PENALTY PHASE

The State presented evidence regarding Mr. Pittman's adjudication of guilt for aggravated assault of Linda Braze, whom he threatened with a knife in 1985 (R. 4272-5).

Eugene Pittman, testified that he and David's mother had six children: David, Michael, Bill, Andy, Tina and Bobbie Jo. He was not David's biological father, but adopted him as an infant. Mr. Pittman never thought of David other than as his own son (R.

4315-20). Mrs. Pittman had a relationship with David Burke, David's biological father, when she was seventeen (R. 4353).

David and his mother were very close. He was a rambunctious little boy – a child "most mothers would not want to raise."[49] When he was about six, his parents gave him an old car to play with. He siphoned out gasoline and put the hose in his mouth. When his mother looked for him, he had passed out (R. 4362-3).

David was passed into ninth grade despite his inability to even write his own name (R. 4377). His parents finally arranged to get him into vocational technical school where he studied mechanics and did well (R. 4327-9, 4379). David finally learned to read and write at age 18 while incarcerated at Broward County Correctional Institute (R. 4389).

Dr. Dee, a clinical psychologist with specialties in clinical neuropsychology and child psychology, interviewed David Pittman and his mother and conducted twelve hours of testing (R. 4498, 4417-9, 4426).[50] Dr. Dee characterized David as a child

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[49]Mr. and Mrs. Pittman tried unsuccessfully to get help for David. They took him to a psychiatrist who was of no help and an unaffordable expense (R. 4333). Another doctor put David on Ritalin due to hyperactivity. But, his mother took him off the medication because he was listless (R. 4402). She once tried to give the children to HRS because she felt that she was a bad mother (R. 4391).

She explained that she "spanked" David every day or every other day. She "beat the shit out of him" the first time he got in trouble with the law (R. 4392-4). She tried to break David's leg when he was 22 (R. 4396). She once whipped all of the children three times before David finally admitted he spilled oak stain. She made him sit on a kitchen bench for seven days except to use the bathroom. He ate and slept on the bench and could not watch television (R. 4399-400).

[50]Dr. Dee said that David's biological father, David Burke, was a paranoid schizophrenic who died in an institution. Burke had a

with a severe attention deficit disorder that was often called minimal brain dysfunction. David's dysfunctional family and the school system failed to recognize what was wrong and to provide an environment where he could use what abilities he had (R. 4468).

Tests showed indications of brain damage (R. 4440-1). Dr. Dee opined that at least some of the brain damage was congenital because David showed signs of it at an early age (R. 4438). His development, such as learning to talk, was late (R. 4433-34).

Dr. Dee diagnosed organic personality syndrome. Organic personality syndrome causes severe paranoia, especially under stress. Alcohol makes everything worse (R. 4449). Tests showed he was addicted to alcohol or some other major psychoactive substance (R. 4445). Persons with brain dysfunction have little capacity to control their behavior (R. 4451).

Dr. Dee found that David was under extreme mental and emotional disturbance at the time of the homicides. He also concluded that at the time of the homicides, David suffered major mental and emotional disturbance evidenced by impairment in cognitive function (memory impairment) and difficulty in emotional control. This substantially impaired his ability to conform his conduct to the requirements of the law (R. 4467).

THE POSTCONVICTION PROCEEDINGS

Withheld Evidence

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son who resembled David like a twin. He was a homeless paranoid schizophrenic who wandered around Lakeland (R. 4434).

At the evidentiary hearing, Mr. Pittman presented evidence of favorable information that the State withheld at the time of Mr. Pittman's trial.

Carl Hughes

Kathleen Anders, Hughes' wife, testified in 2006 (PC-R. 3539). She was married to Hughes between 1980 and 1994, and had three children with him (PC-R. 3540-1). After he went to jail in late 1989, she spoke to him often. In one call, Hughes wanted some money. When she balked, "he became very angry and told [her] that he was trying to keep me from being arrested along with him and that he had been asked by FDLE to obtain information regarding this case that had been in the newspapers, which, in fact, was Mr. Pittman's case" (PC-R. 3542). Hughes told her that "the FDLE had [her] and the house under surveillance and that they were watching [her] coming and going" (PC-R. 3543).[51] In order to protect her and their three young children, Hughes said, "He was to - - the way it was told to me is that he was to gather information for them by way of befriending Mr. Pittman while they were both incarcerated" (PC-R. 3543).[52] When asked if she had a clear recollection of this, Ms. Anders responded: "Absolutely, That I know, because it involved me specifically being arrested,

[51]Ms. Anders testified that she was interviewed by the prosecutor on her husband's case, David Bergdoll (PC-R. 3545). Bergdoll asked her "to come in and they asked me, you know, how I paid the bills and financial things like that" (PC-R. 3549). A polygraph examination was even administered (PC-R. 3549). She found the experience very frightening (PC-R. 3549).

[52]As Ms. Anders remembered it, Hughes was sent in as an agent for the State to get evidence from Mr. Pittman. Had this been disclosed, Hughes' testimony would have been inadmissible.

so, yes, I do" (PC-R. 3549).[53] She explained that he told her that "he had kept her from being arrested" by agreeing "to obtain information regarding the Pittman case" (PC-R. 3549-50).[54]

Ms. Anders also explained that Hughes "was always concerned about how much time he would have to spend in jail, if any. He was pretty much, as related to me by him, that if he did certain things, that they could, in fact, possibly lower that time in jail. He was going to do some time in jail, but it wouldn't be as much if during this time he cooperated doing other things" (PC-R. 3546). According to Ms. Anders, Hughes' involvement in the Pittman case was in order to reduce the amount of time that he, Hughes, faced in prison, and to protect Ms. Anders, who had custody of his three young children, from prosecution.

Hardy Pickard, Mr. Pittman's prosecutor, testified that he did not recall learning of the polygraph administered to Ms. Anders, nor of the potential for criminal charges against her:

[53]Ms. Anders' testimony revealed that Hughes lied at Mr. Pittman's trial when he claimed to have no incentive to gather evidence against Mr. Pittman and testify for the State.

[54]Ms. Anders frequently relayed messages back and forth between Dey and Hughes while he was incarcerated in 1990. However, she did not remember that any of these messages were related to Mr. Pittman's case (PC-R. 3544). She remembered that Hughes asked her to find out from Dey if he could stay in the State of Florida. Occasionally, he would tell her to tell Dey that he needed to talk to him about paperwork he had received (PC-R. 3544). From what he told his wife, Hughes was in frequent direct contact with Dey (PC-R. 3550).

Q: Was it ever brought to your attention that Mr. Hughes' wife was polygraphed by Mr. Bergdoll?

A: I don't know if I knew that or not.

Q: Was it ever brought to your attention that there was potential criminal charges against her or that there was consideration of charges against her?

A: I don't recall having that information or even knowing that, no. Whether Mr. Bergdoll may at some point in time have mentioned that to me in passing, I guess that's conceivable, but I don't recall it.

Q: Well, do you recall Mr. Hughes ever mentioning to you that he was concerned about protecting his wife?

A: No. But then again, I mean, that's certainly possible he could - - at some point he could have mentioned that and I don't recall it.

(PC-R. 3897).[55] Mr. Pickard testified that even if he knew about the polygraph given to Ms. Anders and the threat of criminal charges against her, he did not see the information as something he was required to disclose:

Q: If you had known that, is that information that you would have disclosed to the Defense?

A: I don't know.

[55]Mr. Pickard acknowledged that Def. Ex. 31 showed a phone message from David Bergdoll requesting Mr. Pickard to respond to a call from Kathy Hughes. The message included a notation in Mr. Pickard's handwriting of her name and phone number. "So it does appear that I probably talked to her on the phone at least once, although I don't have any recollection of doing that" (PC-R. 3948). With the phone message was a note from David Bergdoll saying, "Carl received some papers from the State and wants to discuss them with you" (PC-R. 3939). Mr. Bergdoll was about to be deposed by the defense, and he did not want to be the one returning the call to Hughes' wife (PC-R. 3939)

> Q: When you say you don't know, that implies certain amount of hesitation. Can you elaborate on your hesitation?
>
> A: I would question whether that is Brady material.
>
> Q: And why would you question whether that's Brady material?
>
> A: It just doesn't seem to me to be something of any significance.
>
> Q: Are you aware of the Defense's right under Davis v. Alaska to pursue potential motives or bias of why a witness may want to curry favor with the State?
>
> A: Yes.
>
> Q: Do you see this as something the Defense may want to pursue that this is an additional reason for why Mr. Hughes would want to curry favor with the State in order to protect his wife?
>
> A: No.
>
> Q: You don't see that?
>
> A: No.

(PC-R. 3969). Mr. Pittman's trial counsel, Mr. Norgard testified that he was never advised of a threat of criminal prosecution against Ms. Anders. Mr. Norgard explained, "If I knew that there were threats of prosecution to his wife by the State Attorney's Office or law enforcement, that's certainly an area of impeachment I would have gone into" (PC-R. 4174). Moreover, he would have wanted to contact Hughes' wife to inquire about the threat - "I mean, it would open up a whole array of inquiry" (PC-R. 4175). If he had learned that "Hughes had said that he had to get information against Mr. Pittman in order to save her from

prosecution", such information "would be very important" (PC-R. 4175-6). He would have presented such information as evidence of both "a threat as well as benefit" (PC-R. 4176). He would have pursued the evidence as demonstrating that "law enforcement had gone to him and requested that he try to get information" as indicating that Hughes was an agent within the meaning of the Fifth and Sixth Amendment (PC-R. 4177).

Also undisclosed was Hughes' handwritten summary of his involvement with Mr. Pittman. This had been provided to Det. Cosper (PC-R. 3513; PC-RE. 894-904). In this document, Hughes said he had contacted his wife, recited facts of Mr. Pittman's case, and told her to contact Randy Dey to verify their validity. Dey then advised Hughes' wife "that everything was, in fact, true" (PC-R. 3967). Mr. Norgard testified that if he had received this note, he would have used it (PC-R. 4180).[56]

Mr. Pickard also did not provide Mr. Norgard with his October 11, 1990, letter to Det. Cosper instructing him to tell Hughes if he refused to testify against Mr. Pittman, "we will ask that he be held in contempt" (PC-R. 3917; PC-RE. 839).[57] Though

[56]Mr. Norgard explained: "[I]f I had information and knowledge that Randy Dey was talking to Mr. Hughes' wife and having her convey information to him, I would have, even if I didn't know what it was, and even if it turned out to be innocuous, I would have asked about in the deposition, yes, sir" (PC-R. 4179).

[57]Mr. Pickard indicated that the sentence of the contempt charge "would be added to his present sentence and delay his release" PC-R. 3917). Mr. Pickard acknowledged that "if you want to consider contempt a threat, yeah, there is a discussion of contempt" (PC-R. 3919). He acknowledged that Hughes was being told that if he did not testify, his prison sentence "would lengthen" (PC-R. 3919).

he had no specific memory whether this letter got disclosed, Mr. Pickard acknowledged that "in the normal course of things, I would not consider that to be discoverable" (PC-R. 3918).

Mr. Norgard did not recall having the October 11th letter from Mr. Pickard to Det. Cosper, but he believed it was discoverable (PC-R. 4180). Even though Hughes testified that he had been told contempt was a possibility, the letter made clear that a consecutive sentence would be sought, adding more time to the length of Hughes' incarceration (PC-R. 4276).[58] As Mr. Norgard explained, the October 11th letter added details missing from Hughes' account (PC-R. 4278).

Former Polk County Sheriff Detective Tom Cosper testified about his involvement with Mr. Pittman's case. He identified his handwritten notes from a July 6, 1990, interview of Carl Hughes that he conducted (PC-RE. 866-7).[59] The purpose of the notes was

[58]In fact when Hughes was asked about the discussion with the State about the possibility of being charged with contempt, he explained that his female friend, Lynn, had advised him of the options that Mr. Pickard had told her to communicate to him. Hughes was asked, "They were basically threatening to give you six months for contempt." Hughes replied "[n]obody mentioned six months" (PC-R. 4273). He explained that he learned from a jailhouse lawyer that he could get up to six months for contempt. There was no indication that a law enforcement officer had specifically told him that the State would seek a consecutive sentence if he refused to testify.

[59]Det. Cosper was subpoenaed to appear before the grand jury on July 12, 1990, a few days after his July 6th interview of Hughes (Def. Ex. 16; T. 66). Hughes was not called as a witness (T. 402). Mr. Pittman was indicted on July 12, 1990.

to memorialize what Hughes related to Cosper during the July 6th interview (PC-R. 3598).[60]

Mr. Pickard testified that he did not recall if he knew of the July 6th interview of Hughes, and had no idea as to whether Mr. Pittman's counsel was advised of the interview (PC-R. 3898). Further, Mr. Pickard did not believe the matter was discoverable:

> Q: Is that something, had you known, would you have disclosed?
>
> A: No.
>
> Q: And why is that?
>
> A: We have no obligation to tell the Defense, every time we go out and interview a witness, that we're interviewing a witness. Just the simple fact that Detective Cosper went and talked to Carl Hughes, we don't have to call the Defense and say, hey, Detective Cosper's just gone out to interview Carl Hughes.
>
> Q: Okay. And if in deposition or in his testimony he's asked in terms of his contact with law enforcement and he doesn't mention July 7th - - or July 6th of 1990, are you obligated to point out, well, there was an additional contact?
>
> A: If at the time I was thinking of it, yeah. I think we're – if a witness misspeaks and we're aware the witness is misspeaking or recall that the witness is misspeaking, I think there is an obligation to attempt to correct the record to make it accurate, yes.
>
> Q: Well, do you recall that the Defense in this case was concerned that Carl Hughes – was there an allegation by the Defense that Carl Hughes was

[60]Det. Cosper testified that he would not have knowingly written anything down that was incorrect; the notes reflect what he was told (PC-R. 3527). He also indicated that a report should have been prepared documenting the July 6th interview (PC-R. 3509). Included in the handwritten note was a notation that Hughes' description of the sequence of events following the murders were "real off on time of occurrence" (PC-R. 3509).

fabricating his story and over time embellishing details?

