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IN THE SUPREME COURT OF FLORIDA

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CASE NO. SC12-2102

LOWER COURT CASE NO. CF02-05203A-XX

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HAROLD BLAKE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

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INITIAL BRIEF OF APPELLANT

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### **STANDARD OF REVIEW**

Mr. Blake has presented several issues which involve mixed questions of law and fact. The issues regarding the application of the law present questions of law and must be reviewed *de novo*. See Sochor v. State, 883 So. 2d 766, 772 (Fla. 2004). In regard to the facts, under Porter v. McCollum, deference is given only to historical facts. All other facts must be viewed in relation to how Mr. Blake's jury would have viewed those facts. See Porter v. McCollum, 130 S.Ct. 447 (2009).

### **REQUEST FOR ORAL ARGUMENT**

Mr. Blake has been sentenced to death. The resolution of the issues in this action will determine whether Mr. Blake lives or dies. This Court has not hesitated to allow oral argument in other capital cases in similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Blake, through counsel, accordingly urges that the Court permit oral argument.

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## INTRODUCTION

The errors that occurred in Harold Blake's case were caused individually and collaboratively by due process violations by the State, an unreasonable failure to investigate by trial counsel and by witnesses who were rewarded for making false statements that they perceived law enforcement wanted them to make and which they believed would personally benefit them. This conflux of errors produced severe prejudice to Blake. And, though the errors may not have been caused by a single party, this Court has held that the prejudice analysis must consider the errors not only individually, but also cumulatively. See Parker v. State, 89 So. 3d 844, 860, 867 (Fla. 2011); State v. Gunsby, 670 So. 2d 920, 924 (Fla. 1996).

The evidence linking Blake to the attempted robbery and murder of Maheshkumar Patel essentially came from two witnesses: Teresa Jones and Demetrius Jones. Blake also made a statement that was secretly videotaped by law enforcement. No other witness placed Blake in the vehicle used in the crimes or at the scene. There was no physical evidence linking Blake to the crimes, except a fingerprint on the stolen vehicle.<sup>1</sup> However, what was seemingly lost on law enforcement, the prosecution, the defense and Teresa Jones was the existence of a video

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<sup>1</sup>Both Richard Green's and Demetrius Jones' fingerprints were also identified on the vehicle. Jones was never charged with any crime related to August 12, 2002. And, though numerous witnesses identified Green as possessing the 9 mm gun used to shoot the victim after the crime and informed law enforcement that he shot the victim, he was not charged with any crime related to the Patel homicide until June, 2004 - nearly two years after the crimes.



surveillance tape that was recovered from the victim's store. The scene caught on tape, including the image of the shooter, undermines the prosecution's theory and evidence that was presented to the jury. In addition, a plethora of evidence supports what the video reflects: Richard Green approaching the store with his head and face concealed, gun raised, attempting to enter the store and firing one shot through the glass door that hit the victim in the arm. The victim, did not appear to be badly hurt as he continued to move around the store and look out of the door before collapsing several seconds after being shot. See State's Ex. 72 (TRIAL).

Green testified in March, 2011, that he was indeed the shooter and he approached the store not having told Blake or Key of his intent to rob the store (PC-R. 1533-4). The evidence presented at the evidentiary hearing conclusively supports Green's testimony. Blake is entitled to a new trial where a jury can hear all of the evidence.

#### **STATEMENT OF THE CASE**<sup>2</sup>

The Circuit Court for the Tenth Judicial Circuit, in and for Polk County, Florida entered the judgments of convictions and death sentence at issue.

On August 29, 2002, Mr. Blake was indicted with one count of first degree murder, one count of attempted armed robbery and one count of grand theft (auto) (R. 102-5). On September 10, 2002,

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<sup>2</sup>The following abbreviations will be utilized to cite to the record: "R. \_\_." - record on direct appeal; "T. \_\_" - transcript of the trial on direct appeal; "PC-R. \_\_." - record on appeal on postconviction; "Ex. \_\_." - exhibits.

the State filed a Notice of Intent to Seek the Death Penalty (R. 109).

After the Public Defender's Office declared a conflict, on November 12, 2002, Attorney Gil Colon was appointed to represent Mr. Blake (R. 128).

A motion to suppress hearing was held on February 10, 2005 (R. 194-311).

Mr. Blake's trial commenced on February 21, 2005. Four days later, on February 25, 2005, the jury returned guilty verdicts on all the counts charged (R. 316-8).

Mr. Blake's penalty phase commenced on April 19, 2005. The next day, the jury recommended the death sentence (R. 334).

On May 13, 2005, the trial court sentenced Mr. Blake to death for the first degree murder charge (R. 401-7).

This Court affirmed Mr. Blake's conviction and sentence on direct appeal. Blake v. State, 972 So. 2d 839 (Fla. 2007). The United States Supreme Court denied certiorari on May 12, 2008. Blake v. Florida, 128 S.Ct. 2442 (2008).

On April 16, 2009, Mr. Blake filed a Rule 3.851 (PC-R. 332-409). The State responded to the motion on June 12, 2009 (PC-R. 452-87).

On January 4, 2010, Mr. Blake's filed an amended Rule 3.851 motion (PC-R. 718-822).

An evidentiary hearing was held on March 28 - April 1, 2011, and June 19 - 20, 2012. On July 23, 2013, closing arguments were submitted by the parties (PC-R. 7418-7514, 7516-98).

On August 31, 2012, the circuit court granted in part, and

denied in part, Mr. Blake's Rule 3.851 motion (PC-R. 7600-99).

Mr. Blake timely filed a notice of appeal as to the denial of guilt phase relief (PC-R. 7700).

### **STATEMENT OF FACTS**

#### **A. THE TRIAL**

On August 12, 2002, at 5:30 a.m., Donovan Steverson exited his home and saw a black male with braids walking to a car parked in the parking lot of Steverson's building (T. 580-1).<sup>3</sup> Steverson's building was located near Del's Go Shop and the two buildings were separated by a fence (T. 580). The car left the parking lot (T. 582).

Just after 6:00 a.m., a single gunshot rang out on Coleman Road in Polk County (T. 434-5). Steverson heard the gunshot and ran to the fence where he saw a black male with braids run away from the entrance of Del's Go Shop to the same car he had seen parked near his building minutes before (T. 584, 588).

Trisha Alderman also heard the gunshot and looked out her window and saw a black male, with short black hair (not bald), running to a parked car away from the entrance to Del's Go Shop (T. 435, 444-5). The man was waiving a gun as he ran (T. 444-5). Alderman thought there were three individuals in the car awaiting the fleeing man (T. 444).

Denard Keaton also heard the "pop" (T. 451). Just prior to hearing the gunshot he had seen one young, short, black male walking towards Del's Go Shop (T. 453, 461). After the "pop", he

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<sup>3</sup>In August, 2002, Harold Blake was bald; Richard Green and Kevin Key had braids or dreadlocks (T. 658, 666, 683, 861).

watched the person enter a champagne-goldish colored car (T. 454). There were at least two other individuals in the car who appeared to be black (T. 454); one of them had a large afro (T. 464). The car pulled onto Coleman Road and proceeded north (T. 457).

Maheshkumar "Mike" Patel, the owner of Del's Go Shop had been shot. The medical examiner testified that Mr. Patel had two gunshot wounds - one to his left arm and one to his left armpit (T. 901). The bullet had entered Mr. Patel's arm, exited and re-entered his body where it went through his heart (T. 904). Mr. Patel died within seconds or minutes, at the most (T. 904).

Detective Glenda Eichholtz responded to the crime scene and was instructed to locate the suspects' car, if possible (T. 480-1). Eichholtz located the abandoned car shortly after the shooting, not far from the scene (T. 481). The car was still running and the lights were on (T. 481-2). The rear passenger side window was broken and there was damage to the steering column (T. 482).<sup>4</sup> Deputy Scott Billo and his K-9 responded to the scene of the abandoned car (T. 498). The K-9 tracked from the front seat of the car to apartment 2633 Avenue C in the Lake Deer Apartment complex (T. 499).

Teresa Jones lived next door, in apartment 2631 with Richard Green and her children (T. 593). According to Jones' trial testimony, on August 12, 2002, at approximately 7:30 a.m., Green

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<sup>4</sup>Wanda Petranick owned the car and had last seen it in her driveway on the evening of August 11, 2002 (T. 490). She had not loaned it to anyone (T. 492).

came to her apartment with Harold Blake and another boy, who she knew as "Red Man" (T. 595). Jones left with Green, Blake and Red Man in her car. She dropped Red Man off at a store and dropped Blake off at a motel (T. 598). However, before dropping them off, they went to the location of a car on the side of the road and someone got out (T. 599). Jones could not remember if Blake or Red Man got out of the car, but agreed that she had told the grand jury that it was Blake (T. 599-602). She also agreed that in her initial statements she told law enforcement that Blake had retrieved two guns from the car (T. 603-4). Jones testified:

Q: Does that refresh your memory as to whether Mr. Blake has said he had shot anybody?

A: Yes.

Q: Did he tell you he had shot someone that day?

A: Yes.

(T. 607).

Upon returning to her apartment, Jones spoke to the policemen and mentioned that someone had come to her apartment (T. 612-3). However, she did not mention Green (T. 613).

At trial, on cross-examination, Jones confessed that she initially told the police what she believed they wanted to hear (T. 864). She also conceded that she previously testified that she did not see Blake take any guns from the stolen car (T. 866). Finally, Jones admitted that she had lied to the grand jury (T. 890).

On August 14, 2002, Blake was taken into custody (T. 752). Detective Louis Giampavolo testified that he read Blake his

Miranda warnings while he (Blake) was in the back of the police car (T. 753). Giampavolo denied threatening Blake or making him any promises (T. 768-9).

Detective Kenneth Raczynski, Giampavolo and Blake arrived at the police station at approximately 5:00 p.m. (T. 756). According to Giampavolo, Blake admitted to stealing a car in the early morning hours of August 12<sup>th</sup> (T. 758). Blake went on to state that he had gone to Green's house in Winter Haven in the stolen vehicle with "Kay-Kay" (T. 759-60). However, Blake maintained that he was not involved with the shooting of Mr. Patel (T. 760). Blake later began crying and told the detectives that he was present when Mr. Patel was shot. He originally stated that all three of the men got out of the car and that he possessed the 9 mm (T. 763). Blake said that when he got to the door of Del's Go Shop he saw the victim make a sudden movement and accidentally fired the gun (T. 764-5).

Raczynski and Giampavolo requested that Blake allow them to tape his statement. Blake refused, but the police secretly videotaped the next part of the interview (T. 766). The videotape was introduced and shown to the jury (771-90).<sup>5</sup> During the secretly videotaped statement a shirtless and shivering Blake told the detectives that they were parked behind a fence when a dog barked at them, so they left the area and went back to the

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<sup>5</sup>In his taped statement, Blake contradicted the statement that he allegedly gave to the detectives before the videotape was turned on. For example, initially, Blake said he picked up Green at his grandmother's house. On the videotape, Blake said that he picked up Green at the Lake Deer apartments. See T. 760, 774.

Lake Deer apartments.<sup>6</sup> Later, they came back to the store (T. 776). All three of them (Blake, Green and an individual whose name was unknown to Blake) went to the door and Blake shot the victim because the victim scared him (T. 777-8). At this point on the video Blake re-enacted his walking to the door of the store with his arm and the gun down at his side (T. 778). Blake could not remember which door he shot through (T. 781).

There was physical evidence obtained from Del's Go Shop. Crime Scene Analyst, Linda Raczynski, recovered a spent casing from the crime scene and a jacket of bullet that was located in the victim's arm and a bullet that was located in the chest of the victim (T. 530, 555).

Later, a 9mm gun was recovered from Lake Conine (T. 693-4). The State's expert testified that the copper jacket that was recovered from the victim's arm was fired from the 9mm found in the lake "with the exclusion of all other firearms in the world" (T. 730-1).

Also, while some of the glass fragments found on Blake's sneakers matched the glass from the window of the stolen car, none of the glass matched the glass from the shattered door at Del's Go Shop (T. 705-6).

A videotape was recovered from Del's Go Shop that captured the incident on video (T. 831). It was shown to the jury at trial (T. 840, 909-10, see also State's Ex. 72).

Finally, Green's right palm print was located in the stolen

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<sup>6</sup>Blake's statement was not supported by the neighborhood witnesses' testimony.

car. Blake's right middle finger was also located in the stolen car. And, a latent print obtained from the stolen car that did not match Green or Blake was submitted to AFIS (T. 821). The print was identified from a subject named Demetrius Jones (T. 821).

Demetrius Jones had known Green for two or three years and called him by his street name, "Plump" (T. 629-30). In August, 2002, Jones had only known Blake for a few weeks (T. 631). Jones testified that in the early morning hours of August 12, 2002, he was outside with Green, Blake and Kevin Key, and Kevie (T. 631-2). Key's street name was "Red Man" (T. 632). Green, Blake and Key had arrived at about 3:00 or 4:00 a.m., in a car driven by Blake (T. 634). Green and Key cleaned glass from the backseat (T. 636). Jones saw two guns - a .38 revolver and a 9mm (T. 637). Green had the revolver and the 9mm was in the front seat (T. 637). Green wore a hooded sweatshirt and had the gun in the pocket of the sweatshirt (T. 638). Jones was asked to accompany the trio to Lakeland to "rob people who sell drugs" (T. 638).<sup>7</sup> Jones spoke to Kevie and Kevie told him not to go, so Jones did not (T. 639). When the trio left, Green was driving (T. 640).

Later that day, about 12:00 p.m., Jones saw Blake on Avenue Y (T. 645). According to Jones, Blake was "acting like he was nervous, like something happened" and that "somebody got shot" (T. 646-7). At this time, Blake asked Jones to help get rid of a

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<sup>7</sup>On cross-examination, Jones clarified that Blake was not present when the group discussed robbing people (T. 671-2). In fact, when Blake did arrive, he stated that he did not want to do that (T. 673-4).



gun, though he never saw a gun (T. 647).

Still later that day, at about 6:30 p.m., Jones ran into Green and Teresa Jones in the same area (T. 645). Green had a 9 mm and he and Jones tried to sell it (T. 651). The two eventually separated after unsuccessfully attempting to sell the gun (T. 652). But, later, Jones saw Green again and they went to Lake Conine (T. 653). At this time Green threw the 9 mm into the lake (T. 654).

At his trial, Blake testified. He told the jury that Green and Key had come to the motel where he was staying at about 3:00 a.m. on August 12<sup>th</sup> (T. 932). Blake left with them and helped steal a car (T. 935-6). The three went to a house where they stole some pressure washers and power tools (T. 937). They took the stolen items to Demetrius Jones' house and dropped them off (T. 938). Green, Key and Jones discussed committing a robbery of a drug dealer and Blake told them that he did not want any involvement in a robbery (T. 940). Blake told them to take him back to the motel (T. 942). The three got in the car. Key made two stops - one in a parking lot where Green got out of the car for a few minutes and then at Del's Go Shop (T. 945-6). Blake thought that they stopped at the store to get cigarettes but then heard what he thought was two gunshots (T. 946). Blake maintained that he did not know that Green intended to commit a robbery (T. 951).

Green reentered the car and the three drove off, abandoning the car moments later and setting off on foot. Green led them to Teresa Jones' apartment where Blake insisted that Jones give him

a ride back to the motel (T. 949-51). They all got into Jones' car and Green told her to go back to the stolen car where he got out and wiped down the car (T. 956). Jones then dropped Blake off at the motel (T. 956).

Blake also testified that he was never read his rights (T. 968). Giampavolo told Blake that he was facing the death penalty (T. 971). The detectives also told Blake about Green and Teresa Jones' statements and played Green's taped statement for him (T. 977, 979). Det. Navarro came into the room and told Blake that he should say it was an accident (T. 975).

Blake was placed in a holding cell where he was withdrawing from the drugs he had taken that day (T. 980). It was in the cell where he made a deal with Giampavolo: Blake would tell him what he wanted to hear and Giampavolo would let Blake call his girlfriend to come and pick him up (T. 982). Blake thought he was going to go home if he told them that he did it; Blake reasoned that both Green and Teresa Jones were permitted to go home after making statements (T. 983).

The jury found Mr. Blake guilty as charged (R. 316-8).

## **B. THE POSTCONVICTION PROCEEDINGS**

### **1. Richard Green Attempted to Rob and Shot Mr. Patel Without Blake's Knowledge.**

Green planned the robbery and shot Patel.

