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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-629

LOWER COURT CASE NO. 96-CF-735 B

LAMAR Z. BROOKS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

Mr. Brooks has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved. Mr. Brooks, through counsel, urges that the Court permit oral argument.

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INTRODUCTION

From the outset, Mr. Brooks' case was one based entirely on circumstantial evidence. There were no eyewitnesses to the murders nor was there any physical evidence tying Mr. Brooks to the crime scene. The main witness against Mr. Brooks, Mark Gilliam, admittedly lied to police investigating the murders, lied during his first trial against Mr. Brooks regarding the extent of his involvement in the crimes, recanted his testimony to the effect that Mr. Brooks and his co-defendant, Walker Davis, did not plan or attempt to carry out the murders, and finally, after being arrested by the State for perjury, Gilliam recanted his recantation at Mr. Brooks' second trial.

Additionally, during Mr. Brooks' first trial, another key witness was a jailhouse snitch, Terrance Goodman, who was a cellmate of Mr. Brooks at the Okaloosa County Jail. Goodman testified that Mr. Brooks talked some about his case and stated that he, Davis and Gilliam discussed various ways to kill the victims (T. 2095). Mr. Brooks admitted his involvement in the murders several times (T. 2103). Mr. Brooks stated that you can feel everything when you stab someone, bones and tissue (T. 2102). Mr. Brooks told Goodman that "his case was the perfect murder, no physical evidence, no eyewitnesses, no DNA, no nothing. That's what I call the perfect murder." (T. 2103). Further, according to Goodman, Mr. Brooks said that it took heart to stab someone (T. 2102), that he "offed the broad" and "copped" the bodies (T. 2099), and that he rode in the backseat of the victim's car to Crestview (T. 2100).

In addition to Gilliam and Goodman, the State was able to obtain a conviction in Mr. Brooks' first trial by introducing numerous hearsay statements made by Davis that were used against Mr. Brooks. As was noted by this Court on direct appeal, "Most of the statements complained of were focused solely on Davis and his motives and plans to kill the victims. Indeed, Brooks claims that his trial was really a retrial of Davis, rather than a trial limited to evidence about Brooks." Brooks v. State, 787 So. 2d 765, 770 (Fla. 2001).

This Court subsequently reversed Mr. Brooks' convictions and remanded for a new trial:

> Our review of the record in light of the State's theory at trial as well as the circumstantial nature of the evidence against Brooks establishes that the cumulative effect of the numerous errors discussed above in the admission of improper hearsay unfairly prejudiced Brooks. In the instant case, the State's admitted theory at trial was to show that Davis and Brooks were inseparable in the days leading up to the murders. In fact, in its opening argument, the State referred to them as "siamese twins." Thereafter, through the admission of numerous hearsay statements, the State sought to impute Davis's actions, statements, motive and intent to Brooks. This is particularly troublesome in this case where the trial court itself struggled with the admissibility of this evidence and concluded that this case was being tried on the basis of numerous hearsay exceptions. As such, the admission of this evidence constituted reversible error. *See, e.g., Selver v. State, 568 So. 2d 1331 (Fla. 4th DCA 1990)*; *Bailey v. State, 419 So. 2d 721 (Fla. 1st DCA 1982)*.

Brooks, 787 So. 2d at 779.

As a result of this Court's opinion, there existed even less of a case against Mr. Brooks. In addition to the evidence that this Court ruled inadmissible, Terrance Goodman was not called as a witness by the State during the guilt phase of Mr.

Brooks' second trial.[1] Thus, there was no "confession" introduced by the State against Mr. Brooks.

Despite this, however, Mr. Brooks was again convicted and sentenced to death. But once again, on direct appeal, even more evidence was ruled inadmissible by this Court. It was determined that the trial court erred in allowing a worker with the child support division of the Department of Revenue to testify that she had received a telephone call from a person who called herself Rachel Carlson and who wanted child support from Walker Davis, which testimony had no relevance and was admitted in violation of Mr. Brooks' Sixth Amendment right to confrontation. Brooks v. State, 918 So. 2d 181, 188 (Fla. 2005). It was determined that the trial court erred in admitting notes that the police seized from Davis, after they were found when his leg cast was removed, a violation of Mr. Brooks' Sixth Amendment right to confrontation and Fourteenth Amendment right to a fair trial. Brooks, 918 So. 2d at 199-201. And it was determined that the trial court erred in allowing the State to impeach the testimony of Melissa Thomas by allowing a police officer to testify that she told him that on the night of the murders, Brooks came to her house wearing black

[1] Following the conclusion of Mr. Brooks' first trial, Goodman recanted his testimony, stating that Mr. Brooks never admitted in any way to participating in the murders for which he was convicted (R. 1242-44). Rather, Goodman stated that he received this information from law enforcement (R. 1242-44). Goodman admitted that he lied at Mr. Brooks' deposition and trial (R. 1242-44). Goodman subsequently recanted his recantation (R. 1255).

pants but left wearing shorts, a violation of the Florida Statutes and the Sixth and Fourteenth Amendments to the United States Constitution. Id. at 2001-01. However, the majority of the Court determined that these errors were harmless individually and cumulatively. Id. at 202.[2]

Mr. Brooks submits that, with the addition of the following evidence which the jury did not hear, the errors in this case can no longer be rendered harmless. Rather, confidence is undermined in the outcome.

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[2]Two of the justices voted to reverse Mr. Brooks' conviction:

> I would reverse the convictions based on the erroneous admission of evidence identifying Walker Davis as the primary beneficiary of a life insurance policy on Alexis Stuart, the infant child of Davis's paramour, Rachel Carlson. Because the State did not lay a proper foundation in the form of knowledge of the policy by Brooks, Davis's alleged codefendant, the policy was inadmissible against Brooks either to establish the source of payment for the murders of Stuart and Carlson or to show Brooks' motive or intent. **The error in admitting the life insurance policy was not harmless beyond a reasonable doubt in light of the absence of direct evidence of Brooks' culpability and the dubious credibility of the State's key witness.**

Id. at 211 (Pariente, C.J., concurring in part and dissenting in part with an opinion, in which Anstead, J., concurs)(emphasis added). And, following Mr. Brooks' motion for rehearing subsequent to this Court's affirmance, a third justice voted for reversal ("[T]he majority's conclusion that a single stabbing blow cannot constitutionally, as a matter of law, constitute an underlying felony for the purpose of application of the felony murder doctrine requires this Court to reverse Brooks's convictions"). Id. at 221 (Lewis, J., dissenting from denial of rehearing).

STATEMENT OF THE CASE[3]

On May 23, 1996, Mr. Brooks was charged with two counts of first-degree murder (R. 1-2). Mr. Brooks was tried, found guilty and sentenced to death. However, on direct appeal, this Court reversed the convictions and remanded for a new trial. Brooks v. State, 787 So. 2d 765 (Fla. 2001).

At the conclusion of Mr. Brooks' second trial, the jury again found him guilty of both counts of first-degree murder (R. 5129). Subsequent to the guilt phase, Mr. Brooks refused to put forth any mitigation evidence (T. 2613). Thereafter, the jury returned two death recommendations by a vote of 9-3 and 11-1 (R. 5152). The trial court then sentenced Mr. Brooks to death (R. 5250-55). On appeal, this Court affirmed Mr. Brooks' convictions and sentences. Brooks v. State, 918 So. 2d 181 (Fla. 2005), rehearing denied December 22, 2005. The United States Supreme Court denied certiorari on May 22, 2006. Brooks v. Florida, 126 S.Ct. 2294 (2006).

Mr. Brooks' initial Fla. R. Crim. P. 3.851 motion was filed on May 18, 2007 (PC-R. 171-267). It was thereafter amended on October 9, 2007 (PC-R. 336-410), and supplemented on December 18, 2007 (PC-R. 480-82). A case management conference was conducted on December 7, 2007, after which the circuit court issued an order granted an evidentiary hearing on a number of Mr. Brooks'

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[3]Citations in this brief are as follows: References to the direct appeal record of Mr. Brooks' trial are designated as "R.____". References to the trial transcript of Mr. Brooks' trial are designated as "T.____". All other references are self-explanatory or otherwise explained herewith.

claims (PC-R. 485-86).

The evidentiary hearing was held on January 14-15, 2008 and May 14, 2008. However, in January, 2009, prior to a final order being issued, the presiding circuit court judge, the Honorable Jere Tolton, died unexpectedly. After the case was reassigned, Mr. Brooks filed a motion for new evidentiary hearing on April 17, 2009 (PC-R. 734-36). The motion was granted (PC-R. 744-45), and an evidentiary hearing was held on May 10-12, 2010.

On March 11, 2011, Mr. Brooks filed a successive rule 3.851 motion, raising a claim of newly discovered evidence (PC-R. 1155-76).[4] An evidentiary hearing was held on March 1, 2012. Thereafter, on March 12, 2012, the circuit court issued its final order denying relief (PC-R. 1247-1535). This appeal follows.

STATEMENT OF THE FACTS

TRIAL PROCEEDINGS

Responding to a 911 call about 10:30 or 11:00 p.m. on Wednesday April 24, 1996, officers with the Crestview Police Department approached a parked car that had its engine running and lights on (T. 1387, 1395). The vehicle was at the end of a dead end street in a ghetto area of Crestview, which had some night clubs and homes nearby, and was about two blocks from

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[4]Mr. Brooks had originally filed the successive motion as a supplement to his Rule 3.851 motion (PC-R. 1096-1127). However, the State moved to strike the supplement (PC-R. 1132-37), which the court granted, without prejudice to Mr. Brooks to file a successive Rule 3.851 motion (PC-R. 1147-50). In its final order denying relief, however, the circuit court determined that Mr. Brooks' successive motion should in fact be treated as an appropriate amendment to his postconviction motion (PC-R. 1253).

the police station (T. 1135, 1258).

When the police officers looked inside the car they saw the woman driver slumped over onto the passenger side. They also saw an infant in the rear passenger side of the car in a child's seat (T. 1263-64). The driver, 23-year-old Rachel Carlson, was dead, as was Alexis Stuart, her three-month-old daughter (T. 1426). Carlson had been strangled and stabbed 66-70 times, the fatal wounds being to her neck (T. 1193-94, 1202, 1205). Alexis also had several stab wounds, and died from a single stab wound to her heart (T. 1212-14).