A: I think Mr. Hughes' credibility was a issue in the case, yes.

Q: And do you think it would have been information that would have assisted the Defense in making that point to show more contact between Mr. Hughes and law enforcement investigating David Pittman's case?

A: No. I don't even know that I was aware of all of the contacts that Detective Cosper may have had with Carl Hughes. He would not necessarily call me up every time he went and talked to Carl Hughes and tell me, I've just talked to Carl Hughes. So he may have had a lot of additional contacts with Carl Hughes, as probably did Randy Dey of FDLE, that I had no knowledge that they were contacting him and talking to him.

Q: So there actually may have been many more contacts between Randy Dey and Carl Hughes and between Detective Cosper and Carl Hughes than just these two that are reflected in these two exhibits?

A: I would be surprised if there weren't more contact. Randy Dey was talking to him about other cases and other investigations, so that would not surprise me. And I wouldn't have any way of knowing every time law enforcement went and talked to Carl Hughes.

Q: Well, was Randy Dey also talking about this case to him.

A: Randy Dey was - - got involved in this case. It wasn't his case, but he did get involved in it when Mr. Hughes told Randy Dey that he had the information that he claimed he had.

Q: Okay. And so you don't know how many times Randy Dey met with Carl Hughes to discuss this case?

A: Have no idea how many times Randy Dey would have discussed this case with Carl Hughes, and Randy Dey would not have called me up and told me about every contact he had with Carl Hughes about this case.

(PC-R. 3899-3900). Mr. Pickard explained that he was only obligated to disclose the July 6th interview occurred if he knew of the interview and if either Hughes or Cosper had testified there was no interview (PC-R. 3903). But, he said that he was not obligated to learn that an interview occurred (PC-R. 3903).

After reviewing depositions and the trial transcript, Mr. Norgard testified that "it would appear that I was not aware of any statement by Mr. Hughes to law enforcement between the June statement and the September statement" (PC-R. 41664).[61] Any statement by Hughes to law enforcement that was inconsistent with the story he told at trial, or that demonstrated that his story evolved over time, would have been used to impeach him (PC-R. 4168). Information showing more contact between Hughes and law enforcement was important to the defense; it could be used to show that over time Hughes' story improved as he met with law enforcement and details were added or subtracted as needed.[62]

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[61]Randy Dey's deposition was introduced as Def. Ex. 38 (PC-RE. 1137). In the deposition, Dey discussed the June 26, 1990, interview of Hughes. When asked about Hughes' second interview, Dey referred to the September 11, 1990, taped statement as Hughes' second interview (PC-R. 4163-64).

Det. Cosper's deposition was introduced as Def. Ex. 6 (PC-RE. 748). In the deposition, Det. Cosper only discussed the June 26, 1990, interview of Hughes that was not taped and the September 11, 1990, taped statement (PC-R. 4165-66).

Carl Hughes' trial testimony made no reference to a July 6th interview. In fact, he claimed that between June 26th and September 11th, he did not provide law enforcement information regarding Mr. Pittman. He was merely negotiating whether he would ("Q. You were giving him information, correct? A. No, sir, we were negotiating giving information")(R. 2300).

[62]Also undisclosed was the Pre-Sentence Investigation prepared in Hughes' state court criminal case (PC-R. 3936). Mr. Pickard acknowledged that it was in the State Attorney's Office, and that he could have accessed it, but he believed that he had no

David Pounds

As to David Pounds, the State did not disclose either his PSI or the favorable information contained therein.[63] The PSI which was prepared in April of 1990 was introduced into evidence at the hearing below (PC-R. 4048; PC-RE. 998). The PSI included a psychological history of Pounds. This history indicated that Pounds was suffering from visual and auditory hallucinations (PC-R. 3930). Reference was made to the fact that Pounds "heard voices talking to him" (PC-R. 3930). The psychological history included the fact that Pounds was at the time being treated with psychotropic medication - Vistaril, Tofranil and Thorazine (PC-R. 3931). The PSI also indicated that Pounds' mother was aware of his emotional problems and believed that he needed counseling and help (PC-R. 3933). The PSI even indicated that Pounds was going to need mental health help in prison (PC-R. 3933).

Mr. Pickard testified that Pounds' PSI would have been provided to the State Attorney's Office and he could have accessed it any time (PC-R. 3929). Mr. Pickard knew from Pounds' deposition that Pounds had a mental health history because the defense sought to elicit information regarding it from Pounds (PC-R. 3930). However Mr. Pickard testified that he "never

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obligation to look at it and determine whether it contained discoverable information. Mr. Norgard testified that he was not provided access to Hughes' PSI (PC-R. 1183).

[63]The State called Pounds to testify that Mr. Pittman had made statements to him acknowledging his guilt (R. 1895). The statements that Pounds testified to were generally superficial and could be readily obtained from any newspaper account.

looked into his mental health issues" (PC-R. 3931). Mr. Pickard explained, "I didn't know any more than the Defense knew" (PC-R. 3931). Mr. Pickard indicated that he knew that a PSI would have been a sealed court document; but, he believed that Mr. Pittman's counsel could have obtained a copy if they had asked the Court to provide it to them (PC-R. 3930).[64] Mr. Pickard testified he did not disclosed the PSI to the defense (PC-R. 3933).

Mr. Norgard testified Pounds' PSI was marked confidential and not available to him unless the State provided it to him (PC-R. 4153). Mr. Norgard believed that the State had a duty to disclose any information contained in Pounds' PSI which was within the State Attorney's possession that was favorable to Mr. Pittman (PC-R. 4254).[65] Mr. Norgard reviewed the PSI and stated that had he known of the content of the PSI regarding Pounds' mental health, he would have explored it in discovery in order to determine how it could be used to impeach Pounds at trial (PC-R. 4154-5). He would have tried to get access to Pounds' mental health records and DOC file. He also would have considered seeking a determination of Pounds' competency (PC-R. 4155).

[64]Mr. Pickard testified that even if he had seen the PSI, "chances are I would not have disclosed this particular document" (PC-R. 3931-2).

[65]During Mr. Pickard's cross-examination of Mr. Norgard regarding this matter, it appeared that it was Mr. Pickard's contention that Mr. Norgard had the duty to obtain the records given what he knew from Pounds' deposition. If it was Mr. Norgard's duty to obtain the records, he obviously failed and rendered constitutionally deficient performance, as discussed in the ineffective assistance section of this argument.

Also not disclosed by the State were DOC records made upon Pounds' placement in DOC custody in June of 1990 as follow up to the mental health issues raised in the PSI. One excerpt from Pounds' DOC records was dated June 26, 1990 (PC-RE. 1092). It contained a discussion of Pounds' then mental health problems as of that date. Another excerpt was dated June 12, 1990 (PC-RE. 1093). It contained a discussion of Pounds' mental health problems as of that date. These documents noted that Pounds' major depression had relapsed, and included psychotic features (PC-R. 4051, 4054).

Again, these were the kinds of material that Mr. Norgard believed that the State was obligated to disclose and that he would have vigorously sought had he been given access to the PSI (PC-R. 4155-6). The information contained in these documents was significant to Mr. Norgard. He would have used it to impeach Pounds' credibility.

In addition, the State did not disclose that Pounds had been interviewed by the police on June 19, 1990.[66] While testifying, Det. Cosper identified three pages of notes from his interviews of Pounds (PC-RE. 728-31). Det. Cosper indicated the second page of the notes were made during his interview of Pounds on June 19,

[66]At trial, Pounds indicated that he was only interviewed by Det. Cosper twice (R. 1903). The first time was the interview at the county jail on June 4, 1990 (R. 1901). At that time, Pounds gave no information. As he explained in his deposition, "I intentionally withheld that [information] to speak to my family about the information I had before I told him" (R. 1923). The second interview was on June 25, 1990.

1990, at 9:07 a.m. (PC-R. 3486).[67] The third page of he notes were from the Pounds interview on June 25, 1990 (PC-R. 3483-7).

Mr. Pickard testified that before these handwritten notes became an issue in collateral proceedings, he had not seen them or even been aware of their existence, so there was no question that they had not been disclosed (PC-R. 3905-6).

Mr. Norgard testified that he was not provided the handwritten notes (PC-R. 4136). Mr. Norgard indicated that it was important for the defense to have access to any and all information in the State's possession that could be used to impeach a State witness (PC-R. 4137-8).[68]

The State also did not disclose documentation that demonstrated Pounds and Hughes were never jailed together with Mr. Pittman.[69] Introduced at the 2006 evidentiary hearing was a police report concerning jail cell locations and recreation yard schedules (PC-RE. 869-93). The report written on April 30, 1991,

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[67]When shown the undisclosed handwritten notes in 2006, Det. Cosper admitted that he interviewed Pounds three times in June of 1990. Yet in his 1990 deposition, only two interviews of Pounds were acknowledged (PC-RE. 812-13).

[68]It was clear from Pounds' trial testimony that between his June 4th taped statement and his June 25th taped statement his story changed. Pounds' explanation was that he withheld the information on June 4th. However, the existence of another interview that was not taped provided Pounds with an opportunity to learn information about the case. It could also explain his 2006 testimony that someone at some point told him to mention Carl Hughes (PC-R. 4021-2).

[69]Pounds was interviewed by Det. Cosper on June 25, 1990 (PC-R. 42-3). In the taped transcript of the interview, Pounds identified other individuals in the same pod with Mr. Pittman and himself (PC-R. 3488). Pounds included the name Carl Hugh which prompted Cosper to ask "Hughes or Hugh" (PC-R. 3488).

reflected police work done on April 17th (PC-R. 3908). Det. Cosper testified about this investigation and explained "It obviously concerns David Pittman and David Pounds being confined in a cell together" (PC-R. 3511). Though he said that he lacked any specific recall regarding the matter, Mr. Pickard acknowledged that the information must have been sought because of something occurring during the trial (PC-R. 3913).

The jail records showed that David Pittman was in pod J227 in the period of May 18-21. The records also showed Pounds was housed in J227 during that period. Others were shown to have been in the pod at that time. The records showed Raymond Reyome was housed in J227 during that period.[70] Carl Hughes was not listed as being in the jail at the time (PC-R. 3910).

While he did not have a specific recall of the documents, Mr. Pickard said that "there's a good chance that this document was never given to the Defense" (PC-R. 3911). Mr. Pickard explained, "Jail records are pretty much public record. They could have gotten it." (PC-R. 3909).

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[70]These records provided the correct spelling of Reyome's name, something that Pounds was not able to provide when identifying him as someone present in the pod when he claimed Mr. Pittman made incriminating statements. Reyome was contacted during the collateral process and was called as at witness at the 2006 evidentiary hearing. He testified that he recalled Mr. Pittman from when they were in J227 together (PC-R. 4007). Reyome testified that Mr. Pittman never talked to him about his case, nor did he ever see him talking to others about his case (PC-R. 4007). Reyome recalled that Pounds was also in J227 with them. Until he saw him when being transported to the hearing, Reyome had not recognized the name. But seeing him while being transported, he recognized him, realized who he was and that he had been in J227.

Mr. Norgard testified that during his representation of Mr. Pittman he wanted to ascertain the names of individuals who had been incarcerated with Mr. Pittman during the time period that Pounds and Hughes claimed he made incriminating statements to them. As a result, Mr. Norgard filled out a Public Defender's Request for Investigation form requesting an investigator to find out what records existed of who had been housed with Mr. Pittman in the months following his arrest in May of 1990 (PC-RE. 1135-36). This form showed that Mr. Norgard made his request January 3, 1991. On March 13, 1991, an investigator provided a response that indicated the records were not available.[71] Accordingly, Mr. Norgard's efforts to obtain information regarding who was housed with Mr. Pittman during the time period involving Pounds and Hughes reached a dead end (PC-R. 4143).

Mr. Norgard was shown Def. Ex. 17, the police report referencing Mr. Pittman's jail pod location in May of 1990 with jail records attached. Mr. Norgard indicated that he expected police reports such as Def. Ex. 17 to be disclosed to the defense in a criminal case (PC-R. 4144).

Mr. Norgard reviewed the jail records attached to the police report and testified that the inmate location roster included in the records was in fact what he had unsuccessfully sought to

[71]An attached memorandum explained that "a jail roster is issued Monday through Friday. These are kept by Elaine Chapman at 6125 annex for a period of time. [The author of the memorandum] spoke with Elaine. She has rosters dating back to October 9th. She purges them periodically and the last purge was late December. Next paragraph: There's no master file kept of where inmates are, why they are moved or other information" (PC-R. 4143).

obtain (PC-R. 4146). Had he been provided with this information he could have used the records to locate other witnesses, like Reyome, who were in the pod with Mr. Pittman and Pounds.[72]

Handwritten notes from interviews of other witnesses

Det. Cosper's notes from an interview of Barbara Marie Pittman that was conducted May 31, 1990, were introduced into evidence as Def. Ex. 13 (PC-R. 3595). The purpose of the note taking was "to record the pertinent information that [was heard] as [it was heard] so that [it could] be documented later" (PC-R. 3595). Mr. Pickard identified within Def. Ex. 26 a state attorney subpoena for Barbara Marie Pittman, aka Barbara Marie Pridgen, requiring her to appear before Mr. Pickard on May 31, 1990 (PC-R. 3880).[73] Mr. Pickard indicated that the notes

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[72]He could also have used the records to see if Hughes and others, who Pounds indicated were present in the pod were in fact there (PC-R. 4148-50). The jail records in Def. Ex. 17 which he had sought, but been advised no longer existed, would have led to Reyome who did testify in 2006. The records would have also been useful in impeaching Pounds by demonstrating that Hughes was never in the pod with Pounds and Mr. Pittman at the same time.