#### **a. Green's admission**

On March 28, 2011, Green testified that he and Key had planned to watch Patel's place of business in the early morning of August 12, 2002 (PC-R. 1531-2). But, when they arrived at

Del's Go Shop Patel was already there (PC-R. 1533). Green exited the vehicle and approached the store with a 9 mm gun (PC-R. 1531-3). Green had not told Blake or Key that he planned to commit a robbery (PC-R. 1534). When Green exited the vehicle he adjusted his hoodie and pushed his dreads back under it (PC-R. 1534). Patel came to the door and Green said he panicked and fired a shot (PC-R. 1533).

Green testified that Blake did not shoot anyone and did not even have a firearm (PC-R. 1536).

Green told Teresa Jones that he was surprised that the victim was killed because he did not think that the victim had been hit (PC-R. 1537-8). Parker may have overheard him say this (PC-R. 1538).

Green admitted lying to law enforcement when he said that Blake was the shooter (PC-R. 1539).

b. the videotape & the red shorts

At trial, the jury viewed the crime scene video surveillance tape. Though the identity of the individual in the tape was difficult to determine, the individual appeared to be wearing a pair of red shorts and a grey hooded sweatshirt. See State's Ex. 72 (Trial); Def. Ex. 65. The shorts were a solid red - there was no other color and no pattern on the shorts (State's Ex. 72 (Trial); Def. Ex. 65). Indeed, according to Renee Arlt, the evidence technician who enhanced the videotape: "A subject is seen with his face covered up to his eye, wearing a grey hooded sweatshirt, red shorts and white sneakers" (Def. Ex. 65).

Green's clothes were collected from him at 10:00 p.m. on the

night of the crimes. The items were described as "cotton shorts from Richard Green" See Def. Exs. 20, 21 and 25.

When Blake was arrested at Priscilla Hatcher's home two days after the crimes, clothes were collected from a closet. See Def. Ex. 26. Det. Harkins described the clothes as "misc. clothes to include a pair of red shorts that Blake was believed to have been wearing at the time of the homicide." (Def. Ex. 26).

The clothes of Green and those collected from Hatcher's closet were submitted to FDLE for analysis to determine whether glass was present. Again, the item from Green was described as: "cotton shorts from Richard Green" while the items submitted from Hatcher's closet were described as: "clothes-multiple (specifically Blake's pair of red shorts)". See Def. Ex. 21. In addition, law enforcement submitted a pair of plaid blue shorts, a black t-shirt and dark blue slacks, from Blake for analysis (Def. Ex. 21).

However, what the State failed to reveal to trial counsel was that the color of Green's shorts was red. See Def. Exs. 63 and 64. And, the items collected from Hatcher's closet do not include a pair of solid red shorts like those in the video surveillance tape. Rather, the clothes collected from Hatcher's closet included four items: a pair of blue pants, a pair of women's pink pants (size 16), a pair of plaid boxer shorts (red, white and blue) and a pair of plaid shorts (red, white and blue) (PC-R. 6965-7).

Furthermore, by 9:00 a.m. on August 12, 2002, before the video surveillance tape had been enhanced, Teresa Jones had

provided law enforcement with a description of Blake and what he was wearing: "5'10" tall, between 160-170 lbs., last seen wearing a blue sweater, dark pants and a bald head." See Def. Ex. 22.

c. the eyewitness descriptions of the shooter

At Blake's trial, when Donovan Steverson testified as a State's witness, he told the jury that he had seen a black male with braids get into the backseat of a car when it was parked outside (R. 581-2). Shortly thereafter, after he had heard a shot, he saw the same man run to the car and again get in the back seat (R. 584-5).

Likewise, Trisha Alderman saw "a man with a gun getting back in on the passenger side" who definitely did not have a bald head (R. 444-5). And, Denard Keaton said the person he saw going back to the car after the shot "wasn't at all tall and thin" but was "5'6" or 5'7"" (R. 461). By his own admission in his August 14<sup>th</sup> statement to law enforcement, Green was riding in the back seat. And, Green was about 5'6" or 5'7" and wore his hair in a style that could be called braids, plaits or dreads. Blake, on the other hand, was almost 5'9" and bald.

d. Green's statements overheard by Angela Parker

Angela Parker was present on August 12, 2002, when Green spoke to Teresa Jones about the crimes that morning. Parker heard Green state: "It didn't look to me like he was shot nowhere that could kill him, he was shot in the arm, I remember him being shot in the arm not the chest or anywhere that could kill him, so he shouldn't be dead." See Def. Ex. 23. Parker was called as a State witness during Green's trial, which occurred before Blake's

trial.

e. other evidence implicating Green.

Also, several witnesses provided information about Green's involvement in the crimes. Melburn Thomas and Terrell Smith told law enforcement that Green was in possession of the 9mm gun after the crimes. This was so despite the State's theory that Blake obtained the guns from the abandoned car after the crimes. See Def. Ex. 20 and 21.

Likewise, within a very short time after the crimes, Hayward Summerall, Tyrone Summerall and Taron Smith all told law enforcement that Green was involved in the crimes. See Def. Ex. 24. There was no mention of Blake, until the police asked if the witnesses were familiar with him. Indeed, during Navarro's deposition, he told trial counsel that while he was investigating the case, "someone" approached him and told him that "Plump-Chicken" was involved. See Def. Ex. 33. However, Navarro failed to follow-up on this information or even find out the witness' name.

Also, during law enforcement's investigation, Kelly Govia was interviewed and told Det. Harkins that the morning of the murder her niece, Kara Poole, talked to Demetrius Jones and came back crying. When Govia asked her what was wrong, Poole said that Jones had told her that Poole's boyfriend, Kevin Key, was with "Imeece's baby's daddy when he shot someone that morning."<sup>8</sup> Later, after Poole talked to Key, she told Govia that Key was not

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<sup>8</sup>Green was known to be the father of Imeece's child.

worried because the police did not have his fingerprints. Govia then eavesdropped on a conversation between Key and another individual in which Key described the crimes - stating that he had been in the back seat and there were four people in the car. Key went on to explain that he participated in the attempted robbery because he was trying to get \$100.00 for a down payment for Poole's car. Key stated that things didn't go as planned and "Plump" pulled the trigger. See Def. Exs. 14 and 26; PC-R. 2144-6.

**2. Law Enforcement's Investigation - What the Jury Did Not Hear.**

On August 12, 2002, at approximately 6:00 a.m. Maheshkumar Patel was shot at his place of business, Del's Go Shop, on Coleman Road in Winter Haven.

Shortly thereafter, a stolen vehicle, believed to be used in the crimes, was located near the Lake Deer Apartments.

By 8:30 a.m., the K-9 unit had tracked from the stolen vehicle to a duplex apartment structure in Lake Deer. Angela Parker occupied one side of the duplex, Teresa Jones the other. Jones was interviewed and wove a story about Blake, whom she called "Blade", having come to her door that morning with two other black males requesting a ride to a motel. Jones obliged and ultimately dropped Blake and one of the others off near a Cash Mart in Winter Haven. On the way to the Cash Mart, Blake told Jones to stop at an abandoned vehicle where he retrieved a screwdriver and 2 guns. He also told Jones that "someone had tried him with a baseball bat and he had to shoot him" See Def.

Ex. 23.

Thus, Blake only became a suspect in the crimes because Teresa Jones pointed the finger at him. Indeed, based on Jones' statement, Det. Navarro was dispatched to a Cash Mart in Winter Haven at 9:00 a.m. with the description of Blake: "A black male approximately 5'10" tall, between 160-170 lbs., last seen wearing a blue sweater, dark pants, and a bald head." See Def. Ex. 22.<sup>9</sup>

And, while law enforcement was searching for "Blade", numerous witnesses stepped forward with information about "Plump" or "Plump Chicken's" involvement in the crimes. "Plump" or "Plump Chicken" were Green's nicknames. Before noon, individuals from the lawn maintenance crew at Lake Deer, including Tyrone Summerall who testified at the evidentiary hearing, told law enforcement that they had heard that Green was involved with the murder (Def. Ex. 24; PC-R. 6946-8). At noon, Green's mother came to the scene because she "heard through a third party that her son had killed someone." Def. Ex. 20

Green was interviewed in the afternoon, but denied involvement in the crimes. Later, after his fingerprint was identified on the stolen vehicle, he was re-interviewed. Indeed, at 10:00 p.m., law enforcement collected Green's "shorts and shoes". See Def. Ex. 25. However, he was not arrested. Green's shorts were submitted as evidence and characterized as "cotton shorts from Richard Green". See Def. Ex. 20 and 21.

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<sup>9</sup>At the time law enforcement obtained the description of Blake, it was believed that there was no surveillance video from the store.



The following day, at approximately 6:30 p.m., Parker met with law enforcement and told them about a statement Green had made the previous morning at approximately 9:00 a.m., while overhearing officers at Lake Deer. Parker told them that when Green learned that the victim was killed: "Green looked over at Jones and Parker and said 'it didn't look like to me he was shot nowhere that could kill him. He was shot in the arm. I remember him being shot in the arm, not in the chest or anywhere that could kill him, so the man shouldn't be dead.'" Def. Ex. 23.

On August 14, 2002, Green provided a taped statement to law enforcement admitting that he was at the crime scene. However, he maintained that he did not know that the vehicle was stolen, did not participate in planning the robbery, stayed in the vehicle and only saw a gun when Blake raised it, after exiting the vehicle. Green then showed law enforcement where Blake was. See Def. Ex. 20. Green was not arrested.

Blake was arrested at 4:40 p.m., on August 14<sup>th</sup>, and was interrogated for many hours. Ultimately, Blake provided a statement, which unbeknownst to him was videotaped, admitting that he shot the victim because he scared him. See Def. Ex. 20. Blake demonstrated how he committed the crime and was captured on the secret videotape. However, after making a statement to Polk County Sheriff's officers, Blake immediately told Det. Brad Grice, of the Lakeland Police Department that he did not shoot the victim in Winter Haven and only said he did so that the detectives would leave him alone. See Def. Ex. 30.

On August 16, 2002, Terrell Smith voluntarily directed law

enforcement to Lake Conine because he said that on August 13<sup>th</sup>, he accompanied Green and another male, in Teresa Jones' vehicle, to the lake where he observed Green throw the gun in the water. Smith saw the clip and gun separate in the air. See Def. Ex. 20; PC-R. 6986-9. According to his testimony on June 19, 2012, Demetrius Jones was not the other individual present (PC-R. 6988).<sup>10</sup>

On August 16, 2002, after contacting law enforcement, Kelly Govia was interviewed. Govia explained that she was concerned because on August 12, 2012, at approximately 8:00 - 8:30 a.m., she observed Demetrius Jones and her niece Kara Poole speaking. Poole started crying uncontrollably and walked back to her house. Govia asked what was wrong and Poole told her that Jones told her that her boyfriend, Kevin Key, aka, Red Man, was with Green when he shot someone that morning. See Def. Exs. 14, 26; PC-R. 2140-4.

Later that day (August 12<sup>th</sup>), at 1:00 p.m., Govia listened to a conversation that Key had with his friend. Key said he was not worried because the police did not have his fingerprints. When Key explained what occurred he said that Green pulled the trigger. See Def. Exs. 14, 26; PC-R. 2144.

Demetrius Jones' name and nickname "Meechie" had been provided to law enforcement as early as August 14<sup>th</sup> as having been with Green in the early morning hours of August 12<sup>th</sup>. However, it was not until the afternoon of August 19<sup>th</sup> that law enforcement made any effort to speak to Jones. And that was only

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<sup>10</sup>On September 6, 2002, Green corroborated Smith's statement. See Def. Ex. 21.

because a latent fingerprint from the stolen vehicle had been submitted to AFIS and came back as a match to Jones. See Def. Ex. 20.

On August 20, 2002, law enforcement located Jones and interviewed him. Jones told law enforcement that Key was the third person involved in the crimes. Jones stated that he met with Green after the crimes and Green was attempting to locate Key so he could tell Key to tell law enforcement that Key was driving. He also stated that Green and Key were in the boggy on Sunday night, trying to get in touch with Blake by paging him. Green and Key ultimately left and returned at 4:00 a.m. in a stolen vehicle talking about robbing people. See Def. Ex. 20.

Jones provided a taped statement that night in which he reiterated his statements to law enforcement. However, he also told law enforcement that when Key and Green were plotting the robbery Blake was not even present, though Green had attempted to page him. Jones also stated that Green and Key "went and woke [Blake] up out of his sleep." And, that, even when they brought Blake back, Blake still did not want to be involved in any robbery, i.e., "Blake was like, 'No' - he don't feel like going . . . so they just squashed that." In addition, Jones admitted that he had seen Green with a chrome 9 mm "like all that week." See Def. Ex. 15.

Jones also told law enforcement that it was his opinion that Green was trying to shift all of the blame to Blake and Key. Green was even going so far as to obtain money so that he could convince Blake to leave town, "so he wouldn't have to worry about

Blake saying anything . . . and then he gotta tell Red Man what to say." Jones also specifically told law enforcement that: "Blake - he was cool, but he ain't you know really care about that kinda shit like robbin' people." See Def. Ex. 15.

Jones also told law enforcement that he saw Blake the next day and Blake had mentioned getting rid of the gun. See Def. Ex. 15. Jones said he had been with Green when he threw the gun into the lake. And, the following day, he accompanied law enforcement to Lake Conine (to the same area where Terrell Smith had taken law enforcement), and explained how the clip and gun separated in the air. See Def. Ex. 15.

Because Demetrius Jones mentioned Kevie Hall as also being present in the early morning hours of August 12<sup>th</sup>, law enforcement interviewed him on August 27, 2002, Hall corroborated Jones' statement that Green and Key were planning to go rob someone in Lakeland. Hall made no mention of Blake even being present. See Def. Ex. 20.

Despite the evidence implicating Green and Key in the attempted robbery and murder, they were not arrested or charged with any crime stemming from the crimes that occurred on August 12, 2002.<sup>11</sup>

### **3. Teresa Jones.**

Teresa Jones lied at Blake's trial. Her motives were simple: she was Green's girlfriend; she had been threatened by

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<sup>11</sup>Green was arrested and charged with first degree murder in June, 2004, after he refused to testify in Blake's Lakeland case.

law enforcement; and she expected benefits.

Jones told individuals that law enforcement threatened to take her kids away unless she said what they told her to say. Indeed, in December of 2002, Jones was being investigated for child abuse, but shortly after the investigation commenced, it was closed. See Def. Ex. 6. Priscilla Hatcher testified that Jones had confided in her that the statements she made were far from true. See PC-R. 2571-4, 2579-81, 2587. And, Hatcher had observed law enforcement threaten Jones. See PC-R. 2571-4, 2579-81, 2587.

Indeed, in 2002, Jones had already confided to Travell Jones<sup>12</sup> that Green was the shooter in the Patel homicide (PC-R. 1747). Teresa Jones provided Travell Jones with details about the crime shortly after it occurred (PC-R. 1745-6). Teresa Jones admitted that she was worried about her kids (PC-R. 1748).

In addition, to her concerns about the custody of her children, Jones was also concerned with criminal charges that were pending against her.

On September 11, 2004, Jones was charged and admitted to armed robbery; she was driving the vehicle that pursued an unsuspecting victim and when the victim parked his car, other passengers in Jones' car "ran up to him and pointed a gun in his face.". Jones was present when the armed robbery plan was hatched and followed the victim, then drove the getaway vehicle. See Def. Ex. 6. She was facing life in prison for her role in

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<sup>12</sup>Travell Jones' name was listed in police reports. See Def. Ex. 20.

the armed robbery. However, the day before she testified in Blake's trial, her charge was reduced to petty theft, a misdemeanor, and she was allowed to plead to six months probation. Def. Ex. 6.

Just days after being placed on probation, and before Blake's penalty phase, Jones was arrested for obstructing without violence, i.e., she lied to law enforcement to protect her boyfriend, Pierre Dugazon. See Def. Ex. 67.

Jones' motives to lie led to her making several inconsistent statements. At trial, the State relied on Jones to establish three facts against Blake: 1) that Blake was with Green on the morning of August 12, 2002; 2) that Blake took two guns from the abandoned vehicle; and 3) Blake told her that he shot the victim. However, specifically, as to whether Jones observed Blake obtain guns from an abandoned vehicle on the morning of August 12, 2002, Jones has repeatedly, under oath, maintained that she did not.