The car had been parked for about two hours. About 10 p.m., Walker Davis, who was limping because he had a cast on his foot (T. 1436), and another man were seen walking quickly along the street the car was parked on (T. 1143-44, 1149, 1153, 1512, 1513). Other than that lead, the police initially had little to go on, but within a day they began questioning Davis about what he knew regarding Carlson (T. 1279-80).[5]

Davis, who was married and had two children at the time, never mentioned that he knew Carlson (T. 1292, 1357). Carlson, on the other hand, not only knew Davis, but had claimed that Alexis was his child (T. 1410), which was untrue (T. 2049). Davis also denied the infant was his (T. 1458). Nevertheless, as early as December 1995, he had inquired about buying an insurance policy for Alexis, and in February 1996, he purchased one worth

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[5]Davis and Carlson were both in the Air Force and worked at the hospital on Eglin Air Force Base (T. 1281).

$100,000 with him as the primary beneficiary and Carlson as the contingent beneficiary (T. 1500-01).

The police also questioned Mr. Brooks, Davis' cousin, who had come to visit him and had been there since the Sunday before the murders (T. 1288, 1293). When asked what he had been doing for the past several days, he told the police that he had gone to town twice, once looking for marijuana (T. 1290). About 7 p.m. on the night of the murders, he had helped his cousin put together a water bed, walked Davis' dog, watched a movie, and then gone to bed (T. 1290, 1366).[6] Mr. Brooks denied being in Crestview the night of the murders (T. 1290).

Contrary to Mr. Brooks' statement, an individual named Melissa Thomas said that Davis and Mr. Brooks were at her house in Crestview near the crime scene about 9 p.m. on the night of the murders and had stayed there for 20 minutes (T. 1525, 1531). The two men left and apparently went to a nearby credit union[7] where a work acquaintance of Davis', Rochelle Jones, picked them up and drove them back to Davis' house (T. 1567-73).[8]

On the way back, Jones was stopped for speeding (T. 1572).

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[6]It took about two hours to set up the waterbed and fill it with water (T. 1367).

[7]Glenese Rushing went to the Eglin Federal Credit Union on the night of the murders to withdraw some money from the ATM machine (T. 1471-72). She saw two men across the street get in a car (T. 1476). Bank records established that the withdrawal occurred at 9:53 p.m. (T. 1483).

[8]Davis had also used the telephone while at Thomas' home (T. 1527). According to telephone company records, Davis apparently called Jones at 9:22 p.m.(T. 1565).

A police officer testified that he issued a ticket to Jones for driving with a suspended license (T. 1583, 1585).[9] The officer testified that there were two males in the front seat and children in the back (T. 1584). Because her license was suspended, the officer allowed Davis to drive (T. 1585).

Mr. Brooks, when questioned, also told the police that an Army buddy, whom he identified only as Mark, had come with him and Davis from a weekend trip to Atlanta (T. 1455). The police eventually identified Mark as Mark Gilliam, a soldier stationed at Ft. Benning, Georgia (T. 1698). At the retrial, Gilliam testified that he had met up with Mr. Brooks in Atlanta on the weekend of April 21-22, 1996 (T. 1618-20). After partying there, he, Mr. Brooks, Davis, and others came to Crestview on Sunday evening and stayed in Davis' apartment (T. 1621-22). Early the next morning a woman banged on Davis' door, and she was angry (T. 1625). Gilliam was too drunk to get up, but Davis later told him that "this girl kept pestering him about a stereo he owed money for," and that upset him (T. 1629). He said she should be choked, but Mr. Brooks said, "nah you should just shoot her," and Gilliam added "nah, shooting would be too messy. You should just stab her." (T. 1631). For Gilliam they were only joking, but later on Monday evening, Davis and Mr. Brooks approached him, and each offered him $500 if he would drive a car so they could kill the girl (T. 1634-36). Davis told him that he would pay Mr. Brooks ten thousand dollars to kill her (T. 1634), would provide

[9]The citation was issued at 10:20 p.m. (T. 1586).

the shotgun Mr. Brooks would use, and would also get some latex gloves so no fingerprints would be left (T. 1640-42). Davis promised Gilliam that he would provide falsified medical records to explain his absence from work (T. 1647).

Accordingly, Davis got Rachel Carlson to come to his house on Monday evening (T. 1651). He got in her car, and Gilliam and Mr. Brooks followed in the former's vehicle (T. 1656). Carlson was speeding, and soon a police car had pulled her over and given her a ticket (T. 1817-19). Gilliam drove past but circled back and stopped behind the two cars (T. 1657). Another police car pulled behind Gilliam. Mr. Brooks, according to Gilliam, said he was going to "have to shoot them," but Gilliam told Mr. Brooks to put the shotgun away (T. 1659). He did, and the officer asked why Gilliam had pulled behind Carlson and the other police car. Gilliam said that the light from his gear shifter had gone out (T. 1663). The officer gave him a warning ticket and let them go (T. 1665, 1831, 1844). Scared, Gilliam returned to Davis' apartment, and when Davis showed up Gilliam said he was leaving the next day (T. 1670). Instead, however, Gilliam went to bed, woke up the next afternoon, and just hung around (T. 1672). According to Gilliam, Davis had a dentist appointment in the morning, but when he returned, he and Brooks said they should "try it again." (T. 1673). Although he did not want to, Gilliam eventually gave in (T. 1675).

Yet, on the next attempt, Gilliam lost Carlson's car, and went to the place they had agreed they would commit the homicide and waited (T. 1679-80). Davis never showed up, and after a

while Mr. Brooks and Gilliam returned to Davis' house (T. 1681). When Davis came home some time later, Gilliam said "I'm out of here. I'm leaving tomorrow." (T. 1682). And he did, but not before getting the promised, falsified papers saying that he had been in an accident (T. 1684).[10]

POSTCONVICTION PROCEEDINGS[11]

During the postconviction evidentiary hearing, Mr. Brooks presented evidence regarding the ineffective assistance of counsel at the guilt phase.[12] Kepler Funk testified that he and Keith Szachacz, his law partner, were Mr. Brooks' trial attorneys at his retrial (PC-R. 6902). They also represented Mr. Brooks on appeal prior to the trial (PC-R. 6902).

Funk testified that generally he and Szachacz equally share in the duties, and they each review every document in discovery

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[10]When the police questioned him about the murders, Gilliam initially told them nothing until he was threatened with criminal charges (T. 1701). Then at the retrial, Gilliam admitted that he had "left out some parts" when he had testified at Mr. Brooks first trial (T. 1701, 1722). Specifically, he omitted that he had "helped attempt their murder two nights in a row," and said, instead that they had "just hung out." (T. 1701). As a result, the State charged him with four counts of perjury for the testimony he had given in 1997 and 1998 (T. 1722).

[11]During the postconviction evidentiary hearing, the State and the Defense stipulated to the introduction of the prior transcribed testimony of the trial attorneys as to their recollection of whether they recalled seeing previously admitted exhibits that had been entered into evidence (PC-R. 6898-6900). They also stipulated that the circuit court make a part of the record the transcript of Walker Davis' trial and of Mr. Brooks' initial jury trial (PC-R. 6901).

[12]Mr. Brooks presented an alternative argument that the State failed to disclose material, exculpatory evidence.

and every witness (PC-R. 6903). While he had no independent memory, Funk had no doubt that he and Szachacz went over Szachacz's opening statement many times and made revisions (PC-R. 6904-05). They hoped at least the jury would hear the matters discussed in the opening during their cross-examination of the witnesses (PC-R. 6932).[13] However, because the prosecutor limited his questions on direct, they were prevented from getting everything they wanted in cross based on the prosecutor's objections that it was beyond the scope (PC-R. 6933).[14] This required the defense to make the decision of what was the benefit or detriment of putting on a case (PC-R. 6933).

Funk testified that the defense was ready to put on a case, but Funk didn't know whether they intended on doing it (PC-R. 6908).[15] That decision was made after the State rested (PC-R. 6908). So when Szachacz got up to deliver his opening statement, the intention was to win, not whether to put on a case (PC-R. 6909). The defense believed that in this case, the rebuttal

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[13]In his postconviction motion, Mr. Brooks asserted that trial counsel rendered ineffective assistance when he informed the jury during his opening statement that extensive evidence beneficial to Mr. Brooks' would be presented, yet the jury ultimately never heard this evidence.

[14]Funk didn't think the defense was necessarily hurt by this (PC-R. 6969). They would have liked to get the information out, but he didn't think it was critical and crucial and so outweighed their ability to keep the sandwich (PC-R. 6969).

[15]When asked if he or Szachacz issued any subpoenas for witnesses prior to trial, Funk didn't recall doing that (PC-R. 6905). But he believed that if they wanted to call witnesses in their case in chief, it wouldn't have been a problem, because they could have called witnesses under prosecution subpoena (PC-R. 6905-06, 6950-51).

argument was going to be critical and vital in trying to reach a favorable verdict (PC-R. 6910). Funk didn't have a specific memory, but in general, they took into consideration how the witnesses testified, their demeanor, credibility, the theories the defense raised during cross, and whether there was any doubt raised (PC-R. 6912-13). It came down to whether they would gain more by putting on a case (PC-R. 6914).[16] Funk stated that the decision not to put on witnesses was a tactical one (PC-R. 6950).

Funk further testified that the decision not to put on a case in chief was made between the attorneys and Mr. Brooks (PC-R. 6911). They wanted Mr. Brooks' input on everything (PC-R. 6911). They had a great relationship with Mr. Brooks and he was a pleasant, fine, young man (PC-R. 6911). Mr. Brooks unequivocally stated that he did not commit these crimes, and he has never wavered at all with that position (PC-R. 6970).

Funk was sure that there was debate between Mr. Brooks, himself and Szachacz over whether to call any witnesses (PC-R. 6976). Funk didn't have a memory of directly contradicting Mr. Brooks' request (PC-R. 6977). Mr. Brooks may have asked about calling a witness, and Funk would have explained the good and the bad and why it strategically wasn't the right thing to do (PC-R. 6977).[17] Funk acknowledged that there was a big discussion over

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[16]Funk stated that if there was a witness that was going to exonerate Mr. Brooks or really put a hole in the State's case, they would have called the witness and given up the sandwich (PC-R. 6918).