[73]According to his 2006 testimony, Mr. Pickard routinely used his state attorney subpoena power to compel testimony from witnesses in criminal prosecutions. Using this device, Mr. Pickard would obtain this testimony outside the presence of the defendant or his counsel. In fact, the state attorney subpoena was usually issued in the case of State v. John Doe. This was a fictitious caption used to conceal the issuance of the subpoena from the criminal defendant and his counsel. It was Mr. Pickard's practice to issue state attorney subpoenas both before and after the issuance of the criminal indictment in capital cases. Mr. Pickard's purpose in compelling witnesses to appear before him and testify under the threat of contempt outside the presence of the defense counsel was to force the witnesses to provide testimony to Mr. Pickard that he could use to prepare for trial (PC-R. 3809-18).

appeared to have been taken while she appeared before him pursuant to the subpoena (PC-R. 3880).

Mr. Pickard testified that Cosper's notes from the May 31, 1990, interview "would not have been" disclosed to the defense (PC-R. 3883). Mr. Pickard indicated that "[a]t no point" did he think about whether there was information that came out from Barbara Marie that was favorable to the defense and that should be disclosed (PC-R. 3883-4).

Mr. Pickard also identified his own handwritten notes from the same May 31, 1990, interview of Barbara Marie Pittman (PC-R. 4539-41). These notes were introduced into evidence as Def. Ex. 49. Mr. Pickard testified he did not have an independent recollection of the date of the interview (PC-R. 4540).

Mr. Norgard testified that at trial he had not been provided with Cosper's handwritten notes introduced as Def. Ex. 13 (PC-R. 4194). Mr. Norgard testified that information included in the notes was not disclosed. He indicated that he was never advised that Barbara Marie reported that Mr. Pittman "and my parents had [a] pretty good relationship" (PC-R. 4195).[74] Mr. Norgard testified that he was not advised that Barbara Marie advised the State that Bonnie Knowles was known for "making up physical ailments" (PC-R. 4198).[75]

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[74]This information contradicted the State's claim at trial that there was bad blood between Mr. Pittman and Barbara Marie's parents, which was argued as demonstrating motive for the murders.

[75]The State had argued at trial that Mr. Pittman's motive for the murders was his anger that Bonnie had gone to the police and told them that he had raped her (PC-R. 4199). Mr. Norgard testified that information that she was prone to make up ailments could

Mr. Norgard also testified that he had not been provided with Mr. Pickard's handwritten notes from the May 31, 1990, interview of Barbara Marie (PC-R. 4593-9). Mr. Norgard identified information in these notes that the State had not provided him at the time of Mr. Pittman's trial.

Det. Cosper identified his handwritten notes from a May 30, 1990, interview of Eugene Pittman (PC-R. 3502). These notes were introduced into evidence as Def. Ex. 12. Mr. Pickard testified that he never received Cosper's notes from the May 30th interview (PC-R. 3879). Mr. Pickard acknowledged that Cosper's notes, along with Mr. Pickard's notes, "would be the best evidence of what was said, with the understanding that they're just simply summary versions and that they are not verbatim" (PC-R. 3877). Mr. Pickard testified that neither Cospers' notes nor his own notes of the May 30th interview of Eugene Pittman were disclosed to the defense (PC-R. 3879).

Mr. Norgard testified that he was never provided with the notes from the May 30, 1990, interview of Eugene Pittman that was conducted pursuant to a state attorney subpoena. As a result, he was denied the opportunity to use those notes to either refresh Eugene Pittman's recall when he was testifying at Mr. Pittman's

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have been used to support an argument that the rape claim was false, and that showing that the rape claim was false would have allowed the defense to argue that the anger of an innocent falsely accused of rape would have been less likely to lead to murder (PC-R. 4607). This also would have been very significant in the penalty phase. Information suggesting that the murder was the result of an innocent man accused of rape would present a more compelling case for a life sentence than that presented by a guilty man trying to get back at the victim for reporting the crime (PC-R. 4607).

trial nearly a year later or to impeach Eugene to the extent that he deviated from the earlier statement.

Mr. Pickard also identified a handwritten note listing witnesses regarding the George Hodges letter (PC-R. 3940). The handwritten note showed that the State had not provided the defense with the correct address for Aaron Gibbons (PC-R. 3941). Mr. Pickard also identified a phone message for him from his secretary that indicated that Gibbons had in fact not taken off, but provided an address where he could be found (PC-R. 3943). These notes and the information contained therein were not disclosed to the defense.

Dennis Waters' uncertainty over the wrecker

Dennis Waters testified at the evidentiary hearing that in the years since his trial testimony he has been plagued by anxiety that his testimony before the jury did not convey the doubt regarding whether the wrecker he saw the morning after the murders was Mr. Pittman's (PC-R. 3553). Waters testified in 2006 that he had advised law enforcement officers of his doubts that the wrecker he saw was in fact Mr. Pittman's. He merely told them that the wreckers "looked similar" (PC-R. 3557). When asked to review his trial testimony wherein he testified that it was "the same wrecker", he indicated that he felt that the trial testimony was not accurate because the best he could say was "it was similar to the wrecker" (PC-R. 3564-7).

Mr. Norgard testified that he was unaware of any information indicating that Waters' identification was equivocal (PC-R. 4128) ("It was a definite identification"). Information that the

identification was not definite would have been valuable impeachment (PC-R. 4129).

Undisclosed letter regarding William Smith

Mr. Pickard identified a letter that he sent Det. Cosper on July 2, 1990, providing him with instructions (PC-R. 3919). One of the instructions concerned William Smith, and indicated that Smith had advised Mr. Pickard that he believed the person he saw on the morning of May 15, 1990, was the same person he had seen a couple of weeks before at used car lot on Highway 60 (PC-RE. 843).[76] Mr. Pickard testified that the defense was "[p]robably not" advised of Smith's statement in this regard (PC-R. 3921).

Mr. Norgard testified that he was not advised of Smith's statement in this regard (PC-R. 4132). He stated that from the defense perspective this information was significant and would have effected his trial preparation. Investigation would have been conducted to delve deeper into the matter and definitely Smith would have been cross-examined in order to suggest that his recognition of the man on the morning of May 15th was because he recognized him from an earlier event, and not because he recognized the man as Mr. Pittman (PC-R. 4133-5).

John Schneider

Mr. Norgard testified he wanted to speak to John Schneider during the investigation into Mr. Pittman's case, as is clear

[76]Apparently, Mr. Pickard had interviewed Smith, perhaps pursuant to a state attorney subpoena. Mr. Pickard testified that the notes of the interview were submitted under seal to the court (T. 419). To date, these notes have not been disclosed to Mr. Pittman.

from Def. Ex. 41 (PC-R. 4188). However, Schneider was not spoken to because Schneider's attorney told Mr. Norgard's investigator that Schneider was afraid and did not want to talk.

John Schneider was called at the 2006 evidentiary hearing (PC-R. 4063). Schneider testified that no one representing Mr. Pittman got in touch with him back in 1990, 1991, or 1992 (PC-R. 4084). Schneider indicated that he had wanted to talk to Mr. Pittman's attorney and discuss the interaction that he and Mr. Pittman had on the night of June 26th with Carl Hughes (PC-R. 4083). Moreover, Schneider's testimony regarding the events of that night was very favorable to Mr. Pittman. Schneider directly contradicted Hughes' testimony. He indicated that on two occasion he saw Hughes going through Mr. Pittman's papers (PC-R. 4077). He also indicated that inmates in the jail had access to newspapers (PC-R. 4089).

James Troup

James Troup testified in 2006 that he discovered Bonnie Knowles' vehicle on fire. It was off to the side of Prairie Mine Road. Troup came upon it at around 6:30 AM. The car was parked on the side of the road "at an angle slanted down toward the ditch" (PC-R. 3569). Troup was driving to work. As he came up behind the vehicle, he noticed an orange glow in the back window (PC-R. 3569). There were no people around. No one was running from the car. And importantly, he did not see any smoking coming from the vehicle (PC-R. 3570). This vital fact, not elicited at trial, was crucial because it shows that Troup's observations of the car preceded in time the observations of Barbara Davis.

Newly discovered evidence of another perpetrator

Cindy Pittman

Carlos Battles testified in 2006 that in 1998, he had been employed by the Department of Children and Family Services as a child protector investigator (PC-R. 3466). He identified a case file reporting on an investigation as to the living conditions for Cindy Pittman which was introduced into evidence (PC-RE. 671-726). In the course of the investigation, Battles was told by Cindy Pittman's mother, Barbara Marie Pridgen, that Cindy's difficulties stemmed from her having witnessed her grandmother's murder (PC-R. 3460)("Mom states child Cindy needs counseling for the sexual abuse and states the child witnessed her grandmother being killed by her bother-in-law"). Elsewhere in the file, reference was made to Cindy witnessing her grandmother murdered by her uncle (PC-RE. 681). Battles was not sure why "uncle" was used in one place and "brother-in-law" in another (PC-R. 3462). But while testifying, Battles indicated that he an independent recollection of "that being said to me. That stood out in my mind that the child witnessed a murder" (PC-R. 3460, 3471).[77]

Chastity Eagan

Mr. Pittman also called Chastity Eagan to testify.[78] She indicated that in 1990 when she was 13 years old, her mother

[77]From the birth date appearing in the file (1/13/86), it is apparent that Cindy was a little over four years old at the time that her grandmother was murdered.

[78]Ms. Eagan testified that in August of 2006 she first talked to Mr. Pittman's investigator, Rosa, while in the Alachua County jail (PC-R. 5010). Ms. Eagan said that she was jailed in May of 2006. She indicated that she had been living in Alachua County

lived with Barbara Marie and Allen Pridgen (PC-R. 4987-9). At that time, she spent weekends with her mother (PC-R. 4989). Ms. Eagan observed Barbara Marie using methamphetamine "[e]very time I went over there" (PC-R. 4995). During this time period, Ms. Eagan heard Barbara Marie discussing the deaths of her parents and her sister (PC-R. 4990). Ms. Eagan did not know their names; all she knew was that they were "the Knowles" (PC-R. 4996). Barbara Marie "didn't act upset" over their deaths; Ms. Eagan heard Barbara Marie say that "she was glad her parents were dead" (PC-R. 4991). Ms. Eagan understood that "HRS had been working with her parents to take her children" before their deaths (PC-R.

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for a while before that and did not know that police were trying to find her to put her in jail (PC-R. 5011).

Rosa Greenbaum testified that she works as an investigator for Mr. Pittman (PC-R. 5013). Before the 2006 evidentiary hearing, Ms. Greenbaum was given names of potential mitigation witnesses that she was to locate and speak to (PC-R. 5015). One of the names she was given was Chastity Eagan's. Ms. Greenbaum used the standard methods for locating people when she searched for Ms. Eagan (PC-R. 5016). Ms. Greenbaum learned that Ms. Eagan was on probation. But, Ms. Eagan was not at the address listed by the Department of Corrections. Ms. Greenbaum contacted Ms. Eagan's probation officer and was advised that Ms. Eagan's whereabouts were unknown. The probation officer said that Ms. Eagan would be picked up eventually. He said that he would let Ms. Greenbaum know when that happened (PC-R. 5016). After the evidentiary hearing concluded on May 11, 2006, Ms. Greenbaum learned from the probation officer that Ms. Eagan had been picked up. Ms. Greenbaum went to speak with Ms. Eagan at the Alachua County jail in August of 2006 (PC-R. 5017). During this interview, Ms. Eagan advised Ms. Greenbaum of what she recalled hearing statements by Barbara Marie and David Pridgen. Prior to the interview, Ms. Greenbaum had no information that Ms. Eagan possessed information related to the guilt phase; she was being interviewed as a potential mitigation witness.

4991).[79] After their deaths, Barbara Marie "went on a spending spree" (PC-R. 4992).

Ms. Eagan also testified that she knew David Pridgen, Allen Pridgen's brother, and Barbara Marie's brother-in-law (PC-R. 4993). When she was fifteen, she briefly dated David Pridgen who told her he had killed three people (PC-R. 4993-4).[80] She

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[79]John Van Shuman who was called by the State testified that he also remembered hearing something about HRS trying to take Barbara Marie's children away from her (PC-R. 5046). He also confirmed that in May of 1990 money was tight for Barbara Marie (PC-R. 5045). And, he recalled that after her parents died that she came into money (PC-R. 5041-2).

[80]The State called David Pridgen. He did not dispute talking to Ms. Eagan about killing people, he just did not recall saying that he had killed three people. Pridgen explained: "I may have been talking about the war, but I didn't - - I don't remember specifically saying that I killed three people. I was talking about the killing and how it upset me." (PC-R. 5023, 5030). Pridgen did deny any involvement with the murders of the Knowles (PC-R. 5024). He claimed that on May 15, 1990, he was in the military and stationed at Fort Bragg, North Carolina (PC-R. 5022). He remembered because he had broken his foot in April and was recovering from that injury. However, Pridgen had no military records to support his claim (PC-R. 5026-27). The State had asked him to get military records to corroborate his claim. He said he tried: "I called, you know, and I haven't gotten anything back yet." (PC-R. 5027). Accordingly, he had no documentation to back up his testimony showing his whereabouts in April and May of 1990 (PC-R. 5032).