Jones provided sworn testimony on June 14, 2004, wherein she was asked if she saw Blake take a gun out of an abandoned vehicle on August 12, 2002. She testified that she was not sure about that. She also indicated that what she told the police in August, 2002, was based on what they were telling her and what she heard on the street. She stated that she had lied about some of the things she told law enforcement. Jones testified that it was not her fear of Blake that caused her to lie, but the fact that others had threatened her. She also stated that it was a "crazy morning" and that may have caused her to lie about the fact that she saw Blake take guns from the vehicle. During her

testimony, Jones was asked: "Where did you see him with the guns at?" and she responded: "Earlier, before. Not on that day. I guess before that, like in our neighborhood people walk around with protection." When confronted with her inconsistent statement, Jones stated that the testimony about seeing guns was not true - that she "really didn't see no guns." She described guns that she saw before August 12<sup>th</sup>. See Def. Ex. 34.

Furthermore, at her June, 2004, deposition Jones was also asked: "Did Mr. Blake tell you, that morning, that he had shot someone?" To which she answered: "No." She went on to state: "No. I didn't say nothing about no shooting. I never said nothing about no shooting. He told me he was fighting." Jones explained that she had heard a lot of stories and just repeated the ones that sounded best to her. She said law enforcement had promised to protect her boyfriend, Green. See Def. Ex. 34.

Also, in June, 2004, Blake was tried for the murder of Kelvin Young. At the trial, Jones reiterated that she "gave them what they wanted to hear" before the Grand Jury because "they kept messing with her." She was again asked:

Q: So, you never saw Mr. Blake take any guns out of any car?

A: No.

Q: You never did?

A: No.

Q: Never?

A: No.

See Def. Ex. 51. Jones later reiterated that she did not see

Blake remove any guns from the abandoned car and her testimony before the Grand Jury on this point was not true. Id.

When Jones testified in Green's trial for the murder of Patel, she told the jury that she had received benefits for her testimony, i.e., she and Green would not be charged with any crimes, they would received assistance and expected benefits. See Def. Ex. 51.

On January 6, 2012, Jones testified under oath in Franklin County, Pennsylvania. See Def. Ex. 74. As to whether or not Blake told her he shot someone on the morning of August 12, 2002, Jones testified::

Q: So he didn't tell you he had shot somebody?

A: No. He just said that he beat somebody with a bat or something like that.

See Def. Ex. 74. Also, specifically, when questioned about whether she had told Blake's investigator whether Blake shot someone, Jones testified:

Q: Okay. Do you recall whether in your conversation with [Blake's investigator], did you tell her that you - that Blake had never told you he had shot someone?

A: I can't remember him telling me he shot somebody.

Q: Okay.

A: I said something about a bat.

Q: Okay.

A: I don't remember him saying -

Q: Okay. And I'm just - in terms of what you said to [the investigator], you would have been saying that all that you remember is you saw him?

A: Yes.



Q: Or he said something about a bat?

A: Yes.

Q: Okay. So it wasn't that he had said he shot someone?

A: No, I don't think so.

See Def. Ex. 74.

Thus, on January 6, 2012, Jones testified unequivocally that Blake did not tell her he fired a shot on August 12, 2002. See Def Ex. 74 ("**No, he didn't tell me that he shot anybody.**") (emphasis added).

#### **4. Demetrius Jones.**

Jones was listed as a suspect in the homicide. And, according to Govia, Jones knew information as early as 8:00 or 8:30 about the crimes, when he spoke to her niece. See Def. Ex. 14. However, according to Jones he did not see Blake or Green until mid-day on August 12<sup>th</sup>.

Furthermore, at the time that law enforcement sought out Jones due to learning that his fingerprint was found on the stolen vehicle used in the crimes at Del's Go Shop, Jones had violated his probation in Polk County Case No. 2002CF724A, for possession of cocaine. Jones had been placed on eighteen months of probation, but at the time law enforcement questioned him, he had violated probation. Jones was inexplicably not arrested at the time law enforcement questioned him.

Indeed, it was not until December 16, 2003, that law enforcement arrested Jones on the probation violation. See Def. Ex. 66. In the probable cause affidavit, law enforcement notes

that Jones has four active arrest warrants, including a warrant to be held as a material witness. The warrants relating to Jones being a material witness were related to the cases against Blake. See Def. Ex. 5. And, as of December, 2003, the State also filed an information in Polk County Case No. 2003MM486901 for a battery that occurred in June, 2003. Jones was not arrested for that offense until December 16, 2003. And, when law enforcement located Jones on December 16, 2003, he was charged with 1) possession of cocaine with the intent to sell or deliver; 2) possession of drug paraphenalia; and 3) resisting arrest without violence in Polk County Case No. 2003CF847101. See Def. Ex. 66. Jones was released a few days later with pre-trial release despite his pending substantive charges and probation violations, being told to keep in contact with State Attorney Investigator Zeller. See Def. Ex. 5.

Within days of testifying in Blake's capital case, Jones' charges and probation violations were resolved: Hardy Pickard offered Jones, who was facing more than twenty-five years for the outstanding crimes and probation violations, a below guidelines sentence of 18 months of probation for 2003CF847101 and 2002CF724A.

And, just two days after entering his plea, Jones was charged with committing felony battery and domestic violence assault in Polk County Case NO. 2005CF176501. Those charges were no billed on March 28, 2005.

In addition, the prosecutor in Mr. Blake's case, Cass Castillo, was actively assisting Jones during the prosecution of

Blake and he continued to do so after Blake was sentenced to death. See Def. Exs. 5 and 9; PC-R. 1383. Indeed, Castillo testified that he helped Jones get out of jail at one point (PC-R. 1382).

On June 19, 2012, Jones testified that not everything he told law enforcement and testified about at Blake's trials was true. For example, Jones admitted that he saw Blake once following the crimes, but Blake did not ask him to assist him in getting rid of the gun. Rather, Blake "didn't really say nothing but like, what's up , and that was that." (PC-R. 7113). However, the first person Jones saw after the crimes was Green (PC-R. 7115). Green approached Jones and told him that someone got shot and he was scared and asked for advice about what to do (PC-R. 7110-1, 7115). Green did not listen to Jones and instead just tried to save himself (PC-R. 7111).

Jones also testified that Green told him where he took the gun to dispose of it (PC-R. 7108). And, Jones was not with Green when Green threw the gun into the lake (PC-R. 7109).

Jones also testified that "Key", or Kevin Key, Jones' cousin, told him that Green shot and killed Patel, not Blake (PC-R. 7107-8).

##### **5. Blake Falsely Confessed.**

Dr. Richard Ofshe testified that he examined the circumstances surrounding Blake's "confession." (PC-R. 2083-4). According to Ofshe, the account of his interrogation given by Blake and that described by the detectives involved are irreconcilable. The officers' failure to tape the entire

interrogation created a situation in which much of what Blake recounted is essentially worthless, from an evidentiary standpoint, because it's impossible to know if Blake's statements are truly a product of what he witnessed and experienced or the result of contamination that occurred prior to taping (PC-R. 2096-7).

However, according to Ofshe, there are a number of significant elements that are red flags for false confession, i.e., there is no "fit" (PC-R. 2095-2106). More important than the facts that Blake stated accurately are those that he misstated (PC-R. 2095-2106). In Giampavolo's report concerning the aspects of the interrogation that were not taped, the detective said Blake said he picked up Green at his grandmother's house. In the videotaped portion, Blake says he picked up Green at the Lake Deer apartments, after being specifically asked if he'd picked up Green there or at his grandma's house (R. 1179). This may seem like an insignificant detail, but it has larger ramifications when considered in context. That is, Green claimed in his taped statement, given just a few hours earlier, that Blake had picked him up at his grandmother's. But based on the state's theory, as advanced by the testimony of state witness Demetrius Jones, this was not true. Jones testified that Green and Key went and got Blake at his motel when he failed to answer their phone calls and pages. Jones' neighbor, Kevie Hall, told police that he had heard Green and Key planning to go robbing outside Jones' house when Blake was not even present. Green's claim to have been picked up by Blake at his grandmother's house,

or to have been picked up by Blake anywhere that night, was simply a lie designed to minimize his own involvement. That Blake would adopt this lie into his own statement clearly shows that the sources for the version of events he recited on the videotape were not limited to what he personally witnessed and experienced. This evidence bolsters Blake's claim that the detectives played the taped statement they had received from Green a few hours earlier, which Giampavolo denied.

In addition, Blake could not describe what the door of the store looked like; when asked by Giampavolo if the door was a double door, Blake said, "I done forgot. I don't even know" (R. 1185; PC-R. 2104). And, though he claimed to have burned the clothes he'd been wearing, Blake could not describe the clothing (R. 1188). Likewise, Blake could not say which door had been shot through. Had Blake been the shooter, it seems unlikely that he would not recall such significant details correctly. When Blake was pressed to explain where the gun or guns ended up, he constructed a story out of whole cloth about meeting someone on I-75 and giving the guns to him, and said that they "ain't even in Florida" (R. 1190-1). The detectives, who suspected that the gun or guns had been thrown in a lake, based on information they had received from Angela Parker on August 13<sup>th</sup>, suggested to Blake: "The guns didn't end up in a lake?" To which Blake responded: "Ya'll go check every lake" (R. 1192). Of course, the 9mm had been disposed of in Lake Conine, unbeknownst to Blake, the day of the crimes by Green, but was not actually recovered by law enforcement until August 21 - a week after Blake's

interrogation.

Essentially, Blake was unable to tell law enforcement anything they did not already know. It is also important to distinguish that when Blake stood up in the interrogation room to demonstrate how he approached the store he walks slowly with his hands held down; the video from the store shows a rapidly-moving person with a gun held at shoulder-level. See PC-R. 2104-6. There was no "fit" between the videotape and Blake's statement (PC-R. 2109). However, Green 's statements to Parker demonstrated "fit" (PC-R. 2109). Green knew exactly where the victim was shot. This was a significant statement to Ofshe (PC-R. 2107-8).

In addition, Dr. Barry Crown diagnosed Blake as having organic brain damage (PC-R. 1975). The damage was primarily located in Blake's left temporal lobe (PC-R. 1975). This caused problems with Blake's concentration and attention (PC-R. 1984). Blake's prior IQ testing demonstrates that he suffers from low IQ. Dr. Bhushan Agharkar agreed with Crown's diagnosis and also diagnosed Blake as suffering from PTSD, depression and a panic disorder. Blake's mental health could have effected his statement (PC-R. 2191).

### **SUMMARY OF ARGUMENT**

Mr. Blake's trial counsel was deficient at the guilt phase of his capital trial. Trial counsel's deficient performance caused him to fail to present much exculpatory evidence, which corroborates Mr. Blake's testimony and significantly undermines the State's evidence.

Furthermore, Mr. Blake was deprived of his right to due process at trial when the prosecution committed suppressed critical evidence about key witnesses and evidence. The suppressed evidence would have revealed that Teresa Jones and Demetrius Jones expected to obtain benefits for their assistance to the State. This evidence combined with the numerous inconsistent statements and testimony from Teresa Jones and Demetrius Jones leaves no doubt that their testimony against Mr. Blake was fabricated.

In addition, the red shorts collected from Green, which he declared he had been wearing at the time of the crime, match the shorts that appear in the crime scene video. Green has now testified that he committed the attempted robbery and shot Mr. Patel without Mr. Blake's knowledge. Again, this evidence corroborates Mr. Blake's testimony and significantly undermines the State's evidence.

Mr. Blake is entitled to a new trial.

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**ARGUMENT**

**ARGUMENT I**

**MR. BLAKE WAS DENIED DUE PROCESS DURING HIS  
POSTCONVICTION PROCEEDINGS WHEN THE STATE INTERFERED  
WITH HIS DEFENSE.**

**1. Blake's Efforts to Present His Defense.**

Shortly before Blake's evidentiary hearing commenced he located Teresa Jones in Pennsylvania.<sup>13</sup> Jones had testified at Blake's trial as a prosecution witness. Jones, who was dating Richard Green at the time of the crime, testified that in the early morning of August 12<sup>th</sup>, Blake arrived at her apartment. Jones told the jury that she gave Blake a ride to his motel, but was first instructed to stop at an abandoned car, where Blake retrieved two guns. Jones also told the jury that Blake had made inculpatory statements about shooting someone.

However, in postconviction, Blake learned that Jones had told others that her testimony at his trial was not true and that she had been threatened by law enforcement to testify against Blake or her children would be removed from her custody.

When Blake's investigator, Rosa Greenbaum, interviewed Jones she admitted that her testimony regarding seeing Blake retrieve guns from the abandoned car was false. She also revealed that, contrary to her testimony, Blake did not make any inculpatory

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<sup>13</sup>Blake had made repeated attempts to locate Jones through computer searches and interviews with her known friends and family, but could not locate her. In March, 2011, Blake finally received what looked like a "good hit" for an address for Jones in Pennsylvania. It appeared that Jones had recently obtained a Pennsylvania driver's license which caused her address to be placed in a database used to locate individuals by licensed investigators.



statements about shooting someone. Jones confirmed that she had been threatened and was worried about the custody of her children. And, she confirmed that she wanted to protect her then-boyfriend, Richard Green.

Greenbaum asked Jones to travel to Florida and testify at Blake's upcoming evidentiary hearing. Jones was reluctant, but said she would consider it.

At the evidentiary hearing in March, 2011, Blake informed the circuit court of the statements by Jones and his desire to presented her testimony to the court.

On August 4, 2011, Blake filed a Motion for Certificate of Materiality or in the Alternative for Video Testimony or in the Alternative Motion for Deposition to Perpetuate Testimony (PC-R. 6391-4).

On August 22, 2011, a hearing was held on Blake's motion. The circuit court held that the certificate would be issued if Blake file an affidavit from Greenbaum relating her interview with Jones (PC-R. 6395). Also, at the hearing, Assistant State Attorney John Aguero informed the circuit court that he had spoken to Jones and she denied the substance of the conversation contained in the motion. Blake submitted Greenbaum's affidavit on August 23, 2011 (PC-R. 6396-9).

The following day, the State, through ASA Aguero, issued a subpoena for Greenbaum to appear before a grand jury in Polk County on September 8, 2011 (PC-R. 6410). The subpoena had no case number assigned to it and had been issued in the name of

"John Doe" (PC-R. 6410).<sup>14</sup> However, due to the timing of events, and the fact that Greenbaum had no personal dealings in Polk County, it was clear that the subpoena was related to her work for Blake.

Blake filed a motion to quash (PC-R. 6406-10), a supplement to the motion (PC-R. 6412-4), and memorandum in support of his motion (PC-R. 6415-24). The circuit court scheduled an emergency hearing on Blake's motion for September 7, 2011, but on that same date, ASA Aguero agreed to withdraw the subpoena for September 8, 2011. See PC-R. 6440-1. However, ASA Aguero stated that he intended to re-issue the subpoena after Blake's evidentiary hearing. See PC-R. 6441.

In the two weeks that followed, Greenbaum decided that she could no longer assist with Blake's defense. Thus, Blake's defense counsel was left scrambling - attempting to prepare for Blake's evidentiary hearing without an investigator.

On September 21, 2011, Blake made an *ore tenus* motion to continue his evidentiary hearing (PC-R. 6444-6501). The State, through ASA Aguero opposed the motion to continue and argued that the circuit court had no authority to require him to reveal anything related to a grand jury investigation (PC-R. 6444-6501). ASA Aguero did not in any way indicate that he would not pursue the investigation of Blake's defense team. On the contrary, in response to the argument that the timing of the subpoena demonstrated ASA Aguero's bad faith, he made a point of noting

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<sup>14</sup>Greenbaum was served a week after the subpoena was signed, on September 2, 2011 (PC-R. 6410).

that the subpoena was signed the day after Greenbaum's affidavit was filed with the circuit court; leaving no doubt that the subpoena related to Blake's defense team's investigation of his case. See PC-R. 6465-9.

The circuit court granted Blake's motion and re-scheduled the evidentiary hearing (PC-R. 6504).

Following the hearing, Blake filed a Motion for Discovery requesting that he be permitted discovery as to the communication between ASA Aguero and Jones, including notes, e-mails, memorandum and recordings and that he be permitted to depose ASA Aguero and Jones (PC-R. 6508-10). Blake also filed a motion to disqualify ASA Aguero and the Office of the State Attorney for the Tenth Judicial Circuit (PC-R. 6511-21). In the motion, Blake stated:

...At this point, ASA Aguero and the Office of the State Attorney for the Tenth Judicial Circuit must be disqualified from prosecuting Mr. Blake. ASA Aguero's actions caused Mr. Blake actual prejudice. By subpoenaing Ms. Greenbaum he attempted to and did in fact chill her and Mr. Blake's attorneys' representation. This interference with Mr. Blake's legal representation was improper and unethical and violated Mr. Blake's right to due process.