[17]Funk was shown D-Ex. 111, which is a letter from Mr. Brooks to counsel (PC-R. 6952). In the letter, Mr. Brooks

whether to call Davis as a witness in this case (PC-R. 6974).

Funk thought there was reversible error and that the case would be tried again, but he didn't think that played a part in their decision (PC-R. 6914). They wanted to win it here, not later (PC-R. 6914). They were not looking at it from an appellate perspective (PC-R. 6915). Their target audience was the jury, not the Florida Supreme Court (PC-R. 6916).

According to Funk, a central theme of the defense case was a lack of evidence (PC-R. 6918-19). Funk didn't have an independent memory of some items tested by FDLE that didn't match Mr. Brooks (PC-R. 6919-20). Funk stated that if it was in discovery, he knew about it at the time (PC-R. 6920).[18]

With regard to the DNA profile from a Newport cigarette butt found adjacent to the victim's vehicle and which excluded Mr. Brooks, Funk stated that if it was in discovery, he was aware of it (PC-R. 6920). Funk remembered the name Gerrold Gundy, who had the same brand of cigarettes found outside the gate of his home (PC-R. 6920).[19] Funk though it was Marlboro Reds, and he

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identified evidence and witnesses that he wanted presented at trial (D-Ex. 111). The date was not legible on the envelope stamp (PC-R. 6953). Funk believed that the letter was written after Mr. Brooks' trial, in anticipation of a third trial (PC-R. 6953-54).

[18]The documentation they received in this case came from Barry Beroset, who was Mr. Brooks' counsel at his first trial (PC-R. 6910-11).

[19]In his postconviction motion, Mr. Brooks asserted that trial counsel rendered ineffective assistance for failing to inform the jury that Gundy was a prime suspect in this case and of the evidence against him.

remembered being somewhat disappointed, wishing it was something more unusual than a Marlboro Red (PC-R. 6921).

Funk remembered the name Orr, but not that a neighbor named LaConya Orr stated that Walker Davis and a skinny, shorter black male came to her house looking for her husband at 8:45 to 9:00 p.m. (PC-R. 6921).[20] The prosecutor subsequently refreshed Funk's recollection as to the significance of Orr (PC-R. 6943). Funk stated that it is incumbent on all defense counsel that timing is an issue, but in this case, no one ever really spoke about the time of death (PC-R. 6944). The time was not going to win the day for the defense (PC-R. 6945). The defense talked about this extensively (PC-R. 6945). The bottom line analysis was, from a strategic standpoint, that it was best not to go there (PC-R. 6945).[21] Funk thought the jury would see through that (PC-R. 6945). According to Funk, Orr wasn't subpoenaed because they had already decided not to call her as it would not benefit Mr. Brooks' case (PC-R. 6951).

With regard to a witness named Tim Clark, Funk recalled that he had given a statement about time (PC-R. 6921).[22] Funk's

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[20]In his postconviction motion, Mr. Brooks asserted that Orr's statement conflicted with the timeline set forth by the State as to when the murders occurred, thus casting doubt as to whether Mr. Brooks could have committed the crimes.

[21]Funk believed that the timeline was fixed with the state trooper's citation and the phone call at Melissa Thomas' house (PC-R. 6957). According to Funk, the timeline was going to leave you nowhere in terms of helping Mr. Brooks or casting doubt on the government's theory of what happened (PC-R. 6957).

[22]In his postconviction motion, Mr. Brooks asserted that Clark's statement also conflicted with the timeline set forth by

memory was that Szachacz spoke to Clark and what he said was very different from what he told law enforcement (PC-R. 6922). It comported with Funk's memory that Szachacz informed him that when he spoke to Clark personally, he had essentially changed his testimony from that of the police interviews to include the item that he was now concerned that it was Lamar Brooks who was one of the men with Rachel Carlson (PC-R. 6946). Funk was sure that they were happy that Clark wasn't called (PC-R. 6947). They would never have presented Clark once he said it was Mr. Brooks (PC-R. 6948). Thus, according to Funk, there was no need to subpoena Clark because they had already decided not to call him (PC-R. 6951).

When asked about a BOLO being put out on a green Nissan pickup truck that was a suspect vehicle in this case, Funk stated that he didn't recall (PC-R. 6923).[23] When he was subsequently show the relevant document on cross-examination, Funk's recollection was that he never received anything that linked the vehicle to the homicides (PC-R. 6950).

In addition to a lack of forensic evidence, Funk testified that there was no eyewitness to the murders or confession by Mr. Brooks (PC-R. 6935). Going against the defense, however, was the fact that Mr. Brooks in his statement to law enforcement denied being in Crestview at all (PC-R. 6937). Funk thought that it was

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the State as to Mr. Brooks having committed the murders.

[23]The jury was not informed that a stolen pickup truck was a suspect vehicle in the murders.

reasonable for any juror to conclude that he had been in Crestview (PC-R. 6937-38).

Funk acknowledged that there was a group of four young people who claimed to have seen Rachel Carlson in a vehicle at an intersection near the murder scene at a time later than Mr. Brooks and Davis were at Melissa Thomas' house (PC-R. 6952). Funk's memory of them was that they had some significant impairment of their ability to recall and have recollection with accuracy (PC-R. 6952). They had also been called and impeached at Davis' trial (PC-R. 6952).

Funk also testified that he made the decision not to introduce evidence regarding Gerrold Gundy (PC-R. 6959). Funk remembered seeing it as somewhat of a red herring: "That we want to focus the jury on what Judge Tolton was going to instruct them as it relates to the government's burden and that lack of evidence argument versus that, well, look at all Elmore put on to prosecute Mr. Brooks versus the scant evidence suggesting Mr. Gundy had something to do with it and it turns into a changing of the burden, so to speak." (PC-R. 6960). Funk then stated, "I think we did, during cross-examination, suggest quite a bit and we got quite a bit out that Gundy was a potential bad actor who committed these crimes." (PC-R. 6960). Subsequently, Funk stated that the defense had witnesses available regarding Gundy, but they thought that the prosecutor had the ability to rebut any claim that Gundy was the one who committed the homicides (PC-R. 6961). Funk elaborated that the value was that the science contradicted the State's theory (PC-R. 6963). The value wasn't

that it was Gundy (PC-R. 6961).

Regarding the lead sheet as to the taxi service, Funk thought it wasn't worthwhile to present and lose the closing argument (PC-R. 6964).[24] It didn't tend to prove or disprove anything (PC-R. 6964).

Finally, Funk testified that everything that was complained of in the 3.850 regarding the guilt phase that counsel did not do was based on a tactical decision, and that Mr. Brooks agreed or consented to their tactics (PC-R. 7001-05). Funk was of the opinion that the defense did not make any errors (PC-R. 7009).

Keith Szachacz was Mr. Brooks other trial attorney (PC-R. 7036). Like Funk, Szachacz stated that Mr. Brooks expressed his innocence (PC-R. 7095).

Szachacz was shown several exhibits from the previous evidentiary hearing that he stated he didn't recognize (PC-R. 7037). As to D-Ex. 17, which related to a polygraph being administered to Melissa Thomas,[25] Szachacz did not remember

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[24]In his opening statement, trial counsel informed the jury that they would hear about the police investigation into a suspicious looking individual being picked up around 9:15 p.m. and brought to a residence on Lakeview Drive. The jury never heard this information.

[25]During her polygraph exam, which was administered by Special Agent Tim Robinson, Thomas was asked if she noticed if Mr. Brooks changed clothes, to which she answered "No." Robinson opined that Thomas was truthful in her answer (D-Ex. 17). At trial, Thomas testified that on the night of the murders, Davis and Brooks came to her house around 9 p.m. (T. 1525). Both men wore black nylon pants, but she could not recall what type of shirts they had on (T. 1527-28). The State asked Thomas, "Do you remember telling Agent Haley that Lamar Brooks came out of the bathroom in shorts?" She responded, "I don't remember." (T.

seeing this document as being in the documents he received from Beroset (PC-R. 7037-38). Szachacz couldn’t say for certain that it was not provided in discovery (PC-R. 7051-51). Szachacz spoke with the prosecutor by phone in the week prior to the evidentiary hearing (PC-R. 7051). He went back and looked through his Melissa Thomas folder that he had prepared in preparation for trial; he did not see that document in the folder (PC-R. 7051-52). He had his secretary look through the Tim Robinson folder that morning; she said she did not see anything in there about a polygraph other than she read something in a transcript where Elmore spoke about it, perhaps from Robinson’s prior testimony at the Davis trial (PC-R. 7052).

If it was admissible, Szachacz would have used D-Ex. 17 to impeach Thomas as to any testimony regarding Mr. Brooks changing clothes (PC-R. 7038-39). On cross-examination by the State, Szachacz agreed that the value of the question and answer section by the polygraph examiner essentially related only to the issue of whether or not Mr. Brooks changed clothes at the home of Thomas (PC-R. 7052). When asked if he agreed that the document would have played a minor role in the trial, Szachacz stated that that was a tough question:

1533).

Later, the State called Agent Haley, who testified over objection that Thomas had stated to him, “When Lamar Brooks arrived at her house he was wearing black jogging pants and a dark colored shirt, and when he went into the bathroom and came out he was wearing shorts and he was carrying a backpack.” (T. 2157).

> [T]here's an insinuation that if the jury believed that he changed clothes, that he did so for a reason. To hide blood or get rid of evidence. And if Ms. Thomas testified with some more strength that she now does not remember that he didn't change clothes, then that might help the jury believe in his innocence.

(PC-R. 7056).

D-Exs. 106, 107 and 108 are all handwritten notes (PC-R. 7059). While Szachacz didn't recall seeing the specific documents themselves, he was aware of the information contained in them (PC-R. 7039-41).[26] For instance, the field notes contained in D-Ex. 106 were a summary of information that he had already known and prepared for (PC-R. 7060). They appeared to essentially match the lead sheets that Investigator Worley and the Crestview Police Department typed up of all the different aspects of their investigation of these homicides (PC-R. 7060).