He was asked at the hearing if he could obtain the records. He responded: "No, I can't." (PC-R. 5028). He was then asked to explain what he meant by "can't". At that point, Mr. Pridgen testified: "I mean, I haven't been able to get them. I called the VA about it and filled out the form, but I don't know how the military records work, but they should have been here by now." (PC-R. 5028).

The State's very next witness contradicted Pridgen. John Van Shuman, the boyfriend of Chastity Eagan's mother, testified that David Pridgen was staying in his mom's house in May of 1990 (PC-R. 5045). Shuman also indicated that Pridgen was Cindy Pittman's uncle (PC-R. 5046).

As to overhearing Pridgen's conversation with Chastity about killing people, Shuman said he did not recall such a discussion (PC-R. 5037). However, Shuman testified that starting in the

believed this (the conversation) occurred at a Halloween party in 1992 and that others may have heard the statement (PC-R. 5002, 5006).

Though Marie Pridgen was listed as a witness by the State and was present outside the courtroom on July 27th, the State did not call her as a witness. No evidence was presented refuting or disputing Ms. Eagan's testimony regarding Marie Pridgen's statements about her parents and her sister. Nor was any evidence presented refuting or disputing Ms. Eagan's testimony that Marie's parents in conjunction with HRS were working together to take custody of Marie's children.

Evidence of Mr. Pittman's Substance Abuse

In addition to the information set forth in the preceding sections, Mr. Pittman demonstrated that mitigating evidence was withheld from the defense. Specifically, Barbara Marie Pittman told Mr. Pickard that Mr. Pittman had a crank problem. As Mr. Norgard explained, corroboration of a crank problem from a hostile witness is particularly helpful because it is less likely to be viewed as something a friend or a family member is saying in order to save the defendant's life (PC-R. 4198).

In 2006, Mr. Pittman called a number of a witness to testify to mitigating evidence. These witness included: Robert Barker,

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late 80's he began using "meth" (PC-R. 5044). He was doing "meth" when he was with Chastity's mother (PC-R. 5043). Because of his "meth" use, he had gaps in his memory. As a result, Shuman had no reason to question Chastity's memory as to such a conversation occurring in the early 90's, even though he did not remember it (PC-R. 5044).

Michael Pittman, Jean Wesley and Tillie Woody.[81] Each of these witnesses testified to mitigating evidence that was not heard at the penalty phase and which provided compelling evidence of Mr. Pittman's substance abuse problems and life long afflictions. Mr. Pittman also called Tammy Davis and William Pittman to testify to mitigating evidence that trial counsel failed to elicit from them when they testified at Mr. Pittman's penalty phase. Dr. Henry Dee was called to testify that the witnesses that trial counsel failed to discover, and the information from witnesses who trial counsel had called but failed to elicit further information from, would have corroborated his conclusion at the time of trial. The corroboration would have buttressed his conclusions and provided a way to make his testimony more convincing.

Also presented in 2006 was the testimony of Dr. Joseph Wu. He testified to the results of the PET scan that he administered to Mr. Pittman. This PET scan showed that Mr. Pittman suffers from brain damage, specifically an impaired frontal lobe (PC-R. 3647-52). The results provided concrete support for Dr. Dee's opinion that Mr. Pittman likely had some brain damage. This is extremely important in light of the fact that when imposing a death sentence the judge said: "The expert has offered an opinion as a mitigating circumstance that the Defendant suffers brain damage. Other than this opinion there exists no corroborating

[81]Barker testified that he had seen Mr. Pittman mix gasoline with milk and drink it (PC-R. 3613).

evidence to suggest the presence of this damage or its degree, nor its actual relationship to the murders" (R. 5180).

STANDARD OF REVIEW

Mr. Pittman has presented several issues which involve mixed questions of law and fact. "Brady claims are mixed questions of law and fact. When reviewing Brady claims, this Court applies a mixed standard of review, 'defer[ring] to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but review[ing] de novo the application of those facts to the law.'" Johnson v. State, 921 So. 2d 490, 507 (Fla. 2005)(citations omitted). This Court has applied a similar standard of review for ineffective assistance of counsel claims. Evans v. State, 946 So. 2d 1, 24 (Fla. 2006).

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

SUMMARY OF ARGUMENT

1. Due to the State's failure to disclose exculpatory information, as well as counsel's constitutionally deficient performance, Mr. Pittman did not receive a constitutionally adequate adversarial testing. In addition, newly discovered evidence of innocence has been presented which if it had been known by the jury, would have probably resulted in an acquittal.

Under Florida law, the exculpatory material withheld by the State, the favorable evidence that was either undiscovered or unpresented by defense counsel, and the newly discovered evidence of innocence must be evaluated cumulatively in order to determine if the ends of justice require that a new trial be ordered. When all of the evidence is properly considered here, a new trial should be ordered.

2. Due to the State's failure to disclose mitigating information to Mr. Pittman, and due to counsel's constitutionally deficient performance at the penalty phase, Mr. Pittman did not receive a constitutionally adequate adversarial testing at his penalty phase as guaranteed by the Due Process Clause of the Fourteenth Amendment. In addition, newly discovered evidence has been presented which would have resulted in a life sentence had it been known at the time of trial. When all of this evidence is considered cumulatively, Mr. Pittman's death sentence must be vacated, and/or a new penalty phase must be ordered.

ARGUMENT

ARGUMENT I

MR. PITTMAN WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE EITHER THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING AND FALSE EVIDENCE AND/OR DEFENSE COUNSEL UNREASONABLY FAILED TO DISCOVER AND PRESENT EXCULPATORY EVIDENCE, AND/OR THE FAVORABLE EVIDENCE CONSTITUTES NEWLY DISCOVERED EVIDENCE OF INNOCENCE, ALL OF WHICH WHEN CONSIDERED CUMULATIVELY AS REQUIRED UNDERMINES CONFIDENCE IN THE RELIABILITY OF THE TRIAL CONDUCTED WITHOUT THE EVIDENCE PRESENTED.

A. Introduction

In Strickland v. Washington, 466 U.S. 668, 685 (1984), the 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." In order to guarantee that a constitutionally adequate adversarial testing occurs, constitutional obligations are imposed upon both the prosecutor and the defense attorney. Failures by other to function as required will generally warrant a new trial where confidence is undermined in the reliability of the outcome of the trial.[82] Brady v. Maryland, 373 U.S. 83, 87 (1963).

B. The Prosecutor's Obligations

1. Brady obligation

a. legal standard

In order to insure a constitutionally adequate adversarial testing, and hence a fair trial, occurs, certain obligations are imposed upon the prosecuting attorney. He is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). See Kyles v. Whitley, 514 U.S. 419, 438 (1995)("the prosecutor's responsibility for failing to disclose known, favorable evidence rising to a material level of

[82]When the State engages in deliberate deception, a new trial is warranted unless the State proves the error harmless beyond a reasonable doubt. Guzman v. State, 868 So. 2d 498, 506 (Fla. 2003)("[t]he State as beneficiary of the Giglio violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt.").

importance is inescapable"). The prosecutor has a "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police". Kyles, 514 U.S. at 437. The prosecutor as the State's representative has a duty to learn of any favorable evidence known by individuals acting on the government's behalf and to disclose any exculpatory evidence in the State's possession to the defense. Strickler v. Greene, 527 U.S. 263, 280 (1999). Thus, a prosecutor's specific knowledge of the favorable evidence does not matter, if the favorable evidence is in the possession of other State agents. Kyles, 514 U.S. at 438-39 ("Since, then, the prosecutor has the means to discharge the government's Brady responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials."). As the Supreme Court has explained, "procedures and regulations can be established to carry [the prosecutors'] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." Giglio v. United States, 405 U.S. 150, 154 (1972).

Thus, constitutional deprivation has occurred when: "The evidence at issue [was] favorable to the accused, either because it [was] exculpatory, or because it [was] impeaching; that evidence [was] suppressed by the State, either willfully or inadvertently; and prejudice [ ] ensued." Strickler v. Greene,

527 U.S. 263, 281-82 (1999). This affirmative obligation to disclose cannot be transferred to the defense. The prosecutor's constitutional obligation is not discharged simply because the prosecutor thought the defense should have been aware of exculpatory information. In Strickler, the Supreme Court made it clear that defense counsel's diligence was not an element of a Brady claim.[83] "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." Banks v. Dretke, 124 S. Ct. 1256, 1263 (2004). A rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." Id. at 1275. Accordingly, "[t]he prudent prosecutor will resolve doubtful questions in favor of disclosure." United States v. Agurs, 427 U.S. 97, 108 (1976). "[A] prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence." Kyles, 514 U.S. at 439.

Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or sentencing phase of the trial would have been different. Garcia v. State, 622 So. 2d 1325, 1330-31 (Fla. 1993). This standard is met and reversal is

[83]But of course, if defense counsel was not diligent, his performance was deficient and failed to meet the constitutional standards imposed upon him. State v. Gunsby, 670 So.2d 920 (Fla. 1996). As a result, it merely converts the claim into an ineffective assistance of counsel inquiry which will then turn on whether confidence is undermined in the reliability of the trial, *i.e.* the same standard at issue if the claim is resolved as a Brady claim.

required when there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles, 514 U.S. at 434.

This Court has indicated that the question is whether the State had exculpatory "information" that it did not reveal to the defendant. Young v. State, 739 So.2d 553 (Fla. 1999).[84] "In determining whether prejudice has ensued, this Court must analyze the impeachment value of the undisclosed evidence." Mordenti, 894 So. 2d at 170. The materiality of evidence not presented to the jury must be considered "collectively, not item-by-item." Kyles, 514 U.S. at 436; Young v. State, 739 So.2d at 559. In making this determination, "courts should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case." Rogers, 782 So.2d at 385. This includes

[84]This Court has not hesitated to order new trials in capital cases wherein confidence was undermined in the reliability of the conviction as a result of the prosecutor's failure to comply with his obligation to disclose exculpatory evidence. Floyd v. State, 902 So.2d 775 (Fla. 2005); Mordenti v. State, 894 So.2d 161 (Fla. 2004); Cardona v. State, 826 So.2d 968 (Fla. 2002); Hoffman v. State, 800 So.2d 174 (Fla. 2001); State v. Hugins, 788 So.2d 238 (Fla. 2001); Rogers v. State, 782 So.2d 373 (Fla. 2001); State v. Gunsby, 670 So.2d 920 (Fla. 1996); Gorham v. State, 597 So.2d 782 (Fla. 1992); Roman v. State, 528 So.2d 1169 (Fla. 1988).

impeachment presentable through cross-examination challenging the "thoroughness and even good faith of the [police] investigation." Kyles , 514 U.S. at 446. See Scipio v. State, 928 So. 2d 1138 (Fla. 2006).

b. Prosecution's failure to disclose in Mr. Pittman's case

Mr. Pittman has presented evidence of favorable information that was withheld by the State at the time of his trial.

i. information regarding Carl Hughes[85]

[85]At Mr. Pittman's trial Hughes testified that Mr. Pittman made a detailed confession of having committed the murder that he was charged with. Hughes' testimony was absolutely critical to the State's otherwise circumstantial case. In fact, the timeline of the State's case was very problematic.

The State called Mr. Pittman's sister, Bobbie Jo Pittman, who accounted for all of Mr. Pittman's whereabouts up until 2:30 AM on May 15, 1990 (R. 2061-70). According to Bobby Jo, she was with David until 2:30 AM when she left him in front of the TV and went to bed (R. 2039, 2070).

Eugene Pittman testified that he left work at "about 25 till 3:00 that morning" (R. 2093). He got home around 3 AM and went to bed. Though he heard noises in the house like someone was walking, he did not see David until close to 3:30 AM (R. 2099). David looked tousled-up, like he was sleepy (R. 2116).

Thus between Bobbie Jo and Eugene, all of David Pittman's time was accounted for by another except the hour between 2:30 AM and 3:30 AM. However, the Knowles' house was ablaze by 3:10 AM when David Hess, a newspaper distributor, saw a burst of fire in the sky (R. 1144-5, 1152). He was some distance from the fire, may be two miles, and yet was able to see blaze in the night sky.

The medical examiner testified that the victims had all stopped breathing by the time the fire started. He knew this because there was no soot in their airways.

But for Carl Hughes and David Pounds, the two jailhouse informants, the State's circumstantial evidence provided a nearly impossibly narrow window for Mr. Pittman to have committed the murders. Since the fire was first seen by 3:10 AM, the fire had to have been burning for some time before it was visible nearly two miles away (R. 4050-1). So the fire would have to have been started by about 3:00 AM, unless the arsonist took a lot of time to obtain, carry and spread a large amount of gasoline in the house (R. 4050). After the victims were dead, the killer had to take the time to find and spread gasoline in the house with a

As Mr. Norgard testified in 2006, but for Carl Hughes and David Pounds, the State's case was entirely circumstantial (PC-R. 4126). There was no evidence tying Mr. Pittman to the scene of the homicides. Even with Hughes and Pounds, Mr. Norgard believed the case was winnable (PC-R. 4125). Mr. Norgard believed that the State had a problem with each and every one of its witnesses,

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fire trail leading away from the house outside. At a minimum, the three murders had to have been completed before 3:00 AM (R. 4051). Before setting the fire, the killer also had to find Bonnie's car keys since the keys were used to drive away in the car. In addition, Hughes version included the time it took to put a spare tire from Bonnie's car under her bed to make the fire burn hotter. Since no blood was found in Bonnie's car which was taken after the murders, some time was spent cleaning up (R. 4051). Further, the killings themselves took some time; three victims in different rooms of the house were stabbed to death. There were a total of 16 stab wounds in the three victims. Unless there was more than one killer, it could not have occurred instantaneously. There was also evidence that the phone lines were cut.