18. Likewise, ASA Aguero's intimidation tactics constitute witness tampering. Ms. Greenbaum and Jones were listed as witnesses on behalf of Mr. Blake. ASA Aguero was aware of Ms. Greenbaum and Jones' status as potential witnesses and issuance of the "John Doe" subpoena was improper and unethical. Had ASA Aguero truly believed that Mr. Blake's defense had engaged in any criminal activity, he could have simply waited until after Mr. Blake's evidentiary hearing and then subpoenaed Ms. Greenbaum to appear for testimony before the grand jury. There was no urgency to the investigation, however, there was an urgency in chilling defense counsel's representation just prior to the continuation of the evidentiary hearing in a case that has fallen apart on the State.

19. Furthermore, ASA Aguero's bad faith is demonstrated by the fact that he cannot establish

jurisdiction and venue for issuing the subpoena to Ms. Greenbaum. At the time Ms. Greenbaum received the subpoena, she had not traveled to Polk County since the date of the March evidentiary hearing. Ms. Greenbaum had no personal dealings in Polk County and had not worked in Polk County since then, either. The affidavit regarding Teresa Jones' statements to her in Pennsylvania was executed in Sarasota County. Thus, ASA Aguero's subpoena was improper and meant solely to interfere with and chill Mr. Blake's representation.

20. Additionally, ASA Aguero's actions are also causing an undue interference on the ability to produce Jones as a witness in the State of Florida. ASA Aguero has repeatedly admitted that he is communicating with Jones - a defense witness. And, because of his communications with Jones, following which, according to ASA Aguero, she has recanted her statements to Ms. Greenbaum, he has now injected himself into the litigation and will undoubtedly be a witness in Mr. Blake's postconviction case.

(PC-R. 6514; see also PC-R. 6647-58 (Supplement to Motion)).

Blake also filed a Motion for Sanctions requesting that the circuit court grant him a new trial or that the State grant immunity to Greenbaum and Jones for any testimony (PC-R. 6522-31).

The circuit court granted Blake's motion for discovery, in part, and permitted Blake to depose Jones and obtain from her any written or recorded information concerning her communication with ASA Aguero (PC-R. 6595-6). However, despite the circuit court's finding that "ASA Aguero's actions were intended to drive Ms. Greenbaum from the witness stand", the court denied Blake's motion to disqualify, motion for sanctions and denied the motion for discovery as it pertained to ASA Aguero (PC-R. 6900-1). The circuit court erred.

## **2. Disqualification.**

Recently, this Court reiterated: "This Court has stated that

'disqualification is proper only if specific prejudice can be demonstrated. Actual prejudice is 'something more than mere appearance of impropriety'. Disqualification of a state attorney is appropriate 'only to prevent the accused from suffering prejudice that he otherwise would not bear.'" McWatters v. State, 36 So. 3d 613, 636 (Fla. 2010) (citations omitted). In McWatters, the Assistant State Attorney listened to phone calls between McWatters and his counsel. In reviewing the circuit court's denial of the motion, this Court held that McWatters was warned that the conversations were being recorded and therefore waived his right to confidentiality.

However, this Court has also carved out an exception to the actual prejudice standard: "on a case-by-case basis, specific or actual prejudice will not be required where the appearance of impropriety is strong." Huggins v. State, 889 So. 2d 743, 768, n.13 (Fla. 2004).

Blake submits that he established a strong appearance of impropriety and actual prejudice in his case. As to a strong appearance of impropriety, ASA Aguero's subpoena to Greenbaum made clear that he launched an investigation into Blake's defense team. Blake's defense team should not have been expected to represent him when the State was attempting to chill his representation. In addition, the timing of the subpoena and fact that there was no jurisdiction or venue for his investigation demonstrates, at a minimum, an appearance of impropriety.

As to actual prejudice, first, Blake's investigator for over two-and-a-half years resigned from his case. Greenbaum was

intimately familiar with details of Blake's case. She reviewed every document that had been produced and interviewed numerous witnesses. She built a rapport with Blake, his family and witnesses. At the time of the subpoena, some witnesses had not yet testified and Blake was forced to proceed without the individual who knew the witnesses and conducted the initial interviews with them.

Further, Greenbaum refused to testify for Blake due to her fear that ASA Aguerro and the Office of the State Attorney for the Tenth Judicial Circuit sought to maliciously prosecute her. Greenbaum's beliefs were based on the bad faith that ASA Aguerro demonstrated.

In addition, ASA Aguerro's interference with Jones caused Jones to refuse to cooperate or speak to Blake's defense. Jones, who was cooperative and willing to speak to Blake's defense team in March, 2011, after speaking to ASA Aguerro, refused to cooperate.

And, ASA Aguerro made himself a witness to Blake's postconviction proceedings, but Blake was not permitted to call him as a witness.

The circuit court erred in failing to grant Blake's motion for disqualification of ASA Aguerro and the State Attorney for the Tenth Judicial Circuit.

### **3. Sanctions.**

In Berger v. United States, the United States Supreme Court discussed the role of a prosecutor in a criminal case:

The United States Attorney 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. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. **But, while he may strike hard blows, he is not at liberty to strike foul ones.** It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

295 U.S. 78, 88 (1935) (emphasis added). Here, ASA Agüero struck a foul blow in subpoenaing Blake's investigator to testify before the grand jury a few weeks before the continuation of his evidentiary hearing was scheduled to commence.

Greenbaum was listed as a witness and expected to testify at the hearing. Thus, ASA Agüero's actions amounted to more than a threat of potential criminal charges – his issuance of the grand jury subpoena demonstrated his decision to investigate and prosecute Greenbaum for her investigation of Blake's case.

In Hendrix v. State, 82 So. 3d 1040 (4<sup>th</sup> DCA 2011), the Fourth District Court of Appeals' reviewed a case where the prosecutor told a witness that he intended to charge him with a crime should he testify consistently with his deposition. Id. at 1041. The Court found that the prosecutor's conduct violated due process and the defendant's right to present a defense. The Court relied on numerous cases, including Webb v. Texas, 409 U.S. 95, 98 (1972), in which the United States Supreme Court held that a judge's threatening remarks to a witness "effectively drove that witness off the stand, and thus deprived the petitioner of

due process of law.”

Here, ASA Aguerro subpoenaed Greenbaum to a grand jury the day after her affidavit regarding her conversation with Jones was filed. Thus, the timing of the subpoena and the fact that ASA Aguerro could not establish jurisdiction and venue for issuing the subpoena demonstrates that his actions were intended to drive Greenbaum and Jones from the witness stand. Greenbaum and Jones could not testify freely before the court. See United States v. Morrison, 535 F.2d 223, 228 (3d Cir. 1976).

Additionally, in Lee v. State, 324 So. 2d 694 (1<sup>st</sup> DCA 1976), the Court of Appeals for the First District confronted a scenario where the prosecutor threatened a witness with perjury shortly before he testified. The Court found that the prosecutor “abandoned the office of a prosecuting attorney and assumed the role of a persecutor.” Id. at 698. Indeed, the Court commented that: “in interviews with witnesses before trial, the examiner, ‘must exercise the utmost care and caution to extract and not to inject information, and by all means to resist the temptation to influence or bias the testimony of witnesses.’ There can be no doubt here that the threatening and abusive remarks to [the witness] by the prosecutor were attempts to inject certain information and to influence or bias the testimony which [the witness] was prepared to deliver on behalf of appellant.” Id. citing Mathews v. State, 44 So. 2d 664, 669 (Fla. 1950). In Lee, the Court held that petitioner was entitled to a new trial.

In Hendrix, the Court held that petitioner was entitled to a



new trial, at which the State would either provide the witness who had been intimidated with immunity, or the defendant would be acquitted.

The circuit court erred in denying Blake's motion for sanctions.

#### **4. Discovery.**

Due to Jones' drastic change in attitude toward Blake, which occurred after ASA Aguerro communicated with her, Blake was entitled to discovery, including all of ASA Aguerro's notes, memorandum, e-mail or recordings of the contacts between he and Jones as well as being permitted to take the deposition of ASA Aguerro. The circuit court erred in denying Blake's motion.

#### **5. Conclusion.**

Throughout Blake's postconviction proceedings the State interfered with Blake's defense by threatening and harassing witnesses.<sup>15</sup> As the circuit court found, ASA Aguerro's actions in

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<sup>15</sup>Van Bossell Preston testified that in August, 2011, he was arrested as he drove to work in Hillsborough County with his stepson (PC-R. 7019-20). He was told that he was being arrested for an outstanding warrant in Polk County, but he knew that he had not committed any crimes in Polk County or anywhere else for that matter (PC-R. 7020). He was left in jail for a week with no bond and then abruptly released (PC-R. 7023-4). Preston had no idea that there had been an application for a capias filed on March 17, 2011, by ASA Aguerro, in which ASA Aguerro falsely attested to the fact that Preston had testified in Blake's capital trial (Def. Ex. 68). ASA Aguerro also falsely attested that Preston was "intentionally secreting himself and his whereabouts." See Def. Ex. 68. ASA Aguerro attested that: "State Attorney Investigator Chuck Zeller has made extraordinary efforts to locate" Preston. However, at the evidentiary hearing, Zeller described his efforts as going to Preston's address and leaving a card (PC-R. 7261). ASA Aguerro's actions in relation to Preston were undoubtedly designed to intimidate, harass and drive him

instituting an investigation of Blake's defense team was designed to drive Blake's investigator from the witness stand (PC-R. 6900). Likewise, Teresa Jones was also driven from the witness stand. Blake is entitled to a new trial.

## ARGUMENT II

**THE CIRCUIT COURT ERRED IN DENYING MR. BLAKE'S CLAIM THAT HE WAS DENIED AN ADEQUATE ADVERSARIAL TESTING AT THE GUILT PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PRESENT EXCULPATORY EVIDENCE AND TO ADEQUATELY CHALLENGE THE STATE'S CASE. AS A RESULT, THE CONVICTION IS UNRELIABLE.**

Counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668 (1984). Strickland requires a defendant to establish unreasonable, deficient attorney performance, and prejudice resulting from that deficient performance. Also, trial counsel cannot be found to have made a strategic decision when he failed to fully investigate. Strickland v. Washington, 466 U.S. 668, 690-1 (1984); Henry v. State, 862 So. 2d 679, 685 (Fla. 2003) ("A reasonable strategic decision is based on informed judgement.").

### **1. Investigation and Preparation for the Guilt Phase**

Gil Colon was appointed to represent Blake on November 12, 2002. Keith Peterson, an attorney employed by Colon took some

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from the witness stand.

depositions in Blake's case (PC-R. 1626-7).<sup>16</sup> And, though trial counsel requested an investigator to assist him (R. 144), and the trial court granted that motion, no investigator was ever retained to work on Blake's case.

Prior to trial, trial counsel filed only one substantive motion - a motion to suppress Blake's statements (R. 159-61). And, the motion was only filed in response to Blake's *pro se* Motion to Suppress and complaints that his trial counsel was not effectively representing him. See R. 148; 155-7.

Trial counsel himself spent minimal time conducting any investigation. All of trial counsel's contact with witnesses occurred over the telephone and none of those communications lasted more than a few minutes. The only exception was a phone call with Marion Clay's grandmother that lasted just over an hour. Even so, assuming that all of the contacts with witnesses was substantive rather than just ministerial, it appears that in representing Blake for over two years, trial counsel spent less than six hours conducting any investigation whatsoever. And, trial counsel's communications with his client were extremely minimal. See Def. Exs. 45, 46, 49 and 50.

In addition to failing to conduct any independent investigation, trial counsel also failed to depose several critical witnesses. Trial counsel failed to depose Kelly Govia, Priscilla Hatcher, Demetrius Jones, Kevin Key-Herrington, Stacy

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<sup>16</sup>Peterson took the depositions Raczynski, Giampavolo and Navarro. See Def. Exs. 31, 32 and 33.

Lampley, Angela Parker, Kara Poole, Taron Smith, Terrell Smith, Donovan Steverson, Hayward Summerall, Tyrone Summerall and Melburn Thomas. Had trial counsel spoken to many of these witnesses whether independently or during a deposition he would have learned that many of them possessed exculpatory information on behalf of Blake.

Not surprisingly, not a single expert was retained to consult on guilt phase issues, including mental health issues regarding Blake's susceptibility and immaturity or his ease in being led by others and the impact those impairments would have during his interrogation by law enforcement.

Blake twice complained of his trial attorney's performance. See R. 155-7; 175-8. Though of limited intelligence and struggling with his mental health deficits, Blake was able to understand that something was awry with trial counsel's representation. Though, due to his limitations, Blake was unable to express his complaints in a coherent way.

**2. Failure to Present Exculpatory Evidence through Cross-Examination and the Presentation of Witnesses and to Challenge State Witnesses.**

a. Evaluating Mr. Blake's Claim.

Trial counsel failed to investigate and present exculpatory evidence in Blake's defense that was readily available.

According to Raczynski's September 7, 2002, report, Demetrius Jones' story of what occurred in the early morning hours of August 12<sup>th</sup>, included an individual he referred to as "Kevie". In fact, "Kevie" was Kevie Hall and he was present in

the early morning hours with Jones. However, according to Hall's statement to Raczynski, and contrary to Jones' testimony, Blake was not present. Hall specifically stated that he heard Green and Key discussing committing a robbery to get money. Hall discouraged Jones from participating and the two - Green and Key - left. Trial counsel failed to speak to Hall. This would have refuted the State's theory that Blake was aware of the robbery plot. See Def. Ex. 20.

Also, in his August 20<sup>th</sup> statement, Jones told law enforcement that Green was looking for Key, so that Green could instruct Key to tell the police that Key was the driver on August 12<sup>th</sup>. Obviously, there was no need for Green to instruct Key how to testify if Green was telling the truth. It was also in this statement that Jones contradicted his testimony when he told law enforcement that Key and Green were plotting the robbery and Blake was not even present, though Green had attempted to page him. Jones also initially told law enforcement that Green and Key "went and woke [Blake] up out of his sleep." And, that, even when they brought Blake back, Blake still did not want to be involved in any robbery, i.e., "Blake was like, 'No' - he don't feel like going . . . so they just squashed that." In addition, Jones admitted that he had seen Green with a chrome 9 mm "like all that week." See Def. Ex. 15.

Finally, Jones also told law enforcement that it was his opinion that Green was trying to shift all of the blame to Blake and Key. Green was even going so far as to obtain money so that

he could convince Blake to leave town, "so he wouldn't have to worry about Blake saying anything . . . and then he gotta tell Red Man what to say." Jones also specifically told law enforcement that: "Blake - he was cool, but he ain't you know really care about that kinda shit like robbin' people." See Def. Ex. 15. And, though Jones testified that Blake told him someone had been shot when he saw him on August 12<sup>th</sup>, Jones had not mentioned this in his interview with law enforcement. Though trial counsel brought out one of the inconsistencies from Jones' statement<sup>17</sup>, he failed to demonstrate the complete evolution and unreliability of Jones' testimony based on the version of events he had originally told law enforcement.

Had trial counsel established Blake's resistance to committing a robbery and Green's desire to control all of the information that was provided to law enforcement, the State could not have characterized Blake as the "leader" in the plan to commit the robbery, as the trial court concluded in its order sentencing Blake to death.

Furthermore, trial counsel made no inquiry into Jones' evolving story or about Jones' background. There was no inquiry into the fact that Jones was himself listed as a suspect in the homicide - a powerful motive for Jones to fabricate a story and testify falsely. Indeed, according to Govia, Jones knew

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<sup>17</sup>Trial counsel brought out the fact that Blake was not present when Green and Key initially discussed robbing someone (R. 672).

information as early as 8:00 or 8:30 about the crimes, when he spoke to her niece. See Def. Ex. 14. However, according to Jones he did not see Blake or Green until mid-day on August 12<sup>th</sup>.