Szachacz agreed that these exhibits were obviously field notes of Worley and one or more officers that investigated the case (PC-R. 7061). Collateral counsel had indicated to Szachacz that he obtained the records through a public records request (PC-R. 7061). Szachacz testified that he would not be surprised that the State did not provide the written notes of police officers in discovery (PC-R. 7061). Szachacz understood that the general law in Florida was that the handwritten notes of police officers are not discoverable (PC-R. 7061).

Szachacz also testified that D-Ex. 105 appeared to be a typed written summary of various information and interviews

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[26] Szachacz didn't identify anything in the notes that would have changed the way he handled the case (PC-R. 7062).

gathered by the Crestview Police Department (PC-R. 7063). Szachacz was provided with it at the 2008 hearing; he believed that if there was anything in there that was a surprise, he would have pointed it out (PC-R. 7063). Szachacz read this information before, but not in this form (PC-R. 7063-64).

Szachacz testified that he made the opening statement for the defense (PC-R. 7042). When he described the evidence that he thought the jury was going to hear, he believed at that point in time that the jury was going to hear it through the direct examination by Elmore or the cross-examination by the defense (PC-R. 7042). It would be fair to say that at that point in time, the defense wasn't necessarily intending on presenting a case in chief, nor did it rule it out (PC-R. 7042-43).

When the defense made the decision not to put on a case, they reviewed the transcripts from the first trial and Davis' trial; they discussed many other factors and consulted with Mr. Brooks (PC-R. 7043-44). Their initial thoughts were that maybe they shouldn't call anybody, but that was not set in stone prior to the beginning of the trial (PC-R. 7044).

Szachacz testified that the defense knew going into the trial from their research that part of prosecutor Elmore's style was to try to limit what you were able to get out on cross by narrowing or tailoring his direct (PC-R. 7044). Throughout the trial, they ended up proffering evidence that they would have presented had Judge Tolton not limited their cross (PC-R. 7044). Szachacz stated that it was evidence that the appellate court needed to hear to make a proper ruling on whether Judge Tolton

was correct in making his decision (PC-R. 7045). When he was preparing his cross, Szachacz thought those were valid, salient points to make to further the case (PC-R. 7045).

Szachacz testified to his conversation with Tim Clark. His memory in general is that they subpoenaed Clark in case they wanted him to testify (PC-R. 7045-46). Clark stated to either Szachacz or an investigator that he was surprised they subpoenaed him because the last time he spoke to Beroset, he made it clear he wasn't going to help Mr. Brooks (PC-R. 7046). Clark stated that he could identify Mr. Brooks and remembers seeing him and would be able to identify him (PC-R. 7046). Szachacz thought he told Funk that somebody got to Clark because he was so adamant; maybe he just didn't want to get involved (PC-R. 7046). During his conversation with Clark, Szachacz didn't remember how it was that he switched his opinion (PC-R. 7046-47).

According to Szachacz, they debated calling Clark (PC-R. 7070). They also weighed whether it was worth calling one witness for that information and allowing Elmore to have the last three to four hours with the jury (PC-R. 7069-70). Szachacz noted that witnesses were called in the first case and there was still a guilty verdict (PC-R. 7071). Here, the defense believed it would be very important to have the last word with the jury (PC-R. 7071).

Szachacz further testified that he was aware of the BOLO that had been sent out about the stolen vehicle, but he saw no way to connect the BOLO in any useful way in the defense (PC-R. 7047, 7074). He was aware of the DNA profile from the Newport

cigarette butt found adjacent to the vehicle (PC-R. 7047-48). He was aware that the testing of the contents of Mr. Brooks' backpack and his other personal items had come back negative as to anything to connect him to Rachel Carlson (PC-R. 7048). Szachacz was also aware of the vacuum sweepings from the victim's car and from the clothing of the victims that there was no match to anything regarding Mr. Brooks (PC-R. 7048).[27] Szachacz thought he was aware of CI-10, but he didn't remember if he did anything to learn of his or her identity (PC-R. 7048-49).[28]

With regard to CI-10 and Gundy, Szachacz was aware that the State had a wealth of evidence to explain why someone claimed that Gundy was Rachel Carlson's boyfriend (PC-R. 7073). A white lady named Shana Tatum was romantically involved with Gundy (PC-R. 7073). She drove a small red car with an infant child and was very similar to Carlson's appearance that night (PC-R. 7073). According to Szachacz, the defense made a decision not to try to put Gundy on trial, at least anymore to the extent that he had already been raised as a possible suspect during the State's case (PC-R. 7074). Mr. Brooks agreed with that decision (PC-R. 7074).

In his testimony, Szachacz acknowledged that the defense could have called Agent Bettis to say he went to Philadelphia or Chester, arrested Mr. Brooks, and seized the backpack in his

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[27]In his postconviction motion, Mr. Brooks asserted that the jury was not informed that numerous items were tested yet failed to connect Mr. Brooks to the murders.

[28]CI-10 was a confidential informant who connected Gundy to the victim.

possession at the time (PC-R. 7075). And the defense could have called Jack Remus to say he tested everything in the backpack and found no blood, nor did the State find any trace evidence connecting to the victims (PC-R. 7075). Yet, Szachacz, agreed with the State that the defense had that already by virtue of the fact that the prosecutor didn't present a connection to the backpack (PC-R. 7075). Szachacz did, however, take issue with the notion that such evidence was not valuable:

> There was a bloody, bloody, bloody scene and in my opinion, the person or persons that did this would have blood all over them, including their clothing. And that was part of our theory in this case was that there was no blood found anywhere on Mr. Brooks.

(PC-R. 7077-78).

Szachacz further testified that he was not surprised that there was a Caucasian hair in the victim's palm (PC-R. 7078). An analyst testified that it was similar to the victim's hair (PC-R. 7078-79). And, even if it wasn't the victim's hair, it still would have been just an unknown hair in the car of someone with Caucasian and black friends (PC-R. 7080). Szachacz didn't recall any Caucasian likely suspect in this case (PC-R. 7080).

With regard to everything in the case, Szachacz testified that the defense, including Mr. Brooks, considered all alternatives and in the end made the decision, after the State rested, not to call any witnesses (PC-R. 7079-80). Szachacz testified that the decision was tactical (PC-R. 7082-83).

Barry Beroset testified that he represented Mr. Brooks in this case from 1996 through 1998 (PC-R. 7105). John Allbritton

represented Mr. Brooks after his arrest (PC-R. 7105). He left the case due to health conditions (PC-R. 7105-06). Beroset obtained Allbritton's file, which consisted of two legal cases, including the transcripts of the Davis trial (PC-R. 7106). Rather than obtain a fresh copy of all discovery, Beroset obtained the file from Allbritton (PC-R. 7107). After that, Beroset received additional discovery from the State up and until the trial (PC-R. 7107).

After the trial, Beroset gave the file to Funk and Szachacz (PC-R. 7108). During the 2008 hearing, Beroset was shown a number of exhibits by collateral counsel (PC-R. 7110). Beroset didn't recall any of these documents being a surprise; his recollection was that they were something he was familiar with as he defended Mr. Brooks (PC-R. 7112-13).

When Beroset was shown D-Ex. 17, he stated that at this time, he didn't have a specific recollection of Melissa Thomas taking a polygraph (PC-R 7130-31). And with regard to D-Exs. 106-108, Beroset didn't have an independent recollection of seeing them (PC-R. 7132-33).

Debbie Carter testified that she is a legal assistant in the state attorney's office (PC-R. 7140). She was prosecutor Elmore's legal assistant in 1996 at the time of the Brooks and Walker prosecutions (PC-R. 7142). Based on the procedures utilized in the office, Carter believed that the polygraph report was sent to defense counsel in both cases (PC-R. 7146-49). Similarly, Robert Elmore, the prosecutor in this case, testified to his belief that D-Ex. 17 was provided to Allbritton and

Edmund, Walker Davis' counsel (PC-R. 7164).

During the postconviction evidentiary hearing, testimony was presented regarding penalty phase ineffective assistance of counsel. Wilden Davis, Lamar Brooks' cousin, testified about his childhood interaction with Mr. Brooks (PCR. 6805-06). Wilden, who is four years younger than Lamar, is the younger brother of Walker Davis, the co-defendant in this case (PC-R. 6806). Lamar also had an older brother (PC-R. 6806-07). Growing up, the four of them were in regular contact with each other during summer stays in Chester, Pennsylvania (PC-R. 6870).

Wilden testified that Lamar was his favorite cousin (PC-R. 6807). Lamar was funny, a practical joker (PC-R. 6870). He did well in school and is really smart (PC-R. 6807). There came a point when Lamar went into the military (PC-R. 6808). Wilden didn't have much contact with him again until after he graduated from high school (PC-R. 6808). Wilden went to Morris College in South Carolina and graduated in 1999 (PC-R. 6809). When he was in college, he had regular contact with Lamar, who wasn't in the army anymore (PC-R. 6810). Wilden noticed that every time he would see Lamar, he was drinking (PC-R. 6810). Lamar would have a bookbag with a half a gallon of liquor in it (PC-R. 6811). It was an all day event (PC-R. 6811). When Wilden would come home from college, there would be times when he would stay with Lamar (PC-R. 6823). They would wake up in the morning and instead of eating breakfast, Lamar would turn on reggae music and get a drink and might smoke a blunt (PC-R. 6823). Wilden testified that he didn't know anybody that drank that much other than

somebody who is an alcoholic (PC-R. 6818).

Aside from drinking, the other change that Wilden noticed was that Lamar was smoking marijuana (PC-R. 6811). Lamar was still funny, but he was more non-tolerant; if you got on his nerves, he would leave (PC-R. 6811). Before he was drinking, it was like nothing bothered him (PC-R. 6822-23).

Wilden also testified that at one time, Lamar had an apartment with his brother, who also drank a lot (PC-R. 6811-12). Lamar’s brother later died in a DUI accident (PC-R. 6812). Further, Wilden stated that Lamar never spoke about being in war in the Persian Gulf (PC-R. 6812). Wilden testified that had he been contacted at the time of trial, he would have made himself available to testify (PC-R. 6825).

Joanne Washington testified that she has been friends with Lamar for about 23 years (PC-R. 7011). She knew him as a child and went to school with him (PC-R. 7011). They spent quite a bit of time together in high school (PC-R. 7011). Lamar was then and is still her best friend (PC-R. 7012).