Moreover, the State presented evidence that it took roughly 13 minutes to walk from the Pittman residence to the Knowles' house (R. 2179, 4054). So according to the State's theory of the case as set forth by Carl Hughes, Mr. Pittman waited until Bobbie Jo went to bed at 2:30 AM, then walked to the Knowles' house. Hughes indicated that there was no premeditation. He said Mr. Pittman went there just to talk to Bonnie. Hughes said Mr. Pittman tapped on Bonnie's window and she let him into the house. Hughes said that Bonnie and Mr. Pittman then talked for a while about the rape allegation that she had made. They then talked about having sex, but Bonnie was on her period. They talked about oral sex. Bonnie then got upset and hollered. According to Hughes, while trying to shut her up, Mr. Pittman lost it, cut her throat and stabbed her, cut the phone lines, and stabbed her parents to death (R. 2253-5). Since the State's theory was that the murders were not preplanned, after he lost it and killed her, he had to spend time thinking what to do next. After spending 13 minutes walking there (since he merely wanted to talk, there would have been no reason to even hurry that fast), Mr. Pittman had 17 minutes to do all the things that Hughes testified he did before starting the fire at about 3:00 AM. This alleged scenario and the timeline left plenty of room for reasonable doubt.

and in defending Mr. Pittman, it was a matter of exploiting those problems by highlighting them for the jury.

Hughes' wife

The State did not disclose that Hughes' wife faced criminal charges. The State did not reveal that his wife was being watched or that their home was under surveillance. The State did not reveal that Hughes' wife had been questioned by the prosecutor handling Hughes' criminal case. The State did not reveal that she was polygraphed. The State did not reveal that she was frightened for herself and her three young children for whom she was the sole custodian while her husband was incarcerated.

The State did not disclosed that Hughes had been asked by FDLE to obtain information regarding Mr. Pittman. The State did not disclose that in order to protect his wife and children, Hughes "was to - - the way it was told to me is that he was to gather information for them by way of befriending Mr. Pittman while they were both incarcerated" (PC-R. 3543). The State did not disclosed that Ms. Anders was being asked to carry messages back and forth between Hughes and FDLE agent, Dey, during the time period he was negotiating with the State about whether he would assist them (PC-R. 3544). The State did not disclose that Hughes was in constant contact with Dey.

The undisclosed bits of information that Ms. Anders revealed in her testimony when considered separately and together provided a wealth of impeachment that the defense could have used to attack Hughes' credibility. To the extent that this information

demonstrates that Hughes was a State agent when he spoke to Mr. Pittman and tried to obtain information, Hughes' testimony could even have been challenged as inadmissible.

Ms. Anders' testimony clearly impeaches Hughes' trial testimony in numerous ways. At Mr. Pittman's trial, Hughes claimed that he told his wife to contact Dey and relay the facts of the Pittman murder in order to confirm that they were accurate. Ms. Anders' testimony indicates that this isn't true.

Ms. Anders' testimony shows that Hughes' claim that he had no incentive to testify against Mr. Pittman was untrue.[86] It

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[86]Hughes had testified in 1991 that:

> So I haven't got any rewards that you're going to be able to convince this jury I got. I haven't got any incentives to sit here today and do this, I wasn't going to do this. I'm facing a situation where I had -- I was going to be brought back anyway, ultimately I was. But you talk with my fiancee who thinks it's the right thing to do, the reasons I told you.

(R. 2336-7). He reiterated this several times:

> But I don't think it's fair that you try to persuade this jury I have some motive. I was given no favors as a result even up to the day of sentencing of doing that, contrary to what you're trying to lead them to believe. It didn't happen that way.

(R. 2337).

> Q: And still, despite what happened through the court proceedings, you're telling this jury that you didn't receive any benefits, is that what you're saying?
>
> A: That's what I maintain. Still, I think you failed to show me or anybody else how I got any special favors. I don't understand that.

(R. 2357).

shows that he had tremendous incentive. Mr. Pittman's counsel could have crossed Hughes regarding his statements to his wife that he was protecting her and the kids if these statements had been disclosed.[87] This would have been a devastating cross, particularly in light of Hughes' taunting challenge to find some benefit that he received or some incentive that he had to testify against Mr. Pittman.

Ms. Anders' testimony revealed contacts between Hughes and the State that could have been used by Hughes to gather information to manufacture a false story that Mr. Pittman confessed. It provides an explanation for the obfuscation and deceit regarding how Hughes came to be placed in a cell with Mr. Pittman.[88] It explains why the State needed to have Pounds give them the name Hughes as a cover for the truth.[89]

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[87]It would have also given defense counsel an opening to show that Hughes had implicated his wife in criminal activity. Counsel could have explored the potential charges that she faced. He could have asked about the children who would have been left without a parent if Hughes and his wife both got sent to prison.

[88]Dey's testimony in regard to how the June 26th meeting came to be was laced with uncertainty. He testified that he "believed" that it was Hughes' wife who contacted him, but he wasn't really sure (R. 2414). Cosper was even more unsure in his deposition as to how it came to pass that he and Dey interviewed Hughes on June 26th (PC-RE. 816)("I really don't know").

[89]In his September 11, 1990, taped statement, Hughes said that when Mr. Pittman was booked into the county jail, Hughes was in "227" (R. 2302). During the cross at trial, defense counsel asked if Mr. Pittman was placed in "cell 227" following his arrest on May 15, 1990 (R. 2301). When Hughes answered, "I have no idea", counsel showed him his September 11th statement. Hughes, thereupon, disputed the accuracy of the taped statement, "I would have never at any time given a statement, not ever at any time have I said I was in 227 when David Pittman was booked into jail" (R. 2302). Later in his testimony, Hughes testified that he was not placed in J227 with Mr. Pittman until June 20th

Mr. Pickard, the trial prosecutor, testified that he did not know if he knew about the polygraph administered to Ms. Anders, or of the potential for criminal charges against her:

> Q: Was it ever brought to your attention that Mr. Hughes' wife was polygraphed by Mr. Bergdoll?
>
> A: I don't know if I knew that or not.
>
> Q: Was it ever brought to your attention that there was potential criminal charges against her or that there was consideration of charges against her?
>
> A: I don't recall having that information or even knowing that, no. Whether Mr. Bergdoll may at some point in time have mentioned that to me in passing, I guess that's conceivable, but I don't recall it.
>
> Q: Well, do you recall Mr. Hughes ever mentioning to you that he was concerned about protecting his wife?
>
> A: No. But then again, I mean, that's certainly possible he could - - at some point he could have mentioned that and I don't recall it.

(R. 2359). In his report about the June 26th interview, Det. Cosper did not record anything about when Hughes said he was placed with Pittman, nor did he provide any time frame for when Mr. Pittman supposedly made statements to Hughes (PC-RE. 930-1).

(PC-R. 3897).[90]

However, even if he had known of the polygraph given to Ms. Anders and the threat of criminal charges against her, Mr. Pickard was not sure that he would have disclosed the information to Mr. Pittman's counsel:

> Q: If you had known that, is that information that you would have disclosed to the Defense?
>
> A: I don't know.
>
> Q: When you say you don't know, that implies certain amount of hesitation. Can you elaborate on your hesitation?
>
> A: I would question whether that is Brady material.
>
> Q: And why would you question whether that's Brady material?
>
> A: It just doesn't seem to me to be something of any significance.
>
> Q: Are you aware of the Defense's right under Davis v. Alaska to pursue potential motives or bias of why a witness may want to curry favor with the State?
>
> A: Yes.
>
> Q: Do you see this as something the Defense

[90]Mr. Pickard did acknowledge that Def. Ex. 31 showed a phone message from David Bergdoll requesting Mr. Pickard to respond to a call from Kathy Hughes. Attached to this message was a note in Mr. Pickard's handwriting where he wrote down her name and phone number. "So it does appear that I probably talked to her on the phone at least once, although I don't have any recollection of doing that" (PC-R. 3948).

The phone message was attached to a note from David Bergdoll that said, "Carl received some papers from the State and wants to discuss them with you" (PC-R. 3939). Mr. Bergdoll was about to be deposed by the defense, and did not want to be the one returning the call to Hughes' wife.

> may want to pursue that this is an additional reason for why Mr. Hughes would want to curry favor with the State in order to protect his wife?
>
> A: No.
>
> Q: You don't see that?
>
> A: No.

(PC-R. 3969).

Mr. Pittman's trial counsel testified that he was never advised of a threat of criminal prosecution to Hughes' wife. He explained: "If I knew that there were threats of prosecution to his wife by the State Attorney's Office or law enforcement, that's certainly an area of impeachment I would have gone into" (PC-R. 4174). Moreover, he would have wanted to contact Hughes' wife to inquire about the threat - "I mean, it would open up a whole array of inquiry" (PC-R. 4175). When asked if he learned that "Hughes had said that he had to get information against Mr. Pittman in order to save her from prosecution", Mr. Norgard responded, "It would be very important (PC-R. 4174-5). He would have presented such information as evidence of both "a threat as well as benefit" (PC-R. 4176). He would have pursued the evidence as demonstrating that "law enforcement had gone to him and requested that he try to get information" as indicating that Hughes was an agent within the meaning of the Fifth and Sixth Amendment (PC-R. 4177).

In rejecting this aspect of Mr. Pittman's Brady claim, the circuit court said it was clear that Ms. Anders' testimony wouldn't be admissible, and "the Defendant has not shown any reasonable probability that the information weakens the case

against the Defendant so as to give rise to a reasonable doubt as to his culpability or might have led to a different verdict" (PC-R. 5386). These were erroneous rulings of law. Undoubtedly, Hughes could have been crossed about his statements to Ms. Anders, and she could have been called to testify about them if he denied making the statements. Moreover, Hughes could have crossed about the criminal jeopardy his wife was in.

But beyond the circuit court's erroneous understanding of how the information revealed by Ms. Anders could have been used, it failed to apply the proper standard for considering the materiality of undisclosed favorable information. Under the law, it must be evaluated cumulatively, not only with other bits of undisclosed information, but with newly discovered evidence of innocence. Rivera v. State, 2008 Fla. LEXIS 1069 (Fla. 2008). The circuit court did not engage in the proper analysis.

October 11, 1990, letter instructing Cosper to tell Hughes of more jail time

Mr. Pickard also did not provide Mr. Norgard with his October 11, 1990, letter to Det. Cosper instructing him to tell Hughes if he refused to testify against Mr. Pittman, "we will ask that he be held in contempt" (PC-R. 839). Mr. Pickard wrote that the sentence of the contempt charge "would be added to his present sentence and delay his release" (PC-R. 3917). Mr. Pickard acknowledged that "if you want to consider contempt a threat, yeah, there is a discussion of contempt" (PC-R. 3919). He admitted that Hughes was being told that if he did not testify, his prison sentence "would lengthen" (PC-R. 3919).

Though he had no specific memory whether this letter got disclosed, Mr. Pickard said that "in the normal course of things, I would not consider that to be discoverable" (PC-R. 3918).

Mr. Norgard did not recall having the October 11th letter from Mr. Pickard to Det. Cosper (PC-R. 4180). But, he believed that the letter was discoverable. Even though Hughes testified that he had been told contempt was a possibility, the letter made it clear that a consecutive sentence would be sought, lengthening Hughes' incarceration (PC-R. 4276). In fact when Hughes was asked about the discussion with the State about the possibility of being charged with contempt, he explained that his female friend, Lynn, had advised him of the options that Mr. Pickard had told her to communicate to him. Hughes was asked, "They were basically threatening to give you six months for contempt." Hughes replied "[n]obody mentioned six months" (PC-R. 4273).

As Mr. Norgard noted, the October 11th letter added details missing from Hughes' account. It wasn't a matter of looking at three options that his girlfriend had passed along; the October 11th letter demonstrated "a direct assertion of authority by somebody in the power to do what they say they're going to do", that Hughes never mentioned in his testimony (PC-R. 4278).

The circuit court's consideration of this aspect of Mr. Pittman's Brady claim overlooked the fact that Hughes specifically testified that "[n]obody mentioned six months" (PC-R. 4278). The circuit court erred in finding the undisclosed letter was not Brady material and in failing to conduct any cumulative consideration of the prejudice (PC-R. 5386-87).

July 6, 1990, interview of Hughes and

other State contact with Hughes

Former Polk County Sheriff Detective Tom Cosper identified his handwritten notes from a July 6, 1990, interview of Hughes that he conducted (PC-RE. 866-67).[91] The purpose of the notes was to memorialize what Hughes related to Cosper during the interview (PC-R. 3508). Det. Cosper testified that he would not have knowingly written anything down that was incorrect; the notes reflect what he was told . Written in the portion of the notes discussing Hughes' description of the sequence of events following the murders, were the words "real off on time of occurrence" (PC-R. 3509).