Likewise, Terrell Smith voluntarily approached law enforcement on August 16<sup>th</sup> in order to provide information about the gun that Green disposed of. Smith described the area where Green threw the gun and told law enforcement that the gun and the clip separated in the air. Smith testified at the evidentiary hearing and confirmed his statement. He also was certain that Demetrius Jones was not present when the gun was thrown in the lake. See Def. Ex. 20, PC-R. 6986-9. Smith's statement and testimony undercuts Jones' testimony that he saw the gun thrown in the lake. Had trial counsel spoken to Smith or presented his testimony he could have shown the jury that Jones was an opportunist: he provided information to assist law enforcement with the expectation that he would benefit from providing the information.

Trial counsel also failed to adequately explore Jones' credibility as it related to prior convictions, assistance from the State and relationship with the prosecutor in Blake's case, Cass Castillo.<sup>18</sup> At trial, trial counsel failed to determine how many felony convictions Jones had at the time he testified (R. 626).

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<sup>18</sup>If trial counsel adequately investigated, then the State failed to disclose exculpatory evidence relating to Jones. Blake's pleads his claims in the alternative.

Had trial counsel investigated Jones' criminal history he would have learned that at the time that law enforcement sought out Jones due to learning that his fingerprint was found on the stolen vehicle used in the crimes at Del's Go Shop, Jones had violated his probation in Polk County Case No. 2002CF724A, for possession of cocaine. Jones had been placed on eighteen months of probation, but at the time law enforcement questioned him, he had violated probation. Jones was inexplicably not arrested at the time law enforcement questioned him.

Indeed, it was not until December 16, 2003, that law enforcement arrested Jones on the probation violation. See Def. Ex. 66. In the probable cause affidavit, law enforcement notes that Jones has four active arrest warrants, including a warrant to be held as a material witness. The warrants relating to Jones being a material witness were related to the cases against Blake. See Def. Ex. 5. And, as of December, 2003, the State also filed an information in Polk County Case No. 2003MM486901 for a battery that occurred in June, 2003. Jones was not arrested for that offense until December 16, 2003. And, when law enforcement located Jones on December 16, 2003, he was charged with 1) possession of cocaine with the intent to sell or deliver; 2) possession of drug paraphenalia; and 3) resisting arrest without violence in Polk County Case No. 2003CF847101. See Def. Ex. 66. Jones was released a few days later with pre-trial release despite his pending substantive charges and probation violations, being told to keep in contact with State Attorney Investigator



Zeller. See Def. Ex. 5.

Within days of testifying in Blake's capital case, Jones' charges and probation violations were resolved: Hardy Pickard offered Jones, who was facing more than twenty-five years for the outstanding crimes and probation violations, a below guidelines sentence of 18 months of probation for 2003CF847101 and 2002CF724A.

And, just two days after entering his plea, Jones was charged with committing felony battery and domestic violence assault in Polk County Case NO. 2005CF176501. Those charges were no billed on March 28, 2005.

Indeed, the jury was aware only that Jones was hoping for leniency in his outstanding cases (R. 656). However, the jury was never provided with the true picture of Jones' consideration or his expected benefits. And, the jury was never aware that the prosecutor in Blake's case was actively assisting Jones. See Def. Exs. 5 and 9, PC-R. 1382-3. Indeed, Assistant State Attorney Castillo testified that he helped Jones get out of jail at one point (PC-R. 1383).

Likewise, had trial counsel investigated Teresa Jones he could have totally diminished the impact of her testimony. Not only was Jones Green's girlfriend, but she also told individuals that law enforcement threatened to take her kids unless she said what they told her to say. Indeed, in December of 2002, Jones was being investigated for child abuse, but shortly after the investigation commenced, it was closed. See Def. Ex. 6.

Priscilla Hatcher was an individual of whom trial counsel was aware, as it was her apartment in which Blake was arrested. Hatcher could not only have described Blake's state of mind in the days following the crime and his statements that suggested that he had been unwillingly caught up in others' criminal behavior, but that Teresa Jones had confided in her that the statements she made were far from true. See PC-R. 2571-4, 2579-81, 2587. And, Hatcher had observed law enforcement threaten Jones (PC-R. 2571-4, 2579-81, 2587).

Indeed, in 2002, Jones had already confided to Travell Jones<sup>19</sup> that Green was the shooter in the Patel homicide (PC-R. 1747). Teresa Jones provided Travell Jones with details about the crime shortly after it occurred (PC-R. 1745-6). Teresa Jones admitted that she was worried about her kids (PC-R. 1748).

Of course, trial counsel conducted no investigation into Teresa Jones and was caught off guard when the State revealed that Jones had pending charges throughout much of Blake's prosecution. See R. 590-2. Rather than look into the matter, trial counsel accepted the State's representations. However, in failing to fully investigate the matter, trial counsel failed to demonstrate the benefits (and the timing of the benefits) to Jones.

On September 11, 2004, Jones was charged and admitted to armed robbery; she was driving the vehicle that pursued an

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<sup>19</sup>Travell Jones' name was listed in police reports. See Def. Ex. 20.

unsuspecting victim and when the victim parked his car, other passengers in Jones' car "ran up to him and pointed a gun in his face.". Jones was present when the armed robbery plan was hatched and followed the victim, then drove the getaway vehicle. See Def. Ex. 6. She was facing life in prison for her role in the armed robbery. However, the day before she testified in Blake's trial, her charge was reduced to petty theft, a misdemeanor, and she was allowed to plead to six months probation (Def. Ex. 6).

Just days after being placed on probation, and before Blake's penalty phase, Jones was arrested for obstructing without violence, i.e., she lied to law enforcement to protect her boyfriend, Pierre Dugazon. See Def. Ex. 67. Trial counsel failed to learn of this information.

Furthermore, trial counsel failed to adequately impeach Teresa Jones with her prior inconsistent statements. The State relied on Jones to established three facts against Blake: 1) that Blake was with Green on the morning of August 12, 2002; 2) that Blake took two guns from the abandoned vehicle; and 3) Blake told her that he shot the victim. However, specifically, as to whether Jones observed Blake obtain guns from an abandoned vehicle on the morning of August 12, 2002, Jones has repeatedly, under oath, maintained that she did not.

Jones provided sworn testimony on June 14, 2004, wherein she was asked if she saw Blake take a gun out of an abandoned vehicle on August 12, 2002. She testified that she was not sure about

that. She also indicated that what she told the police in August, 2002, was based on what they were telling her and what she heard on the street. She stated that she had lied about some of the things she told law enforcement. Jones testified that it was not her fear of Blake that caused her to lie, but the fact that others had threatened her. She also stated that it was a "crazy morning" and that may have caused her to lie about the fact that she saw Blake take guns from the vehicle. During her testimony, Jones was asked: "Where did you see him with the guns at?" and she responded: "Earlier, before. Not on that day. I guess before that, like in our neighborhood people walk around with protection." When confronted with her inconsistent statement, Jones stated that the testimony about seeing guns was not true - that she "really didn't see no guns." She described guns that she saw before August 12<sup>th</sup>. See Def. Ex. 34.

Furthermore, at her June, 2004, deposition Jones was also asked: "Did Mr. Blake tell you, that morning, that he had shot someone?" To which she answered: "No." She went on to state: "No. I didn't say nothing about no shooting. I never said nothing about no shooting. He told me he was fighting." Jones explained that she had heard a lot of stories and just repeated the ones that sounded best to her. She said law enforcement had promised to protect her boyfriend, Green.<sup>20</sup> See Def. Ex. 34.

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<sup>20</sup>In fact, Green was not charged with anything relating to the Patel murder until he refused to testify against Blake in another unrelated homicide case.

Also, in June, 2004, Jones testified against Blake in his non-capital case. At the trial, Jones reiterated that she "gave them what they wanted to hear" before the Grand Jury because "they kept messing with her." She was again asked:

Q: So, you never saw Mr. Blake take any guns out of any car?

A: No.

Q: You never did?

A: No.

Q: Never?

A: No.

See Def. Ex. 51. Jones later reiterated that she did not see Blake remove any guns from the abandoned car and her testimony before the Grand Jury on this point was not true. See Def. Ex. 51.

Though trial counsel attempted to show Jones' inconsistencies through her deposition, he failed to fully impeach her with her deposition and never mentioned her sworn testimony from June, 2004. Likewise, trial counsel failed to impeach Jones with the testimony she provided in Green's trial for the murder of Patel in which she told the jury that she had received benefits for her testimony, i.e., she and Green would not be charged with any crimes, they would receive assistance and expected benefits. See Def. Ex. 51.<sup>21</sup>

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<sup>21</sup>Again, trial counsel was deficient or the State violated Blake's rights to due process.

Trial counsel failed to adequately cross-examine the witnesses against Blake: Demetrius Jones and Teresa Jones. Had he effectively done so, the jury would not have convicted Blake.

Furthermore, not only could trial counsel have shown that the State's evidence against Mr. Blake was riddled with inconsistencies and several witnesses had credibility problems, trial counsel also could have shown that it was Green who in fact planned the robbery and shot Patel. When Donovan Steverson testified as a State's witness, he told the jury that he had seen a black male with braids get into the backseat of a car when it was parked outside (R. 581-2). Shortly thereafter, after he had heard a shot, he saw the same man run to the car and again get in the back seat (R. 584-5). While on cross-examination, trial counsel essentially had Steverson repeat his testimony, he failed to emphasize that the man running to the car after the shot was fired was the same man he saw earlier - the man with braids. The issue of the shooter's hair was incredibly important since Green and Key had braids and Blake was bald. Yet, trial counsel missed the opportunity to highlight a glaring problem in the State's case - that the shooter had braids and could not be Blake.

Likewise, Trisha Alderman saw "a man with a gun getting back in on the passenger side" who definitely did not have a bald head (R. 444-5). And, Denard Keaton said the person he saw going back to the car after the shot "wasn't at all tall and thin" but was "5'6" or 5'7"" (R. 461). By his own admission in his August 14<sup>th</sup> statement to law enforcement, Green was riding in the back seat.

And, Green was about 5'6" or 5'7" and wore his hair in a style that could be called braids, plaits or dreads. Blake, on the other hand, was almost 5'9" and bald.

In addition to the eyewitnesses, several witnesses provided information about Green's involvement in the crimes. Melburn Thomas and Terrell Smith told law enforcement that Green was in possession of the 9mm gun after the crimes. This was so despite the State's theory that Blake obtained the guns from the abandoned car after the crimes. See Def. Ex. 20 and 21.

Likewise, within a very short time after the crimes, Hayward Summerall, Tyrone Summerall and Taron Smith all told law enforcement that Green was involved in the crimes. See Def. Ex. 24. There was no mention of Blake, until the police asked if the witnesses were familiar with him. Indeed, during Navarro's deposition, he told trial counsel that while he was investigating the case, "someone" approached him and told him that "Plump-Chicken" was involved. See Def. Ex. 33. However, Navarro failed to follow-up on this information or even find out the witness' name. Trial counsel should have introduced the evidence that implicated Green and his involvement in the crimes.

Also, during law enforcement's investigation, Kelly Govia was interviewed and told Det. Harkins that the morning of the murder her niece, Kara Poole, talked to Demetrius Jones and came back crying. When Govia asked her what was wrong, Poole said that Demetrius had told her that Poole's boyfriend, Kevin Key, was with "Imeece's baby's daddy when he shot someone that

morning."<sup>22</sup> Later, after Poole talked to Key, she told Govia that Key was not worried because the police did not have his fingerprints. Govia then eavesdropped on a conversation between Key and another individual in which Key described the crimes - stating that he had been in the back seat and there were four people in the car. Key explained that things didn't go as planned and "Plump" pulled the trigger. See Def. Exs. 14 and 26. Govia was willing and available to testify, but was never spoken to by trial counsel. Indeed, Govia was a responsible, mature individual who had no criminal record and had volunteered what she knew to law enforcement. Govia affirmed her statement at the evidentiary hearing. See PC-R. 2140-6.

Another witness, who gave a statement to law enforcement, but who was not spoken to by trial counsel was Angela Parker. Parker was present on August 12, 2002, when Green spoke to Teresa Jones about the crimes that morning. Parker heard Green state: "It didn't look to me like he was shot nowhere that could kill him, he was shot in the arm, I remember him being shot in the arm not the chest or anywhere that could kill him, so he shouldn't be dead." See Def. Ex. 23. Parker was called as a State witness during Green's trial, which occurred before Blake's trial, yet trial counsel never spoke to Parker. Clearly, Parker was important to Blake's defense because according to Green he must have been in close enough proximity to Patel in order to see

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<sup>22</sup>Green was known to be the father of Imeece's child.



where he had been shot. Yet, the witnesses who observed the shooting testified that only one individual was seen approaching and running from the store. Based on Green's statements, that Parker was privy to, it was logical and reasonable that he was in fact the shooter as Blake maintained in his testimony.

Trial counsel also failed to object to or limit damaging testimony that was clearly irrelevant and prejudicial. For example, when Teresa Jones testified on direct examination by the State, she indicated that she had lied under oath to the grand jury about the fact that Blake had been the one who removed two guns from the car, as she had told detectives earlier, out of fear of Blake's family (R. 605). Trial counsel failed to object, and failed to explore this issue on cross-examination despite the fact that there was absolutely no basis for Jones' testimony. Again, on redirect examination, in order to explain Jones' shifting stories about Blake's actions, the State brought up the fact that Jones had concerns for her safety (R. 873-4). Trial counsel again failed to object. The import of the State's questioning was that Jones had minimized Blake's involvement in the crimes when she testified before the grand jury because she was being threatened by his family. Trial counsel requested re-cross on several issues, including the reason for Jones' evolving stories as being the alleged threats from Blake's family. However, the trial court ruled that the threats were not a proper subject for re-cross, but that had the subject been objected to, the Court would have sustained the objection (R. 883-4; 885).

Because of trial counsel's failure to object, a witness who had given two statements to law enforcement, sworn testimony before the grand jury, a deposition and sworn testimony in Blake's trial in Lakeland that were all in conflict would normally have been made to appear as a liar who could not be believed. But, Jones was allowed to blame her own lack of consistency on Blake's violent family, despite there being no evidence of any threats at all, other than from law enforcement. The prejudice of trial counsel's failings cannot be overstated, especially when it was Blake's family who would eventually testify on his behalf in the penalty phase.

b. The Circuit Court's Order.

The circuit court did not address much of Blake's claim. And, the court considered each statement or witness individually, rather than consider the total picture of trial counsel's investigation and how the various statements and witnesses would have undermined the State's theory of prosecution and thus, Blake's conviction.

Initially, the court dismisses the statement provided by Kevie Hall simply because Blake did not present Hall to testify at the evidentiary hearing and affirm his statements (PC-R. 7646).<sup>23</sup> However, this Court has never required that a postconviction defendant must present a live witness rather than a statement for a court to assess the importance or credibility

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<sup>23</sup>The circuit court also made a similar erroneous finding as to what Marion Clay reported to Det. Harkins (PC-R. 7655).

of the testimony. See Kyles v. Whitley, 514 U.S. 419 (1995) (assessing prejudice of police memorandum and interview notes with witness); Floyd v. State, 902 So. 2d 775, 781-5 (Fla. 2005) (assessing prejudice of statements contained in police report made by a witness to law enforcement); Young v. State, 739 So. 2d 553 (Fla. 1999) (same).

Hall made his statement to law enforcement officers when he was interviewed after Demetrius Jones had told law enforcement that Hall was present. Hall's statement contradicted Jones' testimony while corroborating Blake's testimony because Hall indicated that it was only Green and Key that were present and discussing a robbery, not Blake. See Def. Ex. 20. Had trial counsel interviewed Hall and/or deposed him, or even presented him as a witness at Blake's trial and he attempted to deviate from his statement to law enforcement, trial counsel could have impeached him and shown him his original statement.

Furthermore, as to the additional impeachment evidence of Demetrius Jones, the circuit court stated:

Although, it could be argued that trial counsel may have been able to more strongly present an argument that Mr. Jones was receiving more benefit for his testimony than he indicated in his trial testimony had counsel more thoroughly looked into Mr. Jones' charges and criminal history, a review of the trial transcript shows that Mr. Jones admitted at trial that he had pending criminal charges and was not going to be sentenced until after he testified.

(PC-R. 7646). The court's analysis is in error. Here, Jones was a critical state witness who established Blake's participation in the planning of the robbery. Therefore, it was critical for

trial counsel to show the true extent of what Jones' true motives were. See Napue v. Illinois, 360 U.S. 264, 269 (1959) ("the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend"); see also Banks v. Drehtke, 540 U.S. 668, 1278 (2004); Davis v. Alaska, 415 U.S. 308, 315 (1974).