Washington testified that in high school, Lamar was happy go lucky and a class clown (PC-R. 7012). He was a clean cut kid and put together (PC-R. 7013). At some point, he went into the military and Washington went to college (PC-R. 7012). Washington felt that Lamar was smarter than her and that he could have gone to college but chose not to (PC-R. 7012). Lamar did very well in school, and he was one of five high school students in the area to receive an award from the NAACP based on academics and community work (PC-R. 7013). Also, Lamar did a lot of community

work through his church (PC-R. 7013).

During his first tour in the military, Lamar kept in touch over the phone and when he would come home over Christmas (PC-R. 7014). He was still lively, but he may have been a little anxious about going to Desert Storm (PC-R. 7014).

In between Lamar's two enlistments, Washington had a lot of contact with him (PC-R. 7014). He would visit her in school and at home during breaks (PC-R. 7014). Washington noticed that his behavior changed whenever he would come back (PC-R. 7015). He was more aggressive, agitated and paranoid (PC-R. 7015). He got a little anxious about people in his direct space (PC-R. 7015). He went from the happy kid to like the mean kid (PC-R. 7016). Further, he cut off other friends a little bit (PC-R. 7016).

Washington testified that she did not know Lamar to drink alcohol before he was in the military (PC-R. 7016). When he came back from Desert Storm, he drank alcohol (PC-R. 7016). After his second tour in the military, it had grown increasingly worse (PC-R. 7016). Lamar drank all the time (PC-R. 7016). According to Washington, "There were times I know I had actually maybe woken him up and that was the first thing that he done was grab a drink, so he drank all day" (PC-R. 7016). He liked gin and grapefruit juice, and he kept his alcohol in a backpack (PC-R. 7017). He carried the backpack everywhere he went (PC-R. 7017).

When Lamar returned from the military, he lived with his parents (PC-R. 7017). At some point he lived on his own as he started to have differences with his father (PC-R. 7018). The rules and his whole attitude didn't mesh well (PC-R. 7018).

Lamar’s brother would stay with him; it became the lounge house as everybody stayed there (PC-R. 7018). They were drinking (PC-R. 7018). Washington stated at the time that Lamar was an alcoholic, which would irate him (PC-R. 7018-19). Lamar’s brother also had a drinking issue (PC-R. 7019).

As to what happened in Iraq, Washington testified that “the most he would say to me was he wasn’t scared of death because he had seen death. He had seen killings and that’s all he would say. When you tried to get more from him he would just shut down” (PC-R. 7019). This conversation transpired one night when it was late and Lamar came to Washington’s home and was drunk (PC-R. 7019). He had been in some type of altercation, which was becoming an ongoing thing (PC-R. 7019).[29] When Washington explained that someone was going to either hurt or kill him, Lamar made this statement (PC-R 7019). Then he started to cry, and he had gotten himself so wound up that he began vomiting (PC-R. 7019-20). By this time his brother showed up and he was trying to console Lamar, but they both started crying (PC-R.

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[29]Washington testified that whenever Lamar went to bars with the group he hung out with, they got so drunk that you knew something was going to happen (PC-R. 7020). There were many times that Lamar slapped somebody in the face or got into an argument (PC-R. 7020).

Washington also testified that she got into a physical altercation with Lamar once in her dorm room (PC-R. 7031). He turned the music up loud and she wanted it down so as not to get into trouble (PC-R. 7031). They were punching and swinging at each other (PC-R. 7031). Neither one of them got hurt to where they had to go to the hospital (PC-R. 7031). Lamar had never been physically aggressive to Washington before (PC-R. 7032).

7020). It was a mess (PC-R. 7020).

Washington further testified that she was contacted by an investigator for collateral counsel around 2007 (PC-R. 7026). As to how collateral counsel picked her, Washington was told that mostly everyone that they had spoken to had mentioned her name as someone they should speak with because of her close relationship with Lamar (PC-R. 7028-29). If anybody asked Washington to help Lamar at any time, she would have been there (PC-R. 7033-34).

Dr. Hyman Eisenstein, a clinical psychologist with a specialty in neuropsychology, evaluated Mr. Brooks in September, 2007 at UCI (PC-R. 6838-39, 6842). Dr. Eisenstein administered the Wechsler Adult Intelligence Scale, Third Edition, the Trail Making Test, the TOMM, some projective drawings, the Peabody Picture Vocabulary Test, paragraph writing, and he started the Halstead Category Test (PC-R. 6843). Dr. Eisenstein also conducted a clinical interview (PC-R. 6843).[30]

Dr. Eisenstein testified that on a number of tests, Mr. Brooks either didn't complete them or didn't follow directions. For instance, on the Category Test, which looks at the individual's ability to make judgment decisions, Mr. Brooks refused to continue and complete the test after he started to get items wrong (PC-R. 6843). On the paragraph writing test, Dr. Eisenstein asked Mr. Brooks to write a paragraph about how he felt (PC-R. 6844). Mr. Brooks just wrote that he felt silly, and

[30]During their interview, Mr. Brooks cut it off at some point (PC-R. 6882). Dr. Eisenstein went back to see him again, but Mr. Brooks refused to come out (PC-R. 6882).

that was the end of it (PC-R. 6844). And on the projective drawing test, Mr. Brooks made some rudimentary drawings and didn't really follow the directions (PC-R. 6845).

There were, however, a number of tests which Mr. Brooks did complete. On the Peabody, which is a measure of receptive language, Mr. Brooks scored in the average range (PC-R. 6844). On the TOMM, Mr. Brooks' performance was indicative that he was trying and not malingering or faking (PC-R. 6846). On The Trail Making Test Part A, Mr. Brooks placed in the mildly impaired range (PC-R. 6847). On Part B, he placed in the moderately impaired range (PC-R. 6847).

On the WAIS-III, an IQ test, Mr. Brooks had a full scale score of 90 (PC-R. 6848). He scored a 90 on both the verbal and performance (PC-R. 6848). Mr. Brooks' verbal comprehension index equaled 100; his perceptual organization equaled 101; working memory equaled 88; and processing speed equaled 71 (PC-R. 6848). Mr. Brooks' score on the processing speed was in the third percentile, which placed him at the borderline range of intellectual functioning (PC-R. 6848). Dr. Eisenstein testified that this score was significantly different than all the other scores (PC-R. 6848).

Additionally, Dr. Eisenstein found that the working memory of 88 was clinically significant in comparison to the scores of verbal comprehension and perceptual organization (PC-R 6849). There was a discrepancy of almost one standard deviation between working memory and all the other index scores (PC-R. 6849).

Dr. Eisenstein explained that there should be consistency

when one completes an IQ examination (PC-R. 6849). Here, however, there were some skill levels where Mr. Brooks was adequate in and other skill levels that he was deficient in (PC-R. 6850). This is indicative of a brain disregulation (PC-R. 6850). Dr. Eisenstein stated:

> But the fact that processing speed, which consists of two subtests, the two very lowest that he obtained, both on digit symbol or coding and symbol search, which were at the borderline range - - now these scales are significant because Mr. Brooks' processing speed - - in other words, he's extremely slow and when he is given a task that requires more than one element to complete - - so what's being asked over here is both a motoric skill, as well as some type of coding or some type of brain capacity to figure out what has to be done on a particular problem together when it's being timed. So you put a variety of different elements altogether and that's the very lowest function that he obtained. So an index score or an IQ score of 71 places him in the borderline range and at the third percentile of the general population and at the 95th confidence interval level and would even go all the way down to an IQ of 66 up to 83 with a range. So in other words, it even dips below borderline when one looks at how slow his brain is able to actually function when it comes to these multiple skill levels that are required on these tasks. It's significant. It's extremely significant because one would expect that given his overall verbal and perceptual index of a hundred, which is average, and the discrepancy of two standard deviations, it's extremely significant. Again, it's indicative that there's some type of brain disregulation or cognitive dysfunction that is demonstrated on this particular index in comparison to other indexes.

(PC-R. 6850-51). Dr. Eisenstein further explained that working memory looks at attention and concentration (PC-R. 6852). Mr. Brooks' scores were lower and his performance on the digit span raised another flag of some type of cognitive disregulation or brain impairment (PC-R. 6853).

Dr. Eisenstein also reviewed Mr. Brooks' school and military records, and he spoke to several different collateral sources to

substantiate or provide additional background information (PC-R. 6855). He spoke to JoAnn Washington, Mr. Brooks' mother Dorothy, Malcolm Lockley and Wilden Davis (PC-R 6855-56). Dr. Eisenstein learned that Mr. Brooks did well in school, was considered a fun going individual, and came from a good home (PC-R. 6856). There was no indication of any type of drinking or abnormal behavior that would have gotten him in trouble with the law (PC-R. 6856).

Mr. Brooks enlisted in the Army when he was seventeen (PC-R. 6856). Shortly after he went into the Army, he went to Saudi Arabia, Kuwait and Iraq and served six months in Desert Storm clearing mines (PC-R. 6856). When he returned, there was a significant change in his demeanor and behavior (PC-R. 6856). Mr. Brooks began consuming significant amounts of alcohol and started smoking marijuana (PC-R. 6856). Also, even while serving in the Army, Mr. Brooks became less compliant (PC-R. 6857). There were infractions for being intoxicated, not listening to his officers and basically getting into trouble (PC-R. 6857).

Mr. Brooks reenlisted for a second tour and was discharged under honorable conditions in 1994 (PC-R. 6857). When he returned home, he was drinking heavily and continuously (PC-R. 6857). He had a backpack with alcohol in it all the time (PC-R. 6857). He was let go of his job as a fork lifter after five months (PC-R. 6857). There was a reported change in his demeanor; he went from happy go lucky to quiet and seclusive (PC-

R. 6857).[31] Within the next few weeks he went to Atlanta and then to Florida where the murders occurred (PC-R. 6857).

Dr. Eisenstein also learned that on one occasion, Mr. Brooks shared a significant event from Desert Storm (PC-R. 6858). He reported something about bodies and death, but it was brief and he didn't touch upon it (PC-R. 6858). Something happened in his behavioral pattern that had changed significantly from the time he had first entered into the Army and his experiences in Desert Storm to the time that he had returned (PC-R. 6858).