Mr. Pickard testified that he did not recall if he knew of the July 6th interview of Hughes (PC-R. 3898). Mr. Pickard indicated that he had no idea as to whether Mr. Pittman's counsel was advised of the July 6th interview. He then testified:

> Q: Is that something, had you known, would you have disclosed?
>
> A: No.
>
> Q:. And why is that?
>
> A: We have no obligation to tell the Defense, every time we go out and interview a witness, that we're interviewing a witness. Just the simple fact that Detective Cosper went and talked to Carl Hughes, we don't have to call the Defense and say, hey, Detective Cosper's just gone out to interview Carl Hughes.
>
> Q: Okay. And if in deposition or in his testimony he's asked in terms of his contact with law enforcement and he doesn't mention July 7th - - or July

[91]Det. Cosper was subpoenaed to appear before the grand jury on July 12, 1990, a few days after his July 6th interview of Hughes (PC-R. 3510). The indictment against Mr. Pittman was returned July 12, 1990.

6th of 1990, are you obligated to point out, well, there was an additional contact?

A: If at the time I was thinking of it, yeah. I think we're - - if a witness misspeaks and we're aware the witness is misspeaking or recall that the witness is misspeaking, I think there is an obligation to attempt to correct the record to make it accurate, yes.

Q: Well, do you recall that the Defense in this case was concerned that Carl Hughes - - was there an allegation by the Defense that Carl Hughes was fabricating his story and over time embellishing details?

A: I think Mr. Hughes' credibility was a issue in the case, yes.

Q: And do you think it would have been information that would have assisted the Defense in making that point to show more contact between Mr. Hughes and law enforcement investigating David Pittman's case?

A: No. I don't even know that I was aware of all of the contacts that Detective Cosper may have had with Carl Hughes. He would not necessarily call me up every time he went and talked to Carl Hughes and tell me, I've just talked to Carl Hughes. So he may have had a lot of additional contacts with Carl Hughes, as probably did Randy Dey of FDLE, that I had no knowledge that they were contacting him and talking to him.

Q: So there actually may have been many more contacts between Randy Dey and Carl Hughes and between Detective Cosper and Carl Hughes than just these two that are reflected in these two exhibits?

A: I would be surprised if there weren't more contact. Randy Dey was talking to him about other cases and other investigations, so that would not surprise me. And I wouldn't have any way of knowing every time law enforcement went and talked to Carl Hughes.

Q: Well, was Randy Dey also talking about this case to him.

A: Randy Dey was - - got involved in this

> case. It wasn't his case, but he did get involved in it when Mr. Hughes told Randy Dey that he had the information that he claimed he had.
>
> Q: Okay. And so you don't know how many times Randy Dey met with Carl Hughes to discuss this case?
>
> A: Have no idea how many times Randy Dey would have discussed this case with Carl Hughes, and Randy Dey would not have called me up and told me about every contact he had with Carl Hughes about this case.

(PC-R. 3899-3900).[92] Mr. Pickard indicated that he himself had interviewed Carl Hughes. He had placed the notes from the interview of Hughes in a sealed envelop marked SA-1 that he provided to the Court. When he was testifying, Mr. Pickard did not recall the date of the Hughes interview and whether it had been under oath (PC-R. 3902). Mr. Pickard further explained that he would not have disclosed to the defense that he had interviewed Hughes under oath or not and that he had notes from the interview - "I would have had no obligation to tell the Defense that, by the way, I went out on August 18th and I - - or whatever the date is, and I interviewed Carl Hughes. I would not tell the Defense that" (PC-R. 3903). Mr. Norgard reviewed Randy Dey's deposition in which Dey discussed the June 26, 1990, interview of Hughes. When asked about Hughes' second interview, Dey referred to the September 11, 1990, taped statement as

[92]At one point in his testimony, Mr. Pickard subsequently clarified that he was only obligated to disclose the fact that Cosper interviewed Hughes on July 6th if he knew of the interview and either Hughes or Cosper had testified there was no interview (PC-R. 3903). However, Mr. Pickard then indicated that he was not obligated to learn that such an interview occurred.

Hughes' second interview (PC-R. 4163).[93] Mr. Norgard was also asked to review Det. Cosper's deposition, in which Det. Cosper only indicated a June 26, 1990, interview of Hughes and the September 11, 1990, taped statement by Hughes (PC-R. 4165-6). Based upon his review of the record, Mr. Norgard testified that "it would appear that I was not aware of any statement by Mr. Hughes to law enforcement between the June statement and the September statement" (PC-R. 4166).

The existence of a July 6th interview impeached Dey, Cosper and Hughes, none of whom had mentioned it. It impeached Hughes' claim that between June 26th and September 11th he was not providing any information to law enforcement about Mr. Pittman. The existence of a July 6th interview at which Hughes had contact with Cosper and Dey could be used to show how Hughes' story evolved over time, particularly in light of the notation that he was off on the time of the occurrence (PC-R. 4168).

The circuit court erred in its analysis of this aspect of Mr. Pittman's Brady claim when it concluded that the existence of the July 6th interview was not favorable evidence subject to disclosure (PC-R. 5387). The circuit court's conclusion is in error as a matter of law in that it fails to recognize the State's obligation to disclose favorable information, *i.e.* information that could be used to impeach a State witness.

[93]The formal police report of the June 26th interview was introduced into evidence at the evidentiary as Def. Ex. 20. The transcript of the September 11th taped statement was introduced as Def. Ex. 19.

Because it did not find an obligation to disclose this information, no cumulative consideration was conducted.

Hughes' PSI

Mr. Pickard identified the Pre-Sentence Investigation prepared in Hughes' state court criminal case (PC-R. 3936). He acknowledged that it was in the State Attorney's Office, and that he could access it. Mr. Norgard testified that he was not provided access to Hughes' PSI (PC-R. 4183).

ii. information regarding David Pounds

David Pounds testified for the State at trial and claimed that Mr. Pittman made a statement in which he used the phrase, "The people I killed" (R. 1895).

Pounds' mental condition when in jail

Pounds' PSI from April, 1990, was introduced into evidence (PC-R. 998-1008).[94] The PSI included a psychological history of Pounds. This history indicated that Pounds was suffering from visual and auditory hallucinations (PC-R. 3930). Reference was made to the fact that Pounds "heard voices talking to him" (PC-R. 3930). The psychological history included the fact that Pounds was at the time being treated with psychotropic medication - Vistaril, Tofranil, and Thorazine (PC-R. 3931). The PSI also indicated that Pounds' mother was aware of his emotional problems and believed that he needed counseling and help (PC-R. 3933).

[94]Pounds was sentenced on May 9, 1990, and received by the Department of Corrections on June 5, 1990. As Mr. Pickard acknowledged in his testimony, Pounds' PSI would have been provided to the State Attorney's Office (PC-R. 3929). Mr. Pickard testified that he could have accessed it any time, but doubted that he ever did (PC-R. 3929).

The PSI even indicated that Pounds was going to need mental health help in prison (PC-R. 3933).

Mr. Pickard testified that he "never looked into [Pounds'] mental health issues" (PC-R. 3931). Mr. Pickard explained, "I didn't know any more than the Defense knew" (PC-R. 3931). Mr. Pickard admitted that the PSI would have been a sealed court document. However, according to Mr. Pickard, Mr. Pittman's counsel could have obtained a copy if they had asked the Court to provide it to them (PC-R. 3930).[95] Mr. Pickard testified that given that he did not get the PSI, he would not have disclosed it to the Defense (PC-R. 3933).[96]

Mr. Norgard testified that Pounds' PSI was marked confidential and not available to him unless the State provided it to him (PC-R. 4153). As Mr. Norgard explained, he understood that the State had a responsibility to disclose any information contained in Pounds' PSI which was within the State Attorney's possession that was favorable to Mr. Pittman (PC-R. 4254).[97]

[95]Mr. Pickard testified that even if he had seen the PSI, "chances are I would not have disclosed this particular document" (PC-R. 3931-32). He believed that the defense was obligated to get the PSI on its own, so he would have felt no need to disclose the PSI or the information contained therein.

[96]Mr. Pickard did acknowledge that though he may not have looked at the PSI, a copy was in the possession of the State Attorney's Office and available to him without the need for a court order (PC-R. 3933-34).

[97]During Mr. Pickard's cross-examination of Mr. Norgard regarding this matter, it appeared that it was Mr. Pickard's contention that Mr. Norgard had the duty to obtain the records given what he knew from Pounds' deposition. If it was Mr. Norgard's duty to obtain the records, he obviously failed and rendered constitutionally deficient performance, as discussed in the ineffective assistance section of this argument.

Mr. Norgard indicated that had he been aware of the information contained in the PSI regarding Pounds' mental health, he would have explored it through discovery in order to determine how it could be used to impeach Pounds at trial (PC-R. 4154-5).

Also undisclosed were documents from Pounds' DOC medical file created after his placement in DOC custody in June of 1990 as follow up to the mental health issues raised in the PSI. One excerpt from Pounds' DOC file was dated June 26, 1990 (PC-RE. 1092). It contained a discussion of Pounds' then mental health problems as of that date. Another excerpt was dated June 12, 1990 (PC-RE. 1093). It contained a discussion of Pounds' mental health problems as of that date. These documents noted that Pounds' major depression had relapsed, and included psychotic features (PC-R. 4051, 4054).

Again these were the kind of material that Mr. Norgard believed that the State was obligated to disclose and that he would have vigorously sought had he been given access to the PSI (PC-R. 4155-6). The information contained in these documents was significant to Mr. Norgard. He would have used it to impeach Pounds' credibility.

The circuit court's analysis of this aspect of Mr. Pittman's Brady claim was in error. The circuit court concluded that because trial counsel failed to request the PSI or the DOC records, the State was under no obligation to disclose the impeachment material concerning Pounds contained in the PSI and DOC records (PC-R. 5388). This conclusion is contrary to the holdings in Strickler v. Greene and Banks v. Dretke.

Moreover, to the extent that the circuit court concluded that the obligation to obtain the impeachment rested with defense counsel, defense counsel failed Mr. Pittman. Trial counsel testified that he believed that it was the State's obligation to disclosed. If trial counsel's understanding was in error then he rendered deficient performance which prejudiced Mr. Pittman.

Undisclosed information regarding Pounds' contact with Hughes

David Pounds was interviewed by Det. Cosper on June 25, 1990. In the taped transcript of the interview, Pounds identified Carl Hughes as one of those in the pod when he talked with Mr. Pittman. However, the State was in possession of undisclosed information demonstrating that Pounds' statement that Hughes was in the jail pod with Mr. Pittman and himself was simply not true. An April 17, 1991, police report showed that Hughes was not in the pod with Mr. Pittman when Pounds was there. The document showed everyone housed in J227 during that period with Mr. Pittman and Pounds, including Raymond Reyome.[98]

Mr. Pickard testified that if he had received the information contained in the report while the trial was ongoing, he probably would not have turned the information over to the defense. Mr. Pickard explained, "Jail records are pretty much public record. They could have gotten it." (PC-R. 3910).

[98]These records provided the correct spelling of Reyome's name, something that Pounds was not able to provide when identifying him as someone present in the pod when he claimed Mr. Pittman made incriminating statements. Reyome was contacted during the collateral process and was called as at witness at the evidentiary hearing. He testified that he recalled Mr. Pittman from when they were in J227 together (PC-R. 4007). Reyome testified that Mr. Pittman never talked to him about his case, nor did he ever see him talking to others about his case (PC-R. 4007). Reyome recalled that Pounds was also in J227 with them.

Mr. Norgard testified that during his representation of Mr. Pittman he had tried unsuccessfully to obtain the names of those who had been incarcerated with Mr. Pittman during the time period that Pounds and Hughes claimed he made incriminating statements to them. However, he was advised that all the records had been destroyed. Thus, Mr. Norgard's efforts to obtain information regarding who was housed with Mr. Pittman during the time period involving Pounds and Hughes reached a dead end (PC-R. 4143).

Mr. Norgard reviewed the jail records attached to the police report and testified that the inmate location roster included in the records was in fact what he had unsuccessfully sought to obtain (PC-R. 4146). Had he been provided with this information he could have used the records to locate other witnesses, like Reyome, who were in the pod with Mr. Pittman and Pounds. He could also have used the records to see if those, like Carl Hughes, who Pounds indicated was present in the pod were in fact there (PC-R. 4148-50). Had he had access to the jail records in Def. Ex. 17, Norgard would have been able to locate Reyome who did testify at the evidentiary hearing. Reyome would have explained as he did as the hearing that there was a TV in the pod, and that on TV the facts of Mr. Pittman's case were discussed (PC-R. 4003-4).

The records would have also been useful in impeaching Pounds by demonstrating that Hughes was never in the pod with Pounds.[99]

[99]Pounds testified at the 2006 hearing and explained the inexplicable reference to Hughes in his June 25th statement. He said that he did not remember knowing Hughes. He said he mentioned his name because the name "was mentioned to [him] by somebody during one of the interviews (PC-R. 4021-2). At the

The circuit court erroneously concluded that the April 17th police report and accompanying documentation was not favorable information subject to disclosure (PC-R. 5389). The circuit erred in its conclusion as a matter of law, and as a result, never considered this undisclosed material cumulatively with the other aspects of the claim.

Cosper's undisclosed handwritten notes regarding Pounds

Neither Det. Cosper's handwritten notes nor the information contained therein about an interview of Pounds on June 19, 1990, were disclosed to the defense. Given that Mr. Pickard had not seen these notes or been aware of their existence at the time of trial, it is clear that he did not disclose them to the defense. Accordingly, none of the handwritten notes were disclosed.