Jones was initially listed as a suspect in the homicide, and according to Govia knew details about the crime earlier than would have made sense if he had only run into Green on Avenue Y in the afternoon of August 12<sup>th</sup>. Jones' circumstances, criminal history and outstanding charges made clear that he had a great incentive to curry favor with the State. Thus, it was deficient for trial counsel to adequately investigate and present evidence relating to the powerful motivating forces behind Jones' cooperation with the State and testimony.

Moreover, under the same reasoning, the circuit court also erred in finding that trial counsel's questioning of Jones about his August 20<sup>th</sup> statement to law enforcement adequately revealed Jones' credibility problem and inconsistencies (PC-R. 7648-9). Though trial counsel used a portion of Jones' statement to demonstrate a few inconsistencies, trial counsel failed to use both Jones' statement to Raczynski and his taped statement to show all of the inconsistencies in Jones' story.

Trial counsel failed to adequately challenge Jones'

testimony with his previous statements, his criminal history and witnesses who would have undermined Jones, like Hall, Govia and Smith. Had trial counsel adequately impeached Jones he would have undermined the State's theory and evidence while also corroborating Blake's testimony that he did not participate in the planning of the robbery, had no idea that a robbery would be attempted of Del's Go Shop and did not shoot anyone.

Likewise, the circuit court agrees that Teresa "Jones' statements over the years have been inconsistent." (PC-R. 7653). Yet, the court did not find that trial counsel's performance in failing to challenge Jones' credibility and testimony was not deficient (PC-R. 7653).

The court did not address trial counsel's failure to challenge Jones' about her criminal history, motives to curry favor with the State or fear having her children removed from her custody. This is so despite the fact that Travell Jones, Priscilla Hatcher and numerous documents establish that Teresa Jones had numerous, compelling reasons to make false statements and lie at Blake's trial. And, as the circuit did find, her prior statements and testimony were inconsistent on key points.

Had trial counsel adequately impeached Jones he would have undermined the State's theory and evidence that Blake participated in the attempted robbery and did not shoot anyone.

As to trial counsel's failure to demonstrate that Green was the shooter based upon the eyewitness descriptions, the circuit court summarily stated that trial counsel was not deficient (PC-

R. 7654). The record clearly refutes the circuit court's statement as there were no less than three eyewitnesses who testified that the shooter was not bald but had hair. According to Teresa Jones' description of Blake and the line-up photos, Blake was bald and therefore could not have been the individual who approached Del's Go Shop and fired the single shot that killed the victim. Obviously, the eyewitness descriptions completely undercut Blake's inculpatory statement to law enforcement and support his testimony at trial. Thus, it was critical for defense counsel to adequately show that Blake was not the shooter. Trial counsel's failure to do so was deficient.

Finally, in denying Blake's claim, the circuit court conceded that Kelly Govia, Angela Parker and Marion Clay "would arguably have been of some help to the defense" (PC-R. 7655).<sup>24</sup> However, without any reasoning the court held that counsel's performance was not deficient. As stated previously, trial counsel could have indisputably shown that the State's theory and evidence was unreliable. Indeed, trial counsel could have demonstrated that Green and Key planned the robbery without Blake and that Green approached Del's Go Shop alone and fired the fatal shot. The evidence would have supported Blake's claim that his statement to law enforcement was false and coerced and that he was unaware that a robbery would be attempted on the morning of August 12<sup>th</sup>. The evidence presented at Blake's evidentiary

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<sup>24</sup>Trial counsel inexplicably failed to speak to or depose any of these witnesses.

hearing placed the case in a whole new light and undermines confidence in Blake's conviction. Trial counsel's deficient performance prejudiced Blake.

**3. Failure to Obtain Expert Assistance and Challenge the State's Case.**

Trial counsel also failed to retain any experts or challenge the State's evidence on cross-examination. Clearly, Blake's videotaped statement was part of the prosecution's case against him. Had trial counsel properly prepared he would have consulted with an expert on false confessions. Indeed, it is common knowledge among criminal attorneys that juries tend to believe that almost no one would confess to a crime he had not committed, and a confession is among the most convincing evidence of guilt the State can hope to present. But as the United States Supreme Court noted in its recent opinion in Corley v. United States, "[C]ustodial police interrogation, by its very nature, isolates and pressures the individual," 129 S.Ct. 1558, 1570 (2009), quoting Dickerson v. United States, 530 U. S. 428, 435 (2000), and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed, see, e.g., Drizin & Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C. L. Rev. 891, 906-907 (2004). The article, which had been published before Blake's motion to suppress hearing and trial, drew on earlier research by Drs. Richard A. Leo and Richard Ofshe (The Consequences of False Confessions: Deprivations of Liberty and

Miscarriages of Justice in the Age of Psychological Interrogation, 88 J. Crim. Law & Criminology 429-496 (1998)).

At Blake's evidentiary hearing, Dr. Richard Ofshe testified that he examined the circumstances surrounding Blake's "confession." (PC-R. 2083-4). According to Ofshe, the account of his interrogation given by Blake and that described by the detectives involved are irreconcilable. The officers' failure to tape the entire interrogation created a situation in which much of what Blake recounted is essentially worthless, from an evidentiary standpoint, because it's impossible to know if Blake's statements are truly a product of what he witnessed and experienced or the result of contamination that occurred prior to taping (PC-R. 2096-7).

However, according to Ofshe, there are a number of significant elements that are red flags for false confession, i.e., there is no "fit" (PC-R. 2095-2106). More important than the facts that Blake stated accurately are those that he misstated (PC-R. 2095-2106). In Giampavolo's report concerning the aspects of the interrogation that were not taped, the detective said Blake said he picked Green up at his grandmother's house. In the videotaped portion, Blake says he picked Green up at the Lake Deer apartments, after being specifically asked if he'd picked Green up there or at his grandma's house (R. 1179). What may seem like an insignificant detail has larger ramifications when considered in context. That is, Green claimed in his taped statement, given just a few hours earlier, that



Blake had picked him up at his grandmother's. But based on the state's theory, as advanced by the testimony of state witness Demetrius Jones, this was not true. Jones testified that Green and Key went and got Blake at his motel when he failed to answer their phone calls and pages. Jones' neighbor, Kevie Hall, told police that he had heard Green and Key planning to go robbing outside Jones' house when Blake was not even present. Green's claim to have been picked up by Blake at his grandmother's house, or to have been picked up by Blake anywhere that night, was simply a lie designed to minimize his own involvement. That Blake would adopt this lie into his own statement clearly shows that the sources for the version of events he recited on the videotape were not limited to what he personally witnessed and experienced. This evidence bolsters Blake's claim that the detectives played the taped statement they had received from Green a few hours earlier, which Giampavolo denied.

In addition, Blake could not describe what the door of the store looked like; when asked by Giampavolo if the door was a double door, Blake said, "I done forgot. I don't even know" (R. 1185; PC-R. 2104). And, though he claimed to have burned the clothes he'd been wearing, Blake could not describe the clothing (R. 1188). Likewise, Blake could not say which door had been shot through. Had Blake been the shooter, it seems unlikely that he would not recall such significant details correctly. When Blake was pressed to explain where the gun or guns ended up, he constructed a story out of whole cloth about meeting someone on

I-75 and giving the guns to him, and said that they "ain't even in Florida" (R. 1190-1). The detectives, who suspected that the gun or guns had been thrown in a lake, based on information they had received from Angela Parker on August 13<sup>th</sup>, suggested to Blake: "The guns didn't end up in a lake?" To which Blake responded: "Ya'll go check every lake" (R. 1192). Of course, the murder weapon had been disposed of in Lake Conine, unbeknownst to Blake, the day of the crimes by Green, but was not actually recovered by law enforcement until August 21 - a week after Blake's interrogation.

Essentially, Blake was unable to tell law enforcement anything they did not already know. It is also important to distinguish that when Blake stood up in the interrogation room to demonstrate how he approached the store he walks slowly with his hands held down; the video from the store shows a rapidly-moving person with a gun held at shoulder-level. See PC-R. 2104-6. There was no "fit" between the videotape and Blake's statement (PC-R. 2109). However, Green 's statements to Parker demonstrated "fit" (PC-R. 2109). Green knew exactly where the victim was shot. This was a significant statement to Ofshe (PC-R. 2107-8).

Likewise, though trial counsel urged the jury to view Blake's statement as unreliable, because he is "a 22-year-old young man who has the maturity level probably less than that who basically his life has been a thief and a drug user" (R. 1132), he presented no testimony from a qualified mental health expert

about Blake's mental illnesses, emotional problems, brain damage or susceptibility to coercion. The testimony about Blake's mental health in 2002, as well as his previous psychiatric treatment was available to trial counsel, he simply did not obtain it or retain an expert to discuss the ramifications of Blake's mental status during the interrogation by law enforcement.

Indeed, Dr. Barry Crown diagnosed Blake as having organic brain damage (PC-R. 1975). The damage was primarily located in Blake's left temporal lobe (PC-R. 1975). This caused problems with Blake's concentration and attention (PC-R. 1984). Blake's prior IQ testing demonstrates that he suffers from low IQ. Dr. Bhushan Agharkar agreed with Crown's diagnosis and also diagnosed Blake as suffering from PTSD, depression and a panic disorder. Blake's mental health could have effected his statement (PC-R. 2191).

The circuit court dismissed Blake's claim holding that trial counsel did not need an expert to challenge Blake's statement (PC-R. 7658). Again, the trial court does not support this conclusion with any reason other than that trial counsel testified he did not think he needed an expert (PC-R. 7658).

However, the circuit court's order is not supported by the record. There is no doubt that trial counsel wanted the jury to believe that Blake's statement was a "false confession. And it flies in the face of what really happened out there when you listen to three witnesses that were at the scene of the crime..."

(R. 1120).<sup>25</sup> Trial counsel urged the jury to disregard the statement because it was "not freely and voluntarily made" and "it was a false confession" (R. 1121). However, beyond making the assertion, counsel did not elaborate as to why the statement should be disregarded. Trial counsel failed to consult Ofshe, or another expert in false and coerced confessions, to contextualize Blake's statement for the judge and jury and explain why it bore the indicia of a false confession. Had trial counsel consulted with Ofshe he could have presented the information supporting Blake's testimony that he was not the shooter and falsely confessed to the crimes due to the circumstances of the interrogation.

Trial counsel undertook no investigation into Blake's mental health pre-trial and never considered how Blake's mental health may have impacted his interrogation. There is no doubt that had trial counsel investigated Blake's mental health and, at a minimum, consulted with an expert in false confessions, he could have shown that Blake's statement to law enforcement was unbelievable.

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<sup>25</sup>The prosecutor incorrectly asserted in his closing argument that Blake's confession matched the video from the store, specifically when Blake said that Patel had something in his hand: "Patel did have something in his hand. He had that kind of a spray container" (R. 1155). However, the video makes clear that Patel put down the spray container before he turned toward the door. Trial counsel failed to object or correct the State's misrepresentation of the video.

**4. Failure to Adequately Prepare Mr. Blake for Testimony.<sup>26</sup>**

Trial counsel's decision to place his mentally and emotionally deficient client on the witness stand was made after minimal, inadequate deliberation and no preparation of Blake. After the State rested its case and a sidebar on jury instructions occurred, the Court announced it would take a 10 to 15 minute recess. Trial counsel requested more time, saying, "We have a decision to make here in a minute. And I want to be sure that we have the proper time and attention to it. Plus I need to go to the restroom for a second" (R. 920). The break, or mid-morning recess even if more than fifteen minutes, was undoubtedly brief.

After the recess, trial counsel indicated he would be calling Blake as a witness. Blake received no preparation or instruction on testifying. Blake's mental and emotional deficits made it impossible for him to testify in a coherent manner. The overall effect of his testimony was extremely detrimental to his defense. For example, when asked by his attorney why he had been staying in Winter Haven when he was from Lakeland, Blake volunteered: "I had previous warrants for violation of probation and I was running" (R. 929). Blake proceeded to admit to stealing a car, but he went on to tell the jury he was adept at

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<sup>26</sup>The circuit court held that Blake abandoned his claim (PC-R. 7660). Blake disputes the court's holding and presented evidence through time records and the trial record to establish that trial counsel was deficient.

stealing cars "cause that's how I support my living" (R. 936). After the crimes, Blake was contemplating leaving town, so he went to see Vanbossell Preston, "because we make fake checks and bust them. I was trying to get enough money where I could support myself when I leave" (R. 962). Obviously evidence of other crimes was not admissible and could have been avoided by preparing Blake for his testimony.

Cross-examination of Blake began with eliciting that he had nine felony convictions and was in the business of "stealing property and selling it," (R. 995). Though it is hard to deduce Blake's demeanor as seen by the jury from a cold record, it is clear that Blake was becoming agitated when he said, apparently referring to the prosecutor: "The same thing the detective was doing, trying to harass me" (R. 1035). Then because Blake said he could not recall all of the details of his videotaped statement, the trial court allowed the State to re-play Blake's videotaped statement for the second time for the jury (R. 1037-9). Cross-examination quickly deteriorated even further when the trial prosecutor began to pursue a line of questioning about Blake's videotaped statement, and after much badgering, trial counsel finally interjected that: "Your honor, perhaps if Mr. Castillo didn't yell at him" and the Court admonished, "Tone of voice please, Mr. Castillo" (R. 1065).

Blake explained that he was crying on tape because, "when I get real mad, I cry," allowing the prosecutor to assert, and Blake to acknowledge, that he wasn't "crying because you felt bad

about what happened to Mr. Patel" (R. 1068-9). Despite all the damage done to Blake's defense by his cross-examination, trial counsel did not have a single question for redirect and rested the case (R. 1070).

The trial prosecutor capitalized on Blake's unpreparedness and told the jury in closing argument, to consider Blake's demeanor on the stand: "You had an opportunity to see Mr. Blake in this case when he testified. Mr. Blake, I would suggest to you, is incapable, incapable, of being told what to do. He had anger in his tone. He was combative with the questions that I was asking. He was not responsive to the things I was -- that I was trying to get from him. He accused me of behaving like the detectives did" (R. 1172). The prosecutor also ridiculed the apparent emotional state of Blake on the video of his statement, and then played it again (R. 1176-95), for the third time. The prosecutor played it again the following morning, for a fourth time, with no objection from trial counsel.

Blake suffers from brain damage and mental illness (PC-R. 1975, 2170). He failed to graduate from high school and his verbal IQ is extremely low. See Def. Ex. 58, PC-R. 1996. Blake has much trouble communicating. Had trial spent any time with his client, collected any of Blake's records and consulted with a mental health expert, he would have known that in order for Blake to testify coherently it would take an extreme amount of preparation and even then, it might not be a reasonable decision. Trial counsel's performance was deficient.

**5. Failure to Challenge the Inconsistent Theories of the Crimes.**

The State's use of inconsistent theories in Blake's trial and his co-defendant's trial violated Blake's right to due process. See Bradshaw v. Stumpf, 545 U.S. 175, 187-88 (2005) (case remanded for consideration of the impact that the prosecutor's inconsistent theories had on Stumpf's sentence and to determine whether the death penalty violated due process). Trial counsel failed to attend Green's trial, obtain Green's trial transcripts or interview witnesses who testified at Green's trial. Trial counsel's performance was deficient.

Green's trial for the first degree murder of Patel occurred a few months before Blake's capital trial. See Def. Ex. 51. At Green's trial, the State presented evidence that demonstrated that Green was equally, if not more culpable than Blake in planning the attempted robbery of Patel. And, that Green had gotten out of the car to rob Patel. Indeed, at Green's trial, the State presented the testimony of Angela Parker, who testified that Green had discussed the murder with Teresa Jones in her presence. Parker testified that Green made statements that placed him in such close proximity to the victim that he saw where he was shot. See Def. Ex. 51. Trial counsel failed to attend or obtain a transcript of Green's trial.

Likewise, Demetrious Jones also testified that Green had told him that both he and Blake had plans on how to commit the robbery - Green wanted to rush Patel at the door as he entered



the store. It is clear from Jones' testimony that Green exited the car and approached the store in order to rob Patel. See Def. Ex. 51. None of this evidence from Parker or Jones was heard by Blake's jury.

Additionally, at Blake's trial, the State presented the testimony of Teresa Jones during which the State elicited testimony that Jones' shifting statements and testimony was due to the fact that she feared Blake's family (R. 605; 873-4). However, in Green's trial, the State actually took the position that Jones had no fear of Blake or his family. In Green's trial the prosecutor argued:

If fear was her motive, if fear was her motive she would have left out [Harold] Blake, or Blade as she knew him, that's who would have been left out. That wasn't her motive. Her motive was to protect Mr. Green, and that's who she leaves out of her initial conversation with the police.