Dr. Eisenstein diagnosed Mr. Brooks with Post-Traumatic Stress Disorder, chronic PTSD (PC-R. 6858). Not being treated for it could explain Mr. Brooks' behavior and the excessive amount of alcohol usage (PC-R. 6859-60). Dr. Eisenstein also diagnosed Mr. Brooks with alcohol abuse.[32] There were several other diagnoses that Dr. Eisenstein suspected but didn't have enough information to completely diagnose (PC-R. 6861). These included head injury, dementia secondary to alcohol abuse, and metabolic disorder due to alcohol abuse (PC-R. 6861).

As to statutory mitigators, Dr. Eisenstein found that Mr. Brooks suffers from extreme mental or emotional disturbance (PC-

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[31]Mr. Brooks didn't tell Dr. Eisenstein that he had changed, only his friends and family (PC-R. 6870). Mr. Brooks' mother, however, reported that she saw no change in his behavior (PC-R. 6877).

[32]In his pre-sentence investigation report, Mr. Brooks described himself as an occasional drinker (PC-R 6870). Dr. Eisenstein's opinions, however, were based on the historical account by friends and family that Mr. Brooks began drinking heavily after the war (PC-R. 6880).

R. 6862). Mr. Brooks also did not have the ability to substantially conform his conduct to the law at the time of the murders (PC-R. 6863).[33] Additionally, Dr. Eisenstein found that Mr. Brooks' adaptive functioning capabilities had gone astray prior to his arrest (PC-R. 6864). He didn't care how he dressed or looked and lacked the ability to do simple things (PC-R. 6864). He had one goal and that was to drink (PC-R. 6864).

Trial counsel Funk testified that prior to Mr. Brooks' case, he didn't think defense counsel had handled many death penalty cases at all (PC-R. 6930). As to a mitigation investigation, Funk testified that the defense reviewed what prior counsel Beroset had (PC-R. 6925).[34] Funk interviewed Mr. Brooks' parents extensively about his childhood and met with Mr. Brooks often in prison (PC-R. 6925). Funk didn't remember if he spoke to anyone outside of Mr. Brooks or his parents regarding mitigation (PC-R. 6926). Further, while Funk was sure that they reviewed records, he didn't recall what records were obtained (PC-R. 6925). Funk didn't think they had a mental health expert examine Mr. Brooks (PC-R. 6925). After spending time with Mr. Brooks and interviewing his parents, Funk didn't think there was a need to do that (PC-R. 6925). Funk testified that he has had mental health people and is real familiar with what they can do in terms

[33]Dr. Eisenstein's testimony was based on a significant period of time and the changes in Mr. Brooks that occurred were consistent throughout that period (PC-R. 6869).

[34]Funk was aware that Beroset had put on mitigation in the first trial, but that no mental health mitigation was presented (PC-R. 6984).

of providing mitigation, but he didn't think there was a need for one (PC-R. 6925-26).[35] Additionally, Funk's recollection was that Mr. Brooks stated that he wouldn't cooperate with a mental health expert (PC-R. 6969).

Funk testified that Mr. Brooks directed counsel not to put on mitigation (PC-R. 6978). Funk would have put on a mitigation case if it was up to him (PC-R. 6978). Funk advocated for Mr. Brooks to fight for his life while at the same time trying to respect him (PC-R. 6980). There were many visits to talk about this decision (PC-R. 6980). Funk told Mr. Brooks that he could change his mind at any time (PC-R. 6981). Funk further testified that Mr. Brooks was offered a life sentence in exchange for a plea of guilty, but that he rejected the offer (PC-R. 6993).

In his testimony, trial counsel Szachacz stated that he agreed with everything Funk testified to about mitigation (PC-R. 7089). If they had been allowed to present mitigation, it would have been very similar to what Beroset put forward, other than they may have called live witnesses in lieu of letters (PC-R. 7091). It would have been a focus on the positive attributes of Mr. Brooks (PC-R. 7092).

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[35]Funk stated that he considered exploring mental health issues (PC-R. 6982). The first thing he talked to Mr. Brooks' mother about was his birth (PC-R. 6982). Funk inquired into whether Mr. Brooks suffered from any head trauma (PC-R. 6983). He spent hours with the client, spoke with his parents, talked about how well Mr. Brooks did in school, whether he had seen a psychologist as a young man, or whether he was on meds (PC-R. 6983). His memory was that they came up empty (PC-R. 6983). There was nothing about Mr. Brooks that suggested he suffered a mental illness or any type of brain impairment (PC-R. 6984).

Szachacz testified that they didn't put on mitigation because Mr. Brooks told them not to (PC-R. 7092). There was nothing about Mr. Brooks' behavior that suggested he was mentally ill, brain damaged or mentally impaired (PC-R. 7093). Mr. Brooks said that if they sent a mental health professional to see him, he wasn't going to cooperate (PC-R. 7094).

Barry Beroset testified that he did a mitigation investigation and presented a mitigation case (PC-R. 7113).[36] When asked if there was any decision to be made whether to waive mitigation, Beroset stated that he couldn't imagine not putting on mitigation in a first-degree murder case (PC-R. 7115). The mitigation case here was designed to present a positive viewpoint of Mr. Brooks and for sympathy (PC-R. 7116). No mental health mitigation was presented and Beroset didn't believe he had Mr. Brooks examined by a mental health expert (PC-R. 7115, 7117). Based on his observations or from any source, Beroset had no reason to believe that Mr. Brooks was brain damaged or that there was a mental health issue (PC-R. 7123, 7130). However, Beroset also stated, "On the other hand, today you probably should have all of them examined in a case like this quite frankly. I don't think that was necessarily the case back then." (PC-R. 7119).

Mr. Brooks also presented at a subsequent evidentiary hearing newly discovered evidence concerning the testimony of an

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[36]Beroset testified that he had a lot of contact with Mr. Brooks' parents, but he couldn't say specifically as to other members of the family (PC-R. 7134). Beroset never traveled to Pennsylvania, nor did he have an investigator or mitigation specialist travel there (PC-R. 7134).

individual, Ira Ferguson, that he saw the victim, Rachel Carlson, with another individual, Gerrold Gundy, on the night that she was murdered.[37]

Kepler Funk testified that he had not come across the name Ira Ferguson before or any information that there was an argument between Rachel Carlson and Gerrold Gundy at approximately 10:45 p.m. on the date she was murdered (PC-R. 7217-18). According to Funk, "Had I been given this, what Mr. Doss has given me - - that this guy is saying - - I assume that this is something new that he's saying today - - you know, of course, it's incumbent upon Defense Counsel to follow that up. But we didn't have any indication in any way, shape, or form that would indicate that Ms. Carlsen was alive at 10:45. I think it was contradicted by the evidence, frankly." (PC-R. 7228).

Dan Ashton, a private investigator who worked with collateral counsel on Mr. Brooks' case, testified that the first time he became aware of Ferguson was in July, 2010, when he received a phone call from Walker Davis' mother. She stated that someone at the prison had made a statement to Davis, and the information that Ashton got was that the individual's name was Ira Ferguson (PC-R. 7240). Ashton immediately called collateral counsel, and within three days he was at Wakulla CI speaking with Ferguson (PC-R. 7240).

When Ashton spoke to Ferguson, he stated that he had sent an

[37]The Brooks and Davis cases were combined for this hearing (PC-R. 7213-14).

affidavit to the State Attorney’s Office because he did not have contact with Davis (PC-R. 7242). After a chance encounter with Davis and after thinking about it, he realized that he needed to come forward because of the information that he had (PC-R. 7242). Ashton spoke to Ferguson at length about any information he may have had and requested that Ferguson send him a copy of the affidavit, which he did (PC-R. 7242).

Ashton also spoke to Davis (PC-R. 7242). Originally, he had spoken to Davis at the time of the 3.851 proceeding because he was Mr. Brooks’ co-defendant (PC-R. 7242-43). Then he spoke to Davis when this came up to find out what he knew about Ferguson and why this was coming forward now (PC-R. 7243). Davis had not provided any information regarding Ferguson prior to this meeting in 2010 (PC-R. 7244).

After the interviews with Davis and Ferguson, Ashton testified that he tried to go through and verify everything Ferguson said, as far as the chronology of events, his history in Crestview, his arrest record and the arrest records of his family members (PC-R. 7244).

Ashton saw Ferguson a second time at the end of October, 2012 (PC-R. 7244). The copy of the affidavit Ferguson had sent wasn’t notarized, so Ashton had him notarize an affidavit (PC-R. 7245). Ashton also had him notarize a subsequent affidavit which explained the chronology of when he saw Davis and why he was coming forward with this now (PC-R. 7245).

Ashton saw Ferguson again in February, 2011, to sign a release for his DOC medical and classification records (PC-R.

7246). Ashton also saw Davis again to obtain a release for his classification records from the Madison Correctional Institution (PC-R. 7247).[38] Ashton testified that the medical records reflect there was a day when both Ferguson and Walker had a medical visit at Wakulla C.I. (PC-R. 7270). Ferguson told Ashton that he only met Davis that one time (PC-R. 7271). Davis said the same (PC-R. 7271).[39]

Ira Ferguson testified that he came into contact with Walker Davis at Wakulla C.I. Annex during a medical call-out (PC-R. 7286).[40] They were sitting on the bench outside the unit when they spoke (PC-R. 7330). Prior to that, he had not known Davis (PC-R. 7286). Ferguson asked Davis where he was from and Davis replied that he was from Crestview (PC-R. 7288, 7332). Ferguson replied that he used to be in Crestview all the time, that he knew people and some girls up there (PC-R. 7288, 7332). He also said he had a partner up there, Gerrold Gundy (PC-R. 7333). When Davis heard this, it was like Ferguson had cussed him out (PC-R. 7333). There was a whole change in his persona (PC-R. 7288). Davis turned his head and said he didn't want to talk to Ferguson anymore (PC-R. 7333). Davis did not discuss his case or what he

[38]Ashton identified Composite D-Exs. 1, 2 and 3 as the DOC records for Davis and Ferguson (PC-R. 7248-50).

[39]Ashton further testified that he did not know how Davis obtained Ferguson's affidavit (Davis filed a pro se motion with the affidavit attached) (PC-R. 7271-72). Ashton thought he may have sent him a copy (PC-R. 7272).

[40]Ferguson testified that he was falsely convicted of all six counts of crimes against him, including second degree murder (PC-R. 7319).

was charged with; he just said he got screwed (PC-R. 7333).