At trial, Pounds indicated that he was only interviewed by Det. Cosper twice (R. 1903). The first time was the interview at the county jail (R. 1901). At that time, Pounds gave virtually no information. As he explained in his deposition, "I intentionally withheld that [information] to speak to my family about the information I had before I told him" (R. 1923). According to Pounds' trial testimony and according to Det. Cosper's testimony, Pounds was only interviewed on June 4th and June 25th. However, the undisclosed information demonstrates that this testimony was not correct.

2006 proceeding, Cosper acknowledged that he had handwritten notes showing that on June 19, 1990, he "talked to Pounds" (PC-R. 3486). At such a meeting, Pounds could have been told to say Hughes' name. At the time of trial, the June 19th interview was undisclosed.

When shown the undisclosed handwritten notes, Det. Cosper admitted in 2006 that he interviewed Pounds three times in June of 1990.[100] In his 1990 deposition, only two interviews of Pounds were acknowledged (PC-RE. 812). At trial, Pounds indicated that Det. Cosper only spoke to him twice.[101]

Mr. Norgard testified that he did not recall being aware of the June 19th interview of Pounds by Det. Cosper. Had he known he would have used the information to impeach both Pounds and Cosper. As an example of impeachment, Mr. Norgard discussed the reference to Carl Hughes in Pounds' June 25th statement and undisclosed evidence demonstrating that Pounds and Hughes were not together in a jail pod with Mr. Pittman (PC-R. 4151).

The circuit court's rejection of this aspect of Mr. Pittman's claim was erroneous. It indicated that there was nothing favorable to the defense. This was error as a matter of law, and preclude this non-disclosure from being evaluated cumulatively with the other aspects of this claim.

iii. handwritten notes from interviews of other witnesses

Undisclosed handwritten notes regarding interview of Barbara Marie Pittman

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[100]Def. Ex. 4 was a transcript of Pounds' June 25th taped statement. Det. Cosper said that the third page of his notes in Def. Ex. 3 were of the same June 25th interview (PC-R. 3487).

[101]Moreover, it was clear from Pounds' trial testimony that between his June 4th taped statement and his June 25th taped statement his story changed. Pounds' explanation was that he withheld the information on June 4th. However, the existence of another interview that was not taped provided Pounds with an opportunity to learn information about the case.

At the 2006 hearing, Det. Cosper's notes from an interview of Barbara Marie Pittman that was conducted May 31, 1990, were introduced into evidence (PC-RE. 856-63). This was the day that Mr. Pickard had directed Barbara Marie to appear before him in a state attorney subpoena. Looking at Cosper's notes from May 31, 1990, and his subpoena of Barbara Marie for May 31, 1990, Mr. Pickard indicated that the notes appeared to have been taken while she appeared before him pursuant to the subpoena (PC-R. 3880).

Mr. Pickard testified that Cosper's notes from the May 31, 1990, interview "would not have been" disclosed to the defense (PC-R. 3883). Mr. Pickard indicated that "[a]t no point" did he think about whether there was information that came out from Barbara Marie that was favorable to the defense and that should be disclosed (PC-R. 3883-4).

As to his own notes from the May 31st interview of Barbara Marie, Mr. Pickard explained that he probably followed his usual note taking practices when making the notes of the interview of Barbara Marie:

> Sometimes I would ask the witness to clarify sometimes and whatever she clarified I would write in the margin. There were other times that I - - I used these notes to assist me in trial preparation for what areas I'm gonna ask the witness in court.
>
> And sometimes when I go back and review the notes months/years later in preparation for the trial if there's something that I want to clarify or ask the witness about in the trial, I will make a note in the margin that that's something I want to go into in the trial. It doesn't necessarily reflect that that is something that the witness told me during the interview. It may be something that I myself added months later.

(PC-R. 4545-6).

Mr. Norgard testified that at trial he had not been provided with either Cosper's handwritten notes or Mr. Pickard's handwritten notes of the May 31st statement taken from Barbara Marie Pittman. Mr. Norgard testified that certain information contained in the notes had not been disclosed by the State. He indicated that he was never advised that Barbara Marie reported that Mr. Pittman "and my parents had [a] pretty good relationship" (PC-R. 4165). This information contradicted the State's claim at trial that there was bad blood between Mr. Pittman and Barbara Marie's parents, which was argued as a motive for the murders.[102] Mr. Norgard testified that he was not advised that Barbara Marie advised the State that Bonnie Knowles was known for "making up physical ailments" (PC-R. 4199).

The circuit court erred in its denial of this aspect of Mr. Pittman's Brady claim. The circuit court stated: "Although the notes might contain some information that might be considered favorable to the defense, there is no reasonable probability that the jury verdict would have been different had the suppressed information been used at trial" (PC-R. 5397). The circuit court erred as a matter of law in failing to consider how the defense could have used this information and in failing to consider this information cumulatively with other aspects of this claim.

Undisclosed handwritten notes regarding interview of Eugene Pittman

[102]In making this claim, the State had presented Barbara Marie's testimony regarding an altercation between Mr. Pittman and her father in 1985, five years before the murders (T. 664-5).

Det. Cosper also identified his handwritten notes from a May 30, 1990, interview of Eugene Pittman (PC-R. 849-55). Mr. Pickard testified that he never received Cosper's notes from the May 30th statement (PC-R. 3874).[103] Mr. Pickard admitted that Cosper's notes, along with Mr. Pickard's notes, "would be the best evidence of what was said, with the understanding that they're just simply summary versions and that they are not verbatim" (PC-R. 3877). Mr. Pickard testified that neither Cospers' notes nor his own notes of the May 30th statement of Eugene Pittman were disclosed to the defense (PC-R. 3879).

Mr. Norgard testified that he was never provided with the notes from the May 30, 1990, interview of Eugene Pittman that was conducted pursuant to a state attorney subpoena. As a result, he was denied the opportunity to use those notes to either refresh Eugene's recall when he testified at Mr. Pittman's trial nearly a year later or to impeach Eugene to the extent that he deviated from the earlier statement in a way adverse to Mr. Pittman.

Undisclosed handwritten notes regarding whereabouts of Aaron Gibbons

Mr. Pickard identified a handwritten note listing witnesses regarding the George Hodges letter (PC-R. 3940). The handwritten note showed that the State had not provided the defense with the correct address for Aaron Gibbons (PC-R. 3941). Mr. Pickard also

[103]Mr. Pickard indicated that the May 30th interview was one he conducted pursuant to a state attorney subpoena and that he would have made notes of the interview as well (PC-R. 3872-4). However, Mr. Pickard's notes of that interview have never been disclosed and, in fact, were submitted to the lower court under seal (PC-R. 3875). These notes remain under seal, as the lower court has not disclosed them to Mr. Pittman's collateral counsel.

identified a phone message for him from his secretary (PC-RE. 1091). This phone message indicated that Gibbons had in fact not taken off, but provided an address where he could be found (PC-R. 3943). This was not disclosed to the defense.

iv. Waters' uncertainty over the wrecker

Dennis Waters testified at the evidentiary hearing that in the years since his trial testimony he has been plagued by anxiety that his testimony before the jury did not convey the doubt regarding whether the wrecker he saw the morning after the murders was Mr. Pittman's. Mr. Waters testified in 2006 that he had advised law enforcement officers of his doubts that the wrecker he saw was in fact Mr. Pittman's. He merely told them that the wreckers "looked similar".

Mr. Norgard testified that he was unaware of any information indicating that Waters' identification was equivocal (PC-R. 4129)("It was a definite identification"). Information that the identification was not definite would have been valuable impeachment (PC-R. 4130).

v. undisclosed letter about William Smith

Mr. Pickard identified a letter that he wrote on July 2, 1990, to Det. Cosper providing him with instructions (PC-R. 3917). One of the instructions concerned William Smith, and indicated that Smith had advised Mr. Pickard that he believed the person he saw on the morning of May 15, 1990, was the same person he had seen a couple of weeks before at used car lot on Highway

60 (PC-RE. 843).[104] Mr. Pickard testified that the defense was "[p]robably not" advised of Smith's statement in this regard.

Mr. Norgard testified that he was not advised of Smith's statement in this regard. He testified that from the defense perspective this information was significant and would have effected his preparation for trial. Investigation would have been conducted to delve deeper into the matter and definitely Smith would have been cross-examined about the matter in order to suggest that his recognition of the man on the morning of May 15th was because he recognized him from an earlier event, and not because he recognized the man as Mr. Pittman.

The circuit court erred in failing to find an obligation to disclose this information and in failing to evaluate it cumulatively with the other aspects of this claim.

c. the non-disclosures undermines confidence in the outcome

The U.S. Supreme Court and this Court have explained that the materiality of evidence not presented to the jury must be considered "collectively, not item-by-item." Kyles, 514 U.S. at 436; Young, 739 So.2d at 559.[105]

In Lightbourne v. State, 742 So. 238 (Fla. 1999),

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[104]Apparently, Mr. Pickard had interviewed Smith, perhaps pursuant to a state attorney subpoena. Mr. Pickard testified that the notes of the interview were submitted under seal to the circuit court (PC-R. 3920). To date, these notes have not been disclosed to Mr. Pittman.

[105]This Court has also held that cumulative consideration must be given to evidence that trial counsel unreasonably failed to discover and present at the capital trial. State v. Gunsby, 670 So.2d 920 (Fla. 1996).

this Court reiterated the need for a cumulative analysis:

> The trial court cannot consider each piece of evidence in a vacuum, but must look at the total picture of all the evidence when making its decision.
>
> * * *
>
> **This cumulative analysis must be conducted so that the trial court has a "total picture" of the case. Such an analysis is similar to the cumulative analysis that must be conducted when considering the materiality prong of a Brady claim. See Kyles v. Whitley, 514 U.S. 419, 436 (1995).**

Lightbourne, 742 So. 2d at 247-248(emphasis added).

The case the State presented at trial was circumstantial, but for Hughes and Pounds. The narrow window of time for Mr. Pittman to have committed the murder was impossibly small. Hughes' testimony in particular was in essence the State's case. Through him, the State argued that while the window of opportunity was small, Mr. Pittman told Hughes that he was able to do it nonetheless. The testimony of Hughes and Pounds as well as their credibility was absolutely critical to the State's case. As it was, the jury still had some difficulty reaching a verdict. The deliberations were lengthy and dragged out over two days (PC-R. 4124). The undisclosed information that impeached Hughes and Pounds would on its own have undermined confidence. A proper cumulative analysis of all of the withheld evidence undermines confidence in the outcome of the trial and requires that this Court grant a new trial. Justice demands that Mr. Pittman receive a new trial. This is particularly so in light of the newly discovered evidence which this Court requires to be evaluated cumulatively with the undisclosed favorable information

withheld in violation of Brady. State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

2. The State engaged in false or misleading conduct

In Giglio v. United States, 405 U.S. 150, 153 (1972), the U.S. 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). The prosecution has a duty to alert the court, the defense, and the jury when a State's witness gives false testimony, Napue v. Illinois, 360 U.S. 264 (1959). The prosecutor must refrain from the knowing deception of either the court or the jury during a criminal trial. Mooney v. Holohan. Similarly, intentional sandbagging of the defense in order to gain a strategic advantage is not permitted. Accordingly, the Supreme Court concluded that on the basis of Mooney the Fourteenth Amendment due process was implicated where the prosecution deliberately misled the defense. Gray v. Netherland, 518 U.S. 152, 165 (1996). The State "may not subvert the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts." Garcia v. State, 622 So.2d 1325, 1331 (Fla. 1993). A prosecutor is 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 and/or misleading argument **affected** the jury's determination, a new trial is warranted. If the prosecutor intentionally or knowingly engages in deceptive practices or presents false or misleading evidence or argument in order to obtain a conviction or sentence of death, due process is violated and the conviction and/or death sentence must be vacated unless the error is harmless beyond a reasonable doubt. Kyles v. Whitley, 514 U.S. 419, 433 n.7 (1995).

Here, the evidence at the evidentiary hearing establishes that uncorrected false or misleading testimony was presented during the trial and during discovery depositions. The instances of false testimony include:

1. Hughes' false claim that he got no benefit (R. 2337)("I was given no favors");

2. Hughes false testimony that he gave no interviews between June 26th and September 11th;

3. Dey's false or misleading testimony in his deposition that the September 11th statement was Hughes' second one;

4. Cosper's false or misleading testimony that the September 11th statement was Hughes' second one;

5. Pounds' false testimony that he was only interviewed by Cosper twice (R. 1903);

6. Cosper's false or misleading testimony in his deposition that the June 25th statement was the product of his second interview of Pounds;

7. False or misleading testimony and argument that Mr. Pittman and his ex-wife's parents had bad blood between them;

8. Dennis Waters' false or misleading testimony positively identifying the wrecker he saw the morning of May 15th as being Mr. Pittman's;

9. The false information that the State provided the defense as to Aaron Gibbons' address and availability.

In this case, the prosecution knowingly presented false and/or misleading evidence. No effort was made to correct the false or misleading testimony;[106] In fact, it was relied upon by the State to obtain a conviction. The prosecution also presented the defense with false and misleading testimony during pre-trial and in the course of discovery. These failures, individually and collectively, were not harmless beyond a reasonable doubt.

C. Defense Counsel's Obligations

In Strickland v. Washington, 466 U.S. 668, 885 (1984), the U.S. Supreme Court held that under the Sixth Amendment: ". . . a

[106]In fact, Mr. Pickard's testimony at the evidentiary hearing seemed to indicate that he believed that if he could plausibly deny knowing the truth, then he had no obligation to correct the falsehood. Mr. Pickard specifically said he was only obligated to disclose the fact that Cosper interviewed Hughes on July 6th, if he knew of the interview and either Hughes or Cosper had testified there was no interview. Yet, Mr. Pickard stated that he was not obligated to learn that such interview occurred. Thus, it appears that Mr. Pickard engaged in a practice of deliberate ignorance. He did not want to learn of information impeaching a witness because then he might be obligated to either disclose it or correct any false or misleading testimony.