So you see, it's not true about fear. This is about protection, protecting someone that was close to her, and that would have been Mr. Green.

See Def. Ex. 51.

Thus, the prosecutor in Green's trial admitted that Jones had no fear of Blake and her shifting statements were not due to any fear of Blake. Her motive was trying to protect Green. The State's conflicting positions was improper and violated Blake's right to due process. Trial counsel failed to present Jones' statements at Green's trial to the jury.

Trial counsel was ineffective in failing to present the easily accessible evidence and testimony that was presented at Green's trial to demonstrate that the State's theories were

inconsistent and to corroborate Blake's testimony that Green solely approached Del's Go Shop and shot the victim in an attempted robbery of which Blake was unaware.

## **6. Conclusion.**

The circuit court determined that "there is no reasonable possibility that the results of the trial would have been different" (PC-R. 7660). However, in arriving at such a conclusion, the court relies on faulty and unreliable evidence of Blake's videotaped statement, the testimony of the trial witnesses and "other evidence"<sup>27</sup>. The court has ignored the plethora of reliable, compelling evidence that was presented at Blake's evidentiary hearing which demonstrates that Blake was not involved in the planning of a robbery, was unaware of the attempted robbery and did not fire the fatal shot at the victim. Indeed, the crime scene video categorically refutes Blake's statement to law enforcement and supports Green's testimony in March, 2011, that it was he who (wearing red shorts and a gray hoodie) individually approached Del's Go Shop without Blake's knowledge to commit a robbery and then fired a single shot at the victim. Blake is entitled to a new trial.

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<sup>27</sup>The circuit court does not identify the "other evidence".

### ARGUMENT III

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

Mr. Blake's trial was afflicted with several violations of Brady v. Maryland, 373 U.S. 83 (1963). In order to prove a violation of Brady, a claimant must establish that the government possessed evidence that was suppressed, that the evidence was "exculpatory" or "impeachment" and that the evidence was "material." United States v. Bagley, 473 U.S. 667 (1985); Kyles v. Whitley, 514 U.S. 419 (1995); Strickler v. Greene, 527 U.S. 263 (1999). Evidence is "material" and a new trial or sentencing is warranted "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. Kyles, 514 U.S. at 433-434; Hoffman v. State, 800 So. 2d 174 (Fla. 2001). To the extent that counsel was or should have been aware of this information, counsel was ineffective in failing to discover it and utilizing it.

A proper materiality analysis under Brady also must contemplate the cumulative effect of all suppressed information. Further, the materiality inquiry is not a "sufficiency of the evidence" test. Kyles, 514 U.S. at 434.

**1. Teresa Jones.**

Just before Teresa Jones testified at Blake's capital trial, the State informed the court and trial counsel that "there's something I need to put on the record if we could go to a side-bar" (R. 590). Thereafter, the following occurred:

MR. CASTILLO: Judge, since, since Ms. Jones' last testimony in Mr. Green's case, it has come to my attention that, it has come to my attention that she has been arrested. I don't know whether the defense knows about that or not.

MR. SMITH: Didn't know it.

MR. COLON: Did not know.

MR. CASTILLO: Well, I wanted to avoid appellate issues on that point. And I certainly have no objection to them inquiring of her outside of the jury's presence what the nature of it is. I understand it to be that she has a pending robbery charge of which several people were charged in it.

And to the extent that her testimony may - they may want to impeach her on trying to curry favor with the prosecution, things of that nature, I wanted to put that in the table and make sure they were aware of it.

Apparently they weren't. So I wanted - that's the only thing that I know of that she has. But I wanted to make that of record.

MR. COLON: I think we should voir dire her before - well, before cross-examination, that's for sure.

THE COURT: Right. I guess what we'll do is do the direct and then before we do the cross-examination we'll let the jury go out and give ya'll a chance to interview her, if necessary gather up any local records that we may have to --

MR. CASTILLO: I think she'll - it's not resolved. It's pending, Judge, so it's --

(R. 590-1). The State conducted the direct examination of Jones and she returned the following day for her cross-examination. Prior to testifying on cross-examination, the following occurred:

MR. CASTILLO: Your Honor, the other concern I have is going to be the cross-examination, if any, on Ms. Jones relating to the disposition of her case yesterday. My understanding in talking with Mr. Pickard is that both defense counsel spoke with him yesterday and they informed him that the disposition was - of that case was in no way related to what happened in this case.

I can represent to the Court that I didn't even know it was going to happen, Mr. Pickard and I have never discussed that case, and whatever decision he made he made on his own. My understanding is that he related that to both counsel.

So I don't know the type of cross-examination that would be. But because of this point, I want to give notice that I want Mr. Pickard on our witness list for rebuttal should it - the cross-examination suggest or indicate that it's anything other than that type of disposition yesterday.

(R. 849). During the cross-examination, trial counsel asked Jones about the September 11, 2004, charge of armed robbery with a firearm and the fact that she had negotiated a plea "just two days ago to petit theft" (R. 870). Jones responded that she was "innocent" (R. 870).<sup>28</sup>

On re-direct, the State asked Jones if she had been promised anything or threatened in any way, to which she responded "No." (R. 877). However, there was more to Jones' testimony concerning the September 11, 2004, charge of armed robbery with a firearm than the defense ever knew. Though the State led the Court and trial counsel to believe that the plea had been negotiated "just two days ago", in actuality, the plea was negotiated on November 4, 2004, less than two months after the charge. The felony plea

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<sup>28</sup>Of course if Jones were truly innocent, then she should not have been allowed to plead guilty. However, the evidence against Jones was overwhelming, including a taped statement taken of her to law enforcement.

form, drafted by Pickard, was executed well before her testimony, yet it was not filed until the day she testified on behalf of the prosecution. Thus, Castillo and Pickard's representations were false. Likewise, Jones' testimony as to the timing of the plea was false. See Def. Ex. 6.

Instead of the innocent timing of the plea, it appears that Jones knew what she would get for her cooperation with the prosecution as long as she stuck to her end of the bargain. The State negotiated the plea with Jones and then hung it over her head until it was time for her to testify in accordance with what the State needed. Trial counsel was never informed of the true circumstances of Jones' plea or of the true facts surrounding the crime for which she was charged. See Def. Ex. 6.

Additionally, on September 11, 2004, Jones actually committed two armed robberies. The first was in Winter Haven and the second was in Lakeland. Jones was only ever charged with the armed robbery in Lakeland. And, despite her trial testimony to the contrary, she admitted at the time of her arrest her "knowledge of the armed robbery prior to it being committed... . The defendant knew that a firearm was going to be used during the crime ...". Though Jones was facing two life felonies, she was not even charged with one and received six months probation for her role in the other. This evidence was never disclosed to the defense. See Def. Ex. 6.

And, just days after being placed on probation, and before Blake's penalty phase, Jones was arrested for obstructing without

violence, i.e., she lied to law enforcement to protect her boyfriend, Pierre Dugazon. See Def. Ex. 67. The State failed to disclose this critical impeachment evidence to the defense.

And, despite Jones' testimony to the contrary, it appears that she received favorable treatment in that she violated her felony probation in December, 2002, shortly after she became a witness for the prosecution against Blake. Her probation was violated in June, 2003, but the affidavit was suddenly withdrawn in April, 2004. And, other violations of her probation were simply ignored.

Additionally, the State failed to reveal to Blake, that Jones had been threatened by law enforcement to say what they told her or her children would be taken away from her. Indeed, in December of 2002, Jones was being investigated for child abuse, but shortly after the investigation commenced, it was closed. See Def. Ex. 6. Priscilla Hatcher testified that she actually witnessed law enforcement threaten Jones (PC-R. 2571-4, 2579-81, 2587).

Furthermore, during Green's trial, Jones testified that she had been promised help:

Q: Now, Ms. Jones, have you ever been charged with anything or accused of anything in connection with this case?

A: No.

Q: And did - the police officers, did they offer you anything in any way?

A: As in if we was to help them?

Q: Um-hum.

A: Yes.

Q: What did they offer you?

A: That if we helped them get what they wanted, then they would help us. They wanted the person that shot him.

Def. Ex. 51.

Finally, Jones was threatened with arrest if she failed to cooperate with the State as evidenced by the State's preparation of a motion to hold Jones as a material witness. See Def. Ex. 7.

Trial counsel was never informed about the pressure that was applied or the consideration that was bestowed on Jones. Jones was a critical State witness. Trial counsel was entitled to learn of the true motives behind Jones' testimony. See Davis v. Alaska, 415 U.S. 308, 315 (1974) (recognizing "that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.").

In denying Blake's claim, the circuit court summarily stated that Blake had not established that information about Jones' criminal prosecution was suppressed (PC-R. 7663). However, the circuit court's finding is not supported by the record. Trial counsel testified that he was not aware of the facts surrounding the armed robbery with a firearm or Jones' statements that she made to law enforcement about her participation in the crime (PC-



R. 1637-8, 1640-1)<sup>29</sup> or that Jones being told that she would receive assistance from law enforcement in return for her cooperation or that they were just interested in the person who shot the victim (PC-R. 1633-4) or that a child abuse investigation had been opened against Jones (PC-R. 1644) or that the State was contemplating holding Jones as a material witness (PC-R. 1642-3) but that this type of information was significant. The circuit court's order is refuted by the trial and postconviction record.

## **2. Demetrius Jones.**

Demetrius Jones also expected to obtain much consideration for his testimony in Blake's case. Initially, though Jones' had violated his probation at the time he was questioned by law enforcement about his fingerprint being on the stolen vehicle, he was not arrested. And, at the time of the crimes in Blake's case, Jones was being prosecuted for an additional charge of possession of cocaine with intent to deliver or sell, possession of drug paraphernalia, resisting arrest without violence and a probation violation. He was granted pre-trial release in December, 2003, because of Blake's trial prosecutor's intervention in Jones' case - to which he was not assigned as the

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<sup>29</sup>Trial counsel agreed that the information about the attempted armed robbery with a firearm and Jones' participation in the crime was "a criminal defense attorney's dream to have that information to use to examine a witness like Teresa Jones." (PC-R. 1639-40). In fact, Jones was facing a life sentence and had already confessed her active role in the attempted armed robbery when she was offered a plea to sixty days of probation.

prosecutor.<sup>30</sup> See Def. Ex. 5 and 66.

The following month, after picking up more new charges, representatives at the Office of the State Attorney made clear that the trial prosecutor in Blake's cases was to be kept apprised of the dealing with Jones and in fact, had possession of Jones' VOP file. See Def. Ex. 5. And after allowing Jones to plead shortly before Blake's trial, it was noted that Jones received a below guidelines sentence. Def. Ex. 5.

Within days of testifying in Blake's capital case, Jones' charges and probation violations were resolved: the State offered Jones, who was facing more than twenty-five years for the outstanding crimes and probation violations, a below guidelines sentence of 18 months of probation. See Def. Ex 5.

And, just two days after entering his plea, Jones was charged with committing felony battery and domestic violence assault in Polk County Case No. 2005CF176501. Those charges were no billed on March 28, 2005. See Def. Ex. 5. Trial counsel was unaware of this case or the resolution, though it occurred prior to the penalty phase in Blake's case.

Indeed, the jury was aware only that Jones was hoping for leniency in his outstanding cases (R. 656). However, the jury was never provided with the true picture of Jones' consideration or his expected benefits. And, the jury was never aware that the

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<sup>30</sup>Curiously, Assistant State Attorney Hardy Pickard was again the assigned prosecutor, as he was in the charges against Teresa Jones.

prosecutor in Blake's case, Cass Castillo, was actively assisting Jones or that he continued to do so after Blake was sentenced to death. See Def. Exs. 5 and 9; PC-R. 1382-3.

And, apparently, even after Mr. Blake's conviction and sentence, Jones still has received consideration for his testimony against Mr. Blake. Indeed, in 2007, after picking up additional charges and violations of community control, the trial prosecutor from Blake's case approved a below guidelines sentence for Jones, and referenced one of Blake's non-capital case numbers. See Def. Ex. 5.

Like with Teresa Jones, the State was also asserting pressure to Demetrius Jones by arresting him on motions to hold him as a material witness. See Def. Ex. 5 and 66. The State failed to disclose this information to the defense.

In denying Blake's claim, the circuit court summarily stated that Blake had not established that information about Jones' criminal prosecution was suppressed (PC-R. 7664). However, the circuit court's finding is not supported by the record. Trial counsel testified that if he did not cross examine Jones about his criminal history, then he was not aware of it (PC-R. 1648).

Also, contrary to the circuit court's determination that confidence in the outcome of Blake's proceedings is not undermined due to the information about Jones (PC-R. 7664), like Teresa Jones, Demetrius Jones was a critical State witness that assisted the State in establishing that Blake was aware of the robbery plot. Trial counsel was entitled to learn of the true

motives behind Jones' testimony. See Davis v. Alaska, 415 U.S. 308, 315 (1974) (recognizing "that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."). The circuit court's erred in denying Blake's claim.

**3. The Video Surveillance Tape from Del's Go Shop and Green's Shorts.**

At trial, the jury viewed the crime scene video surveillance tape. Though the identity of the individual in the tape was difficult to determine, the individual appeared to be wearing a pair of red shorts. See State's Ex. 72 (Trial); Def. Ex. 65. The shorts were a solid red - there was no other color and no pattern on the shorts. State's Ex. 72 (Trial); Def. Ex. 65. Indeed, according to Renee Arlt, the evidence technician who enhanced the videotape: "A subject is seen with his face covered up to his eye, wearing a grey hooded sweatshirt, red shorts and white sneakers" (Def. Ex. 65).

Green's clothes were collected from him at 10:00 p.m. on the night of the crimes. The items were described as "cotton shorts from Richard Green" See Def. Exs. 20, 21 and 25.

When Blake was arrested at Priscilla Hatcher's home two days after the crimes, clothes were collected from a closet. See Def. Ex. 26. Det. Harkins described the clothes as "misc. clothes to include a pair of red shorts that Blake was believed to have been wearing at the time of the homicide." See Def. Ex. 26.

The clothes of Green and those collected from Hatcher's

closet were submitted to FDLE for analysis to determine whether glass was present. Again, the item from Green was described as: "cotton shorts from Richard Green" while the items submitted from Hatcher's closet were described as: "clothes-multiple (specifically Blake's pair of red shorts)". See Def. Ex. 21. In addition, law enforcement submitted a pair of plaid blue shorts, a black t-shirt and dark blue slacks, from Blake for analysis. See Def. Ex. 21.

However, what the State failed to reveal to trial counsel was that the color of Green's shorts was red. See Def. Exs. 63 and 64. And, the items collected from Hatcher's closet do not include a pair of solid red shorts like those in the video surveillance tape. Rather, the clothes collected from Hatcher's closet included four items: a pair of blue pants, a pair of women's pink pants (size 16), a pair of plaid boxer shorts (red, white and blue) and a pair of plaid shorts (red, white and blue) (PC-R. 6965-7). No objective person would have described any of the items collected from Hatcher's closet as a pair of red shorts.

Furthermore, by 9:00 a.m. on August 12, 2002, before the video surveillance taped had been enhanced, Teresa Jones had provided law enforcement with a description of Blake and what he was wearing: "5'10" tall, between 160-170 lbs., last seen wearing a blue sweater, dark pants and a bald head." See Def. Ex. 22.

The circuit court found that: "It seems likely that counsel was not provided with any documentation showing law enforcement

had described Mr. Green's shorts as being red." (PC-R. 7665). Despite this finding, the court determined that the State had not suppressed the color of Green's shorts (PC-R. 7665). The circuit court erred.

Blake's prosecutor may not have seen the initial description of Green's shorts or reviewed the evidence collected from Green or Blake, but law enforcement was well aware that Green's shorts were red and the clothes collected from Blake were not. There is no doubt that knowledge of evidence in possession of all law enforcement agencies is imputed to the prosecutor. Kyles v. Whitley, 514 U.S. 419, 438 (1995). The color of Green's shorts and an accurate description of the clothes collected from Blake was suppressed.

In addition, at the evidentiary hearing, trial counsel testified that the documents he received did not indicate that the shorts collected from Green were red (PC-R. 1652-5). Trial counsel also believed that if Green was wearing red shorts and the video showed the assailant wearing red shorts and Blake was wearing other colors, that fact would be "very significant" (PC-R. 1655).