Ferguson learned about Davis' convictions from another inmate named Haki (PC-R. 7338-39, 7342). Ferguson asked Haki why Buddy acted crazy when he mentioned Crestview (PC-R. 7342).[41]

Ferguson also spoke to Sergeant Summers about this issue twice (PC-R. 7340). He told her he needed to talk to somebody about something that happened in the past (PC-R. 7286-87, 7340). He eventually informed her that he remembered the incident in Crestview and the components didn't match (PC-R. 7287). She said he had to do what he thought was right (PC-R. 7340). Ferguson spoke to Haki again (PC-R. 7342-43). They talked, and Ferguson told Haki that the night Haki was talking about with the girl from the Air Force base, he was at the club (PC-R. 7343). From Haki, Ferguson learned that Walker was alleged of being involved in the murder of Carlson and her infant (PC-R. 7343). All Ferguson knew was that the night when the incident occurred, he remembered Carlson and Gundy arguing (PC-R. 7341).[42]

Months passed and Sergeant Summers never got back to Ferguson (PC-R. 7290). Ferguson went to the law library and got the paperwork he needed, filled it out, and gave it to Summers

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[41]Ferguson didn't know Walker Davis by his real name; he knew him as Buddy or Brother Dawood (PC-R. 7288, 7334). Ferguson learned Davis' real name from Sergeant Summers (PC-R. 7290, 7374).

[42]Ferguson testified that he never learned the time the State suggested that Davis and Mr. Brooks had killed the victims (PC-R. 7353-54). But Ferguson thought his information was relevant because the news said Carlson died the night that Feguson saw Carlson with Gundy (PC-R. 7354).

(PC-R. 7291).

Ferguson decided to write an affidavit and sent it to the district attorney’s office (PC-R. 7350). Ferguson was shown D-Ex. 4, which is a copy of the first affidavit he wrote up (PC-R. 7291-92). There is no signature on the back page (PC-R. 7292). Ferguson’s initials are on the front page (PC-R. 7292). Ferguson stated that any time you send legal mail out of the institution, you have to initial it (PC-R. 7292). It is initialed by the stamp for mailing (PC-R. 7292). The date reflected on the stamp is August 6, 2010 (PC-R. 7293).[43]

Ferguson met with Ashton and went through the circumstances surrounding what was contained in those affidavits (PC-R. 7296). Ferguson, who was based out of Miami, went to Crestview periodically to hang out and meet women (PC-R. 7307).[44] Ferguson knew Gundy back in 1996[45] from partying in the clubs (PC-R.

[43]Ferguson was also shown D-Ex. 5, which is the typed affidavit with his signature on it (PC-R. 7294).

[44]Ferguson is of Bahamian descent and has a Bahamian accent (PC-R. 7322). Since he came from the Bahamas, his primary residence has been Miami (PC-R. 7323). He has family members who have also been in Crestview (PC-R. 7324).

[45]Ferguson maintained that he knew Gundy prior to a 1999 incident in which Gundy was with three of Ferguson’s family members at the Econolodge and they were arrested in a dope bust (PC-R. 7327-28).

7296).[46] Rachel Carlson was Gundy's girlfriend (PC-R. 7297).[47] Ferguson has been in the presence of both Gundy and Carlson multiple times (PC-R. 7297-98). He was in their presence the night Carlson was murdered (PC-R. 7298).

Ferguson went to the club around 10:30 p.m. or right before eleven (PC-R. 7298, 7310). He saw Gundy and Carlson in the parking lot (PC-R. 7298). They were in the car; Gundy was in the passenger seat and the baby was in the back seat (PC-R. 7298). Ferguson asked for a cigarette (PC-R. 7298). Ferguson left and then returned; they had pulled up on the side street that was kind of dark (PC-R. 7298-99). They were talking (PC-R. 7299).

Ferguson later returned to the parking lot (PC-R. 7299). There was a door slamming and he heard arguing (PC-R. 7299). He looked over and saw Gundy outside the car; there was a lady to the right side of him and he was in between them (PC-R. 7300). Rachel was sitting in the car (PC-R. 7300). Ferguson said he was going to leave because it was hectic; Gundy agreed that it was crazy (PC-R. 7300). Ferguson went back to his truck and headed to his friend Michelle's house in Panama City (PC-R. 7301). He stayed there until the next afternoon (PC-R. 7301). She was watching t.v. in the other room and there was a picture of Carlson and her car, stating that they had been found dead (PC-R.

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[46]According to Ferguson, Gundy was a playboy; his specialty was white ladies (PC-R. 7304). He had four or five white women at any given time (PC-R. 7305).

[47]Gundy called Rachel, "Rachel from the Air Force Base." (PC-R. 7306). Ferguson saw her uniform in the back of her car one time (PC-R. 7306).

7301-02). Ferguson couldn't believe it was Carlson (PC-R. 7301). He was shocked and stunned (PC-R. 7328). Ferguson never contacted the authorities at that point (PC-R. 7302). And prior to Ashton, nobody questioned Ferguson about this (PC-R. 7303).

After this took place in 1996, Ferguson took a hiatus from coming to Crestview; he returned maybe in 1999 (PC-R. 7329). Ferguson eventually saw Gundy at a car wash and asked him about whatever happened to those girls; Gundy said something to the effect that those bitches were crazy (PC-R. 7302-03).

During cross-examination by the State, Ferguson was shown his handwritten affidavit dated July 13, 2010, that was attached to Davis' postconviction motion (PC-R. 7365-67). Ferguson stated that he didn't give it to Davis; he sent it to the state attorney or the clerk's office in Crestview, sent a copy to some of Davis' family, gave a copy to Haki, and he kept a copy (PC-R. 7367, 7370-71, 7373). Ferguson had someone look up the address for Davis' family; he didn't remember who (PC-R. 7369). Later, he sent a copy to Ashton (PC-R. 7371).

Ferguson was shown Ex. 1 to his deposition, which is the same as D-Ex. 4, the handwritten affidavit introduced by the defense (PC-R. 7375). There is one difference between the two, the date (PC-R. 7376). In Ex. 1, under the legal date stamp there is a handwritten date, April 24, 1996 (PC-R. 7376). That is the date the incident took place with Carlson (PC-R. 7376).

Ferguson testified that Davis' defense attorney came to see

him just prior to his deposition (PC-R. 7377-78).[48] Ferguson wasn't sure who he was, so he asked the attorney to verify the date of the incident (PC-R. 7377-79). Ferguson wrote it on the copy of the affidavit (PC-R. 7377). Ferguson stated that he wasn't trying to find out the day the incident occurred; he already knew (PC-R. 7377-79).

The typed version of Ferguson's affidavit, D-Ex. 5, has the date in it, while the handwritten affidavit doesn't (PC-R. 7381-82). Ferguson didn't recall if he got it typed in prison or if Ashton brought it for him to sign (PC-R. 7383-84). Ferguson didn't know why the date of the crime wasn't in any of his handwritten affidavits (PC-R. 7384).

Ferguson testified that he never spoke to Davis about the information he had (PC-R. 7388). Ferguson denied getting together with Davis, that Davis told him what he needed to say and then Ferguson wrote it in an affidavit (PC-R. 7389). The only time Ferguson spoke to Davis was at medical (PC-R. 7413).

Diane Davis, Walker Davis' mother, testified that there came a time when Walker called her with notification about some new evidence in his case (PC-R. 7417-18). Walker said he met a guy, who when he found out Walker's name said he had some information (PC-R. 7420). Diane notified a friend who is an attorney (PC-R. 7419, 7424). He recommended contacting Ashton since he was an investigator and it was tied together (PC-R. 7424). Diane called

[48]The court reporter was in the room, but the prosecutor hadn't arrived yet (PC-R. 7378).

Ashton and gave him the information (PC-R. 7419).[49]

Diane testified that she didn't receive a copy of an affidavit from Ferguson; neither did her husband (PC-R. 7422). She wasn't aware of any other family members receiving an affidavit from Ferguson (PC-R. 7422). Diane thought that some months later Walker mailed her a copy of the motion with the affidavit attached (PC-R. 7424). That was the first time she ever heard the name Ira Ferguson (PC-R. 7425).

Elizabeth Hutchinson testified that she knew Ira Ferguson by the name Chris (PC-R. 7477). Ashton came to see her two days prior and showed her a picture of Ferguson; she said he looked familiar but she knew him by Chris (PC-R. 7477-78). Ashton returned a day later and confirmed that Ferguson did go by the name Chris (PC-R. 7478).

Hutchinson didn't know Chris personally; she knew people that he knew from Miami (PC-R. 7478). She saw Chris maybe twice around 1996 (PC-R. 7478). Hutchinson graduated from high school in 1996 and came into contact with a couple of guys from Miami (PC-R. 7479). She ended up having a child with each of those men (PC-R. 7479). Chris was with the guys that she knew from Miami (PC-R. 7478).[50] Hutchinson's first child was born in February, 1997 (PC-R. 7479). She met Chris when she was pregnant (PC-R. 7479-80). Hutchinson was certain that the person Ashton showed

[49]Diane had spoken to Ashton previously when he had been to Pennsylvania to speak to her younger son (PC-R. 7419).

[50]The fathers of her two children who are from Miami are Tony Byrd and Lawrence Martin (PC-R. 7487).

her in the picture was Chris (PC-R. 7486).

Hutchinson also testified that she knows Gerrold Gundy (PC-R. 7480). She and Gundy are from Crestview, born and raised (PC-R. 7480-81). She never saw Chris in the company of Gundy (PC-R. 7480). But one of the men from Miami, her son's father, knew Gundy (PC-R. 7480-81).

Hutchinson has been convicted of two felonies and two misdemeanors (PC-R. 7489). Hutchinson knew of Elmore prior to her testimony because he prosecuted her daughter's father for the murder of an investigator for the state attorney's office (PC-R. 7490). Hutchinson had no anger at Elmore or the state attorney's office over this (PC-R. 7490).

Finally, Hutchinson testified that she did not know Mr. Brooks or Davis and did not remember ever seeing them before in her life (PC-R. 7491). She was getting no benefit for testifying nor was she testifying because of her dislike of the state attorney's office or Elmore (PC-R. 7491).