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." In order to insure that an adequate adversarial testing, and hence a fair trial, occur, counsel must provide the accused with effective assistance.

Here it is clear from Mr. Pickard's testimony that it is the State's position as to much of the undisclosed information set forth in the preceding sections of this initial brief that it was defense counsel's obligation to learn of the favorable evidence, and if defense counsel did not know of it, it was because he did not do his job properly. For example, during Mr. Pickard's cross-examination of Mr. Norgard regarding Pounds' PSI, it appeared that it was Mr. Pickard's contention that Mr. Norgard should of sought to obtain access to the PSI and the information contained therein.[107] To the extent that this Court were to agree with Mr. Pickard that as to any of the items set forth herein that it was not the State's responsibility to disclose the favorable information, but the defense's responsibility to discover it, clearly defense counsel failed to function properly. If it was Mr. Norgard's duty to obtain the records, he obviously failed and rendered constitutionally deficient performance.

[107]Another specific example was the State's position as to Dennis Waters. The State seemed to suggest that from Waters' deposition the defense should have known that Waters' trial testimony was mistakenly a more definite identification of the wrecker. Certainly to the extent that this Court agrees with the State that Mr. Norgard should have been on notice, Mr. Norgard's failure in this regard was deficient performance.

Beyond the favorable information set forth within the preceding section, evidence was presented at the 2006 hearing that counsel rendered deficient performance in failing to discover favorable and available evidence. Mr. Norgard testified he wanted to speak to John Schneider during the investigation into Mr. Pittman's case as is clear from Def. Ex. 41 (PC-R. 4188). However, Schneider was not spoken to because Schneider's attorney advised Mr. Norgard's investigator that Schneider was afraid and did not want to talk. This was deficient performance.

John Schneider testified in 2006 that no one representing Mr. Pittman got in touch with him back in 1990, 1991, or 1992 (PC-R. 4098). Schneider indicated that he wanted to talk to Mr. Pittman's attorney and discuss the interaction that he and Mr. Pittman had on the night of June 26th with Carl Hughes (PC-R. 4084). Schneider's testimony regarding the events of that night was very favorable to Mr. Pittman. Schneider contradicted Hughes' testimony. He said that on two occasion he saw Hughes going through Mr. Pittman's papers (PC-R. 4077). He also said that inmates in the jail had access to newspapers (PC-R. 4089).

Mr. Norgard's performance was also deficient as to James Troup, a witness called by the State at trial, and who testified in 2006. Troup discovered Bonnie Knowles' car on fire on the morning after the murders. It was off to the side of Prairie Mine Road. Troup came upon it at around 6:30 AM (R. 1284). The car was parked on the side of the road "at an angle slanted down toward the ditch" (PC-R. 3569). Troup was driving to work. As he came up behind the car, he noticed an orange glow in the back

window. There were no people around. No one was running from the car. And importantly, he did not see any smoking coming from the vehicle (PC-R. 3570). This vital fact was not elicited from him when he testified at Mr. Pittman's trial.[108] It is extremely important information that shows that his observations of the vehicle preceded in time the observations of Barbara Davis, and demonstrates that whoever she saw was not present when Troup tried to put the fire out before it even started smoking.

According to Davis, she first noticed the vehicle "between 6:35 or 6:40" because she saw "black smoke" in the sky (R. 1702-3). Clearly, Davis' observations are later in time, and after Troup had tried to put the fire out, he called his office to tell someone there to report the fire, and then left to go on to work (PC-R. 3571). Given that Davis' observations were subsequent to Troups' and after a passage of time, the significance this person is rendered meaningless.[109]

When considered cumulatively, the instances of deficient performances, the suppression by the State of exculpatory evidence, and the newly discovered evidence of innocence, it is clear that Mr. Pittman was denied a constitutionally adequate adversarial testing. State v. Gunsby. Rule 3.850 relief is required and a new trial must be ordered.

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[108]At trial he was asked if there was smoke inside the car and explained that there was. But, he was never asked if any of the smoke was billowing out of the vehicle (R. 1284-6).

[109]If the person who started the fire was around when Troup stopped he would have seen him, but he didn't. The failure to elicit from Troup the fact that no smoke was yet coming from the car was deficient performance prejudicing Mr. Pittman.

D. Newly Discovered Evidence of Innocence

This Court recognized in Jones v. State, 591 So.2d 911 (Fla. 1991), that where neither the prosecutor nor the defense attorney violated there constitutional obligations in relationship to evidence the existence of which was unknown at trial, a new trial may nonetheless be required if the previously unknown evidence would probably have produced an acquittal had it been known by the jury. Where the evidence of innocence would probably have produced a different result, a new trial is required.

Here, there is such evidence. In 2006, Carlos Battles testified that in 1998, he had been employed by the Department of Children and Family Services as a child protector investigator (PC-R. 3457). He identified a case file that referenced a 1998 investigation as to the living conditions for Cindy Pittman (PC-RE. 671). In this investigation, Battles was told by Barbara Marie Pridgen, David Pittman's ex-wife, that Cindy's mental difficulties stemmed from the time she witnessed her uncle murder her grandmother (PC-R. 3460)("Mom states child Cindy needs counseling for the sexual abuse and states the child witnessed her grandmother being killed by her bother-in-law").[110] Battles set forth this information in the case file. When testifying, Battles indicated that he had an independent recollection of "that being said to me. That stood out in my mind that the child witnessed a murder" (PC-R. 3460).

[110]The notation does not make it clear whether the killer is Cindy's mom's brother-in-law or her grandmother's brother-in-law.

Mr. Pickard admitted when he testified that Cindy Pittman's "presence at the crime scene as a witness, would be inconsistent with [his] theory of prosecution" against Mr. Pittman and would suggest that others, such as Barbara Marie and her husband, Allen Pridgen, were involved in the murder (PC-R. 3972). The information contained in Def. Ex. 1 and testified to by Battles is newly discovered evidence under Jones. It warrants a new trial. The circuit court erred in its analysis and its failure to recognize the importance of this new evidence, how the defense could have presented, and how any reasonable juror would have a reasonable doubt about Mr. Pittman's guilt in light of Barbara Marie's statement that Cindy witnessed the murder. The circuit court also erred in failing to evaluate this new evidence cumulatively with other new evidence, the suppressed Brady material, and the evidence that the jury did not hear due to trial counsel's constitutionally deficient performance.[111]

Mr. Pittman also presented newly discovered evidence in the form of Chastity Eagan's testimony. In May of 2006, when Mr. Pittman sought to locate Ms. Eagan as a potential mitigation witness, counsel had no reason to know of the bombshell information that she possessed regarding Barbara Marie and David Pridgen. In May of 2006, even law enforcement had been unable to

[111]To the extent that the State argues that any of the evidence outlined in the preceding sections was neither suppressed in violation of Brady nor discoverable by trial counsel, it qualifies as newly discovered evidence under Jones and must be considered cumulatively. Cumulative analysis is in fact legally required where a Brady claim, an ineffective assistance claim, and/or a Jones v. State claim are presented in a 3.850 motion. State v. Gunsby.

find Ms. Eagan. It was only after learning of her whereabouts that she could be interviewed. And it was only then that it was learned that she possessed relevant information regarding Barbara Marie and David Pridgen.[112]

Ms. Eagan's testimony should be considered cumulatively with the testimony of Carlos Battles. It shows that Marie Pridgen not only had a motive for eliminating her family, she had specifically expressed that she was "glad" that they were dead. Further, Mr. Battles' testimony that he was told by Marie Pridgen that her daughter Cindy had "witnessed her grandmother being killed by her brother-in-law" is consistent with Ms. Eagan's recollection that David Pridgen once told her that he had killed three people. David Pridgen can be described as Barbara Marie's brother-in-law and he can also be described as Cindy's uncle. This evidence would have been admissible at trial in order to show that someone other than Mr. Pittman committed the murder. Holmes v. South Carolina, 547 U.S. 319 (2006). A jury hearing Ms. Eagan's testimony and hearing Mr. Battles' testimony would have had more than a reasonable doubt of Mr. Pittman's innocence.

But, the law requires that not just the newly discovered evidence be evaluated together. The analysis must be done cumulatively with all of the undisclosed Brady material and all of the favorable evidence that did not reach the jury due to

[112]If the State changes its position and argues that Ms. Eagan's testimony should have been discovered before, it converts Mr. Pittman's claim into an ineffective assistance of trial counsel claim requiring the evidence to be evaluated under the standard set forth in Strickland v. Washington.

trial counsel's deficient performance. When properly evaluated, the new evidence here does not just call for a new trial, it screams out that justice requires that Mr. Pittman obtain relief.

ARGUMENT II

MR. PITTMAN RECEIVED A CONSTITUTIONALLY DEFICIENT ADVERSARIAL TESTING DURING THE PENALTY PHASE BECAUSE EITHER THE STATE WITHHELD FAVORABLE INFORMATION AND/OR MR. PITTMAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND/OR NEWLY DISCOVERED EVIDENCE SHOWS THAT THE DEATH SENTENCE SHOULD BE VACATED.

A. Brady v. Maryland

The previously set forth law as to Brady applies at the penalty phase of a capital trial. As to the Brady information that has been set forth in the preceding sections, even if this Court finds that a new trial is not warranted, this Court must also consider the effects the misconduct had on the sentencing determination. Garcia, Young. In Young, this Court found that information contained in a prosecutor's notes regarding statements made by a witness while the prosecutor was interviewing him did not warrant a new trial, but did warrant a new penalty phase proceeding.

In addition to the information set forth in the preceding sections, Mr. Pittman demonstrated that mitigating evidence was withheld from the defense. Specifically, Barbara Marie told Mr. Pickard that Mr. Pittman had a crank problem. As Mr. Norgard explained, corroboration of a crank problem from a hostile witness is particularly helpful because it is less likely to be viewed as something a friend or a family member is saying in order to save the defendant's life. Here, such information would

have been particularly valuable because the State contested the defense's claim that Mr. Pittman had a substance abuse problem.

B. Ineffective Assistance of Counsel

As recently explained by the U.S. Supreme Court, an ineffective assistance claim is comprised of two components:

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

Williams v. Taylor, 120 S.Ct. 1495, 1511 (2000), quoting Strickland, at 687. "To establish ineffectiveness, a 'defendant must show that counsel's performance fell below an objective standard of reasonableness.'" Williams, at 1511.

In 2006, Mr. Pittman presented a number of a witnesses to testify to mitigating evidence that trial counsel unreasonably failed to discover and present. These witness included: Robert Barker, Michael Pittman, Jean Wesley and Tillie Woody. Each of these witnesses testified in 2006 to mitigating evidence that was not heard at the penalty phase and which provided compelling evidence of Mr. Pittman's substance abuse problems and life long afflictions. Mr. Pittman also called Tammy Davis and William Pittman to testify to mitigating evidence that trial counsel

failed to elicit from them when they testified at Mr. Pittman's penalty phase. Dr. Henry Dee was called to testify that the witnesses that trial counsel unreasonably failed to discover, and the information from witnesses who trial counsel had called but failed to elicit further information from, would have corroborated his conclusion at the time of trial. The corroboration would have buttressed his conclusions and provided a way to make his testimony more convincing.

As the U.S. Supreme Court observed, "[m]itigating evidence . . . may alter the jury's election of penalty, even if it does not undermine or rebut the prosecution's death eligibility case." Williams, 120 S. Ct. at 1516. Given the substantial mitigation that was unreasonably not discovered and not presented, confidence in the outcome of Mr. Pittman's penalty phase proceeding is undermined. Penalty phase relief is warranted.

C. Newly Discovered Evidence Require a New Penalty Phase

Under Jones v. State, 591 So.2d 911 (Fla. 1991), where neither the prosecutor nor the defense attorney violated their constitutional obligations in relationship to evidence the existence of which was unknown at trial, collateral relief is warranted if the previously unknown evidence would probably have produced a different result had the evidence been known by the jury. Here, such evidence was presented in 2006 when Dr. Joseph Wu testified regarding the results of the PET scan that he administered to Mr. Pittman. This PET scan showed that Mr. Pittman suffers from brain damage, specifically an impaired frontal lobe (PC-R. 3647-52). The results provided concrete

support for Dr. Dee's previously expressed belief that Mr. Pittman likely had some brain damage. This is extremely significant in light of the fact that when imposing a death sentence the sentencing judge stated: "The expert has offered an opinion as a mitigating circumstance that the Defendant suffers brain damage. Other than this opinion there exists no corroborating evidence to suggest the presence of this damage or its degree, nor its actual relationship to the murders" (R. 5180). Dr. Wu's testimony directly addresses this.

Moreover, to the extent that this Court finds that trial counsel did not unreasonably fail to find the lay witnesses presented at the hearing, their testimony is also newly discovered evidence and must be considered cumulatively with Dr. Wu's findings. A new penalty phase is required.

CONCLUSION

In light of the foregoing arguments, Mr. Pittman requests that this Court reverse the lower court, vacate Mr. Pittman's conviction and death sentence and grant other relief as set forth in this brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to Katherine Blanco, Assistant Attorney General, Office of the Attorney General, Concourse Center 4, 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607-7013, on December 22, 2008.

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