The circuit court also determined that even if the State suppressed the evidence it did not undermine confidence in the outcome of the trial (PC-R. 7665).

An accurate description of Blake and Green's clothes was critical to Blake's defense. Indeed, the accurate descriptions constitutes exculpatory evidence that would have assisted trial

counsel in showing 1) that Blake's statement to law enforcement was false; 2) that Blake's trial testimony was credible; 3) that Green was the shooter and 4) that Teresa Jones and Demetrius Jones gave false testimony and were not credible.

Had trial counsel known of the red shorts he would have undoubtedly pointed out to the jury that the clothing seen on the individual approaching the store and firing the gun on the videotape matched Green's clothing, not the description of what Blake was wearing on the morning of August 12<sup>th</sup>. There is no doubt that the color of Green's shorts in and of itself undermines confidence in the outcome of the conviction.

#### **4. The State's Inconsistent Theories.**

The State also violated Blake's right to due process when it presented the testimony of Teresa Jones during Blake's capital murder trial. The State elicited testimony that Jones' shifting statements and testimony was due to the fact that she feared Blake's family (R. 605; 873-4). However, in Green's trial on the murder of Patel, which occurred prior to Blake's trial, the State actually took the position that Jones had no fear of Blake or his family. In Green's trial the prosecutor argued:

If fear was her motive, if fear was her motive she would have left out [Harold] Blake, or Blade as she knew him, that's who would have been left out. That wasn't her motive. Her motive was to protect Mr. Green, and that's who she leaves out of her initial conversation with the police.

So you see, it's not true about fear. This is about protection, protecting someone that was close to her, and that would have been Mr. Green.

See Def. Ex. 51.

Thus, the prosecutor in Green's trial admitted that Jones had no fear of Blake and her shifting statements were not due to any fear of Blake. Her motive was trying to protect Green. The State's conflicting positions was improper and violated Blake's right to due process.

#### **5. Conclusion.**

The State's theory of the case at trial was simple: Blake shot Mr. Patel. The State told Teresa Jones that the State was concerned with the shooter and if she helped the State, the State would help her. Jones pointed the finger at Blake. From that point forward the State single mindedly pursued Blake, rather than justice. That pursuit led the State to control its star witnesses, Teresa Jones and Demetrius Jones, by using threats of detention and prosecution and doling out extremely lenient treatment for criminal conduct. That pursuit led the State to manufacture threats from Blake to explain inconsistencies with Teresa Jones and Demetrius Jones' prior statements and testimony. That pursuit led the State to mislead defense counsel as to the items of clothing collected from Blake and Green and whose clothing matched the image in the crime scene videotape. The State's conduct violated Mr. Blake's right to due process. A new trial is warranted.



## ARGUMENT IV

**THE CIRCUIT COURT ERRED IN DENYING MR. BLAKE'S CLAIM THAT NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. BLAKE'S CONVICTION IS UNRELIABLE AND HE IS ENTITLED TO A NEW TRIAL.**

### **1. Richard Green**

Richard Green did not testify at Blake's trial for the murder of Mr. Patel. However, in his statements to law enforcement he maintained that though present when Mr. Patel was shot, he remained in the vehicle and was unaware that Blake intended to attempt to rob Mr. Patel or had a gun the morning of August 12<sup>th</sup>. Despite all of the evidence law enforcement collected to the contrary, Green made these statements and was never charged with any crime relating to the morning of August 12<sup>th</sup> until nearly two years later when he refused to cooperate with the prosecution of Blake for an unrelated crime. As Teresa Jones stated under oath during Green's trial: They were told "[t]hat if we helped them get what they wanted, then they would help us." See Def. Ex. 51. They told Jones that they wanted the shooter. Obviously, Green's motive to shift the blame to Blake was critical to remaining free and protecting himself from prosecution for Mr. Patel's murder.

On March 28, 2011, Green testified that he and Key had planned to watch Mr. Patel's place of business in the early morning house August 12, 2002 (PC-R. 1531-2). But, when they arrived at Del's Go Shop Mr. Patel was already there (PC-R. 1533). Green exited the vehicle and approached the store with a

9 mm gun (PC-R. 1531-3). Green had not told Blake or Key that he planned to commit a robbery (PC-R. 1534). When Green exited the vehicle he adjusted his hoodie and pushed his dreads back under it (PC-R. 1534). Mr. Patel came to the door and Green said he panicked and fired a shot (PC-R. 1533).

Green testified that Blake did not shoot anyone and did not even have a firearm (PC-R. 1536).

Green told Teresa Jones that he was surprised that the victim was killed because he did not think that the victim had been hit (PC-R. 1537-8). Parker may have overheard him say this (PC-R. 1538).

Green admitted lying to law enforcement when he said that Blake was the shooter (PC-R. 1539).

## **2. Demetrius Jones**

Demetrius Jones testified at trial that he was present when Blake, Green and "Key" plotted the robbery (R. 633-4). He claimed that the trio arrived at his house between 3:00 and 4:00 a.m. in a car he did not recognize and began to clean glass out of a window (R. 636). According to Jones, Blake invited him to go with them to "rob people who sell drugs", but Jones demurred (R. 638-9). When the trio left, Green was driving, Blake was in the front passenger seat and Key was in the back (R. 640-1). Jones also testified that he later saw Blake alone on Avenue Y in Winter Haven at about noon or 1:00 p.m. and that Blake was "nervous, like something happened" and told him that "somebody got shot" (R. 645-7). Blake then asked him to get rid of a gun

but didn't show it to him; Jones agreed to try to sell it (R. 647-8).

However, Jones testified on June 19, 2012, that not everything he told law enforcement and testified about at Blake's trials was true. For example, Jones has now admitted that he saw Blake once following the crimes, but Blake did not ask him to assist him in getting rid of the gun. Rather, Blake "didn't really say nothing but like, what's up, and that was that." (PC-R. 7113). However, the first person Jones saw after the crimes was Green (PC-R. 7115). Green approached Jones and told him that someone got shot and he was scared and asked for advice about what to do (PC-R. 7110-1, 7115). Green did not listen to Jones and instead just tried to save himself (PC-R. 7111).

Jones also testified that Green told him where he took the gun to dispose of it (PC-R. 7108). And, Jones was not with Green when Green threw the gun into the lake (PC-R. 7109).

Jones also testified that "Key", or Kevin Key, Jones' cousin, told him that Green shot Mr. Patel, not Blake (PC-R. 7107-8).

### **3. Teresa Jones**

Teresa Jones testified at Mr. Blake's capital trial. The State relied on Jones to established three facts against Blake: 1) that Blake was with Green on the morning of August 12, 2002; 2) that Blake took two guns from the abandoned vehicle; and 3) Blake told her that he shot the victim. On January 6, 2012, Teresa Jones testified under oath in Franklin County,

Pennsylvania. See Def. Ex. 74. As to whether or not Blake told her he shot someone on the morning of August 12, 2002, Jones testified::

Q: So he didn't tell you he had shot somebody?

A: No. He just said that he beat somebody with a bat or something like that.

See Def. Ex. 74. Also, specifically, when questioned about whether she had told Blake's investigator whether Blake shot someone, Jones testified:

Q: Okay. Do you recall whether in your conversation with [Blake's investigator], did you tell her that you - that Blake had never told you he had shot someone?

A: I can't remember him telling me he shot somebody.

Q: Okay.

A: I said something about a bat.

Q: Okay.

A: I don't remember him saying -

Q: Okay. And I'm just - in terms of what you said to [Blake's investigator], you would have been saying that all that you remember is you saw him?

A: Yes.

Q: Or he said something about a bat?

A: Yes.

Q: Okay. So it wasn't that he had said he shot someone?

A: No, I don't think so.

See Def. Ex. 74.

Thus, on January 6, 2012, Jones testified unequivocally that

Blake did not tell her he fired a shot on August 12, 2002. See Def Ex. 74 (“**No, he didn’t tell me that he shot anybody.**”).

Likewise, as to whether Jones observed Blake obtain guns from an abandoned vehicle on the morning of August 12, 2002, Jones has repeatedly, under oath, maintained that she did not; though this is not what she said at Blake’s capital trial.

Indeed, in her January 6, 2012, testimony, Jones was asked about the sworn testimony she provided on June 14, 2004, wherein she was asked if she saw Blake take a gun out of an abandoned vehicle on August 12, 2002. She testified that she was not sure about that. She also indicated that what she told the police in August, 2002, was based on what they were telling her and what she heard on the street. She did state that she had lied about some of the things she told law enforcement. Jones testified that it was not her fear of Blake that caused her to lie, but the fact that others had threatened her. She also stated that it was a “crazy morning” and that may have caused her to lie about the fact that she saw Blake take guns from the vehicle. During her testimony, Jones was asked: “Where did you see him with the guns at?” and she responded: “Earlier, before. **Not on that day.** I guess before that, like in out neighborhood people walk around with protection.” When confronted with her inconsistent statement, Jones stated that the testimony about seeing guns was not true – that she “really didn’t see no guns.” She described guns that she saw before August 12<sup>th</sup>. During Jones’ January 6, 2012, testimony, she simply could not remember testifying at a

deposition in 2004.

#### **4. The Circuit Court's Analysis.**

In addressing the newly discovered evidence, the circuit court summarily found that Demetrius Jones' testimony from Blake's trial was more credible than his testimony in 2012 (PC-R. 7693), and Green's testimony at his trial in 2004 was more credible than his testimony in 2011 (PC-R. 7695).<sup>31</sup> The court does not include any reasoning and does not acknowledge any of the corroborative testimony that Blake presented at his postconviction evidentiary hearing. The circuit court's order is not supported by competent and substantial evidence.

At Blake's evidentiary hearing, he submitted a plethora of evidence, including witness testimony and documentary exhibits that prove that Green was the individual who approached Del's Go Shop in the early morning hours of August 12, 2002, and fired the single shot that killed Mr. Patel. Green's shorts that were collected from him on August 12<sup>th</sup> and which he indicated he was wearing that morning appear to match the shorts that are seen on the assailant from the crime scene video. In addition, when Demetrius Jones was initially interviewed he told law enforcement that Green was wearing a hoodie and placed a firearm in the front pocket. Green also testified in 2011, that he was wearing a hoodie when he approached the store. The crime scene video shows

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<sup>31</sup>The circuit court did not address Teresa Jones' January, 2012, testimony in Franklin County, though he admitted the testimony as substantive evidence.

an individual wearing a grey hoodie approaching the store.

And, Angela Parker told law enforcement that she overheard Green state: "It didn't look to me like he was shot nowhere that could kill him, he was shot in the arm, I remember him being shot in the arm not the chest or anywhere that could kill him, so he shouldn't be dead." See Def. Ex. 23. Green's statement about where the victim was shot corroborates his testimony from March, 2011.

Likewise, Govia and Summerall's testimony as well as Hall's statement to law enforcement corroborate Green's March, 2011 testimony and refute Demetrius Jones' trial testimony.

And, Smith's unrebutted testimony from the evidentiary hearing places Green in possession of the murder weapon shortly after the crimes and categorically refutes Demetrius Jones' trial testimony relating to the murder weapon.

Furthermore, at the time of Blake's trial the witnesses all had strong motives to shift the blame to Blake - Green was told that if he assisted law enforcement they would assist him. They did. Green was not charged for his role in the crimes until he refused to stop assisting law enforcement. Demetrius Jones and Teresa Jones were facing criminal charges with lengthy terms of prison. And, both Demetrius Jones and Teresa Jones were not charged for offenses they committed while the State prosecuted Blake.

The newly discovered evidence impacts Blake's conviction and had it been heard by Blake's jury, it probably would have

produced an acquittal. The fact that Green has admitted that he was the shooter and Blake had no idea that Green intended to rob the victim completely vindicates Blake.

Also, Demetrius Jones was a critical State witness and his testimony at trial was used to establish that Blake was present and assisted in the planning of the robbery of Mr. Patel. Likewise, Jones testified as to inculpatory statements that Blake made after the crimes. Now, it is clear that Jones' testimony was entirely false.

Teresa Jones' recent testimony once again contradicts her trial testimony and the State's evidence against Blake.

Based on the evidence that Blake submitted in postconviction he is entitled to a new trial.

#### **ARGUMENT V**

**THE CIRCUIT COURT ERRED IN DENYING MR. BLAKE'S CLAIM THAT HE WAS DENIED A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE THE PROSECUTOR'S ARGUMENTS PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY, MISSTATED THE LAW AND FACTS, AND WERE INFLAMMATORY AND IMPROPER. DEFENSE COUNSEL'S FAILURE TO RAISE PROPER OBJECTIONS WAS DEFICIENT PERFORMANCE WHICH DENIED MR. BLAKE EFFECTIVE ASSISTANCE OF COUNSEL.**

The prosecutor's statements throughout Blake's trial unfairly prejudiced him from receiving a fair trial. "Under our law, the prosecutor has a duty to be fair, honorable and just. ... [T]he prosecuting attorney 'may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.'" Boatwright v. State, 452 So. 2d 666, 667 (Fla. 4th DCA 1984), citing, Berger v.



United States, 55 S. Ct. 629 (1935). The prosecutor's actions throughout Blake's trial exceeded all bounds of zealous advocacy and resulted in several instances of prosecutorial misconduct.

During his cross-examination of Blake, the trial prosecutor elicited improper bad character evidence when he inquired about Blake's business of "stealing property and selling it," (R. 995). Later, the prosecutor began badgering Blake and was told to lower his voice (R. 1065).

At one point, Blake explained that he was crying on tape because, "when I get real mad, I cry," allowing the prosecutor to assert his theme of lack of remorse, and Blake to acknowledge, that he wasn't "crying because you felt bad about what happened to Mr. Patel" (R. 1068-9).

In his closing argument, the prosecutor pointed out the fact that the arrest of Blake was serious and the officers had to be "extremely careful with [Mr. Blake]" (R. 1151-2). Indeed, the officer wore bullet proof vests and it took an hour and a half for Blake to surrender (R. 1152). The prosecutor also focused on Blake's testimony and told the jury in closing argument, to consider Blake's demeanor on the stand: "You had an opportunity to see Mr. Blake in this case when he testified. Mr. Blake, I would suggest to you, is incapable, incapable, of being told what to do. He had anger in his tone. He was combative with the questions that I was asking. He was not responsive to the things I was -- that I was trying to get from him. He accused me of behaving like the detectives did" (R. 1172). The prosecutor also

ridiculed the apparent emotional state of Blake on the video of his statement, and then played it again (R. 1176-95), for the third time. The prosecutor played it again the following morning, for a fourth time.

Trial counsel failed to object to the improper arguments and prosecutorial comments and actions.

The circuit court found that the prosecutor's arguments and statements were fair based on the evidence presented, therefore trial counsel was not deficient in failing to object (PC-R. 7685). The circuit court's conclusion is not supported by the record. The statements and arguments are not "fair". Trial counsel was deficient in failing to object.

#### **ARGUMENT VI**

**THE CIRCUIT COURT ERRED IN DENYING MR. BLAKE'S CLAIM THAT HE WAS DENIED HIS RIGHTS UNDER AKE V. OKLAHOMA AT HIS CAPITAL TRIAL, IN VIOLATION OF MR. BLAKE'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.**

A criminal defendant is entitled to expert psychiatric assistance when the State makes his or her mental state relevant to the proceeding. Ake v. Oklahoma, 105 S. Ct. 1087 (1985).

Blake was entitled to an adequate mental health evaluation concerning the psychological issues that were germane to his susceptibility to coercion and his understanding of the circumstances surrounding the interrogation by law enforcement. This did not occur because no mental health expert was retained to even consider this issues.

That due process requires that Ake be extended to non-psychological experts is reflected in the United State Supreme Court's opinion in Caldwell v. Mississippi, 472 U.S. 320, 323-4, n. 1 (1985). Here, Blake was totally denied his right to the assistance of an expert in false confessions. Had an expert been retained, he or she certainly would have assisted Blake in the presentation of the issues that make it clear that Blake's statement was not freely and voluntarily given and was in fact, false.

The circuit court denied Blake's claim holding that it was procedurally barred. However, Blake submits that the issue was properly raised in his Rule 3.851 proceedings and that he is entitled to relief.

#### **CONCLUSION**

Based upon the foregoing, Appellant, HAROLD BLAKE, urges this Court to grant him relief.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by electronic transmission to Katherine Blanco, Assistant Attorney General, on May 29, 2013.

**CERTIFICATION OF TYPE SIZE AND STYLE**

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

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