The State called several witnesses in rebuttal. Glenn Swiatek is an attorney who was appointed to represent Davis on his postconviction motion (PC-R. 7429-30). He attended the deposition of Ferguson and arrived prior to prosecutor Elmore (PC-R. 7430). Swiatek identified himself as Davis' attorney (PC-R. 7431). Ferguson was hesitant about whether Swiatek was who he said or if he had been sent there by Elmore (PC-R. 7431). When Swiatek presented his business card, that might have eased Ferguson's mind somewhat (PC-R. 7431).

Swiatek was new on the case and was reading discovery (PC-R.

7432). As he was doing this, there was a conversation with Ferguson (PC-R. 7432). Ferguson asked Swiatek the date of the murder (PC-R. 7433). Swiatek had read it in the discovery and told Ferguson the date (PC-R. 7433). After he did that, Swiatek realized he had just become a witness in this case (PC-R. 7433). He made the decision to get off the case (PC-R. 7433). Ferguson wrote the date on the top of the affidavit (PC-R. 7434). During the deposition, Ferguson's only explanation for asking for the date was that he was trying to find out if Swiatek was an undercover agent for the state attorney (PC-R. 7439).

Gerrold Gundy testified that he lives in Crestview (PC-R. 7448). Gundy has been convicted of eight felonies, including a crime involving dishonesty (PC-R. 7462). He recalled an incident on March 12, 1999 at the EconoLodge in Crestview where three Bahamian men were arrested (PC-R. 7448). Gundy was there that day (PC-R. 7448). Prosecutor Elmore showed Gundy the names in the arrest documents as Ira, Dewitt, Elroy and Shereef Ferguson (PC-R. 7449).[51] Gundy didn't know the names of those individuals he was with when he got arrested (PC-R. 7449). The arrest was over drugs (PC-R. 7449). Gundy said he was let go because his prints were not on the bags of suspected drugs (PC-R. 7450-51).

Gundy was shown two pictures of Ira Ferguson (PC-R. 7457-58). He couldn't say that he knew him (PC-R. 7458). It was possible that he may have seen him before, but he couldn't say

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[51] Dewitt Ferguson falsely claimed to the police that his name was Ira Ferguson (PC-R. 7453).

that he had ever associated with him (PC-R. 7459). If that person said otherwise he would be lying (PC-R. 7460). And if that person said he was arguing with Rachel Carlson by Club Rachel's on the night of the murders, that would be a false statement (PC-R. 7460).

Gundy denied ever knowing Carlson (PC-R. 7460, 7464). He did know a lady named Shawna Tatum, who at the time of the murders was a white female with sandy colored hair (PC-R. 7460-61). She had a baby who rode in the back of a maroon Grand AM in a car seat (PC-R. 7461). Shawna Tatum's baby was a couple of years old at the time of the incident (PC-R. 7464).

Gundy testified that he was at Laurel Oaks Terrace on the day of the crime (PC-R. 7466). He was talking to Stanley Seals all that day (PC-R. 7466). He was later dropped off at another complex off Bay Street around dusk (PC-R. 7467). He denied going to Club Rachel's that night (PC-R. 7467). He stayed with a female named Tracy Johnson until the following morning (PC-R. 7468). That is where his cousin came and said the police had his house surrounded (PC-R. 7468).[52]

Sylvia Williams, a records custodian for the DOC, brought records to the hearing concerning Davis and Ferguson (PC-R. 7493).[53] Williams compared the external movements of Davis and

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[52]Gundy further testified that he considered himself a "player" at the time of the crimes; he had a lot of girls, and he could get these women to buy things for him (PC-R. 7471-73).

[53]S-Ex. F consists of the external and internal movement records of Walker Davis (PC-R. 7495). S-Ex. G consists of the external and internal movement records of Ferguson (PC-R. 7495).

Ferguson (PC-R. 7496). They were both at Wakulla C.I. from April to November 2010 (PC-R. 7496). They also overlapped in 2003 and 2010 at FSP West (PC-R. 7496-98).

Margaret Summers, a sergeant with the DOC, testified that she worked at the Wakulla C.I. Annex from October of 2008 to June of 2011 (PC-R. 7500-02). During that time, she came to know Ferguson and Davis (PC-R. 7502). Summers verified that according to the reports (D-Ex. 1), Davis and Ferguson were both at medical on July 1, 2010 (PC-R. 7533-35).

Summers studied the internal movement records of Davis and Ferguson while they were mutually incarcerated at Wakulla (PC-R. 7505). Summers never saw Ferguson and Davis together, nor did she find a time when they were housed in the same dormitory (PC-R. 7510, 7516). The closest she was able to place them was a two month period when Ferguson was in P Dorm and Davis was in Q Dorm (PC-R. 7510). Summers testified that they would have opportunities to interrelate on the yard, as the rec yard opportunities are the same time for P and Q (PC-R. 7510-11, 7514). They could be out there anywhere from zero to eight hours on a given day (PC-R. 7511).[54]

Summers further testified that there were also some common areas, such as chapel, medical and library, where inmates could get together (PC-R. 7515). Summers found one overlapping time in June where Ferguson was called out to the property sergeant and

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[54]Summers never saw Davis and Ferguson on the yard at the same time (PC-R. 7532).

Davis was called out to the library (PC-R. 7519). They are in the same building (PC-R. 7519-20). That was the only place that jumped out as Davis and Ferguson being in the same area at the same time (PC-R. 7519).

Regarding her conversation with Ferguson, Summers testified that he approached her, stating that he had something very important that he needed to tell her (PC-R. 7523). "He told me that he saw a dude and the dude is in prison but he didn't do it. And he went into a story about he was in Crestview and that this girl was killed, but he saw the girl at the bar or something and it was late, so they couldn't have done it." (PC-R. 7524). When Ferguson told her the story, she was able to figure out that he was talking about Davis (PC-R. 7545). Ferguson wanted her to tell the inspector, which she didn't do (PC-R. 7524). Summers told him to write a request and tell the inspector that he had important information relating to a crime (PC-R. 7524). Summers didn't recall speaking to Ferguson about it again (PC-R. 7525).

Brenda Adcock from the clerk's office at the Crestview Courthouse testified that there was no filed affidavit standing alone or with a cover letter from Ira Ferguson in either Davis' or Brooks' file (PC-R. 7551-56). And Robert Elmore testified that the first time he saw Ferguson's affidavit was when it came to him attached to Davis' postconviction motion (PC-R. 7563).

SUMMARY OF THE ARGUMENT

1. The jury did not hear critical, exculpatory evidence due to the ineffective assistance of counsel and/or the State's failure to disclose. Th jury did not hear of the extensive

forensic, serological and DNA testing that was conducted and failed to link Mr. Brooks to the crime. The jury did not hear evidence regarding another prime suspect in this case. The jury did not hear evidence conflicting with the timeline set forth by the State and demonstrating that Mr. Brooks could not have committed the murders. The jury did not hear evidence of other leads in the police investigation that did not involve Mr. Brooks. These deficiencies prejudiced Mr. Brooks, particularly when considered in conjunction with other instances of counsels' ineffectiveness as well as the newly discovered evidence.

2. Mr. Brooks was deprived of the effective assistance of counsel at the guilt phase when counsel failed to present available evidence to the jury despite having promised to do so in his opening statement. Trial counsel shifted the burden to his client by promising to prove things to the jury, and then he failed to meet this burden. Mr. Brooks was prejudiced as a result of trial counsels' deficient performance.

3. Mr. Brooks was deprived of the effective assistance of counsel at the penalty phase of his capital trial. Despite Mr. Brooks desire to waive mitigation, counsel was obligated to adequately investigate and prepare for these proceedings. Counsels' failure to do so prejudiced their client.

4. Newly discovered evidence establishes that Mr. Brooks would probably receive an acquittal on retrial. This evidence places another suspect in the case, Gerrold Gundy, with the victim on the night she was murdered. This evidence also establishes a time frame that excludes Mr. Brooks from having

committed the crimes. Standing alone, and/or when considered cumulatively with the favorable evidence that the jury did not hear, this evidence demonstrates that Mr. Brooks is entitled to a new trial.

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving mixed questions of law and fact and are reviewed *de novo*, giving deference only to the trial court's factfindings. Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999); State v. Glatzmayer, 789 So. 2d 297, 301 n.7 (Fla. 2001).

ARGUMENT I

MR. BROOKS WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL AND/OR THE STATE'S FAILURE TO DISCLOSE CRITICAL EXCULPATORY EVIDENCE AND/OR THE STATE'S PRESENTATION OF FALSE OR MISLEADING EVIDENCE, ALL IN VIOLATION OF MR. BROOKS' 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. AS A RESULT, CONFIDENCE IS UNDERMINED IN THE RELIABILITY OF THE JURY'S VERDICT.

A. INTRODUCTION

The United States Supreme Court has explained:

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

Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occurs, certain obligations are imposed upon both the prosecutor and defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and

'material either to guilt or punishment'". United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Additionally, the prosecutor must not knowingly rely on false or misleading evidence to obtain a conviction. Giglio v. United States, 405 U.S. 150 (1972); Alcorta v. Texas, 355 U.S. 28 (1957); Gray v. Netherland, 518 U.S. 152, 165 (1996). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 685. Where either or both fail in their obligations, a new trial is required if confidence is undermined in the outcome. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986).

Mr. Brooks was denied a reliable adversarial testing. The jury never heard considerable and compelling exculpatory evidence. In order "to ensure that a miscarriage of justice [did] not occur," Bagley, 473 U.S. at 675, it was essential for the jury to hear the evidence. State v. Gunsby, 670 So. 2d 920 (Fla. 1996). Whether defense counsel unreasonably failed to present the evidence, or the State suppressed the evidence, confidence is undermined in the outcome because the jury did not hear the evidence.

B. EVIDENCE THAT THE JURY DID NOT HEAR

1. Evidence Collection and Testing

During Mr. Brooks' trial, the jury did not hear available testimony that extensive hair examination was conducted by the Florida Department of Law Enforcement (FDLE), that hairs found at the scene were compared to Mr. Brooks' known hair samples, and

that no hairs were microscopically consistent with Mr. Brooks (D-Ex. 56, 57).[55] Moreover, the jury did not hear testimony that FDLE received debris from numerous items belonging to Mr. Brooks, including his sweat pants, tee shirt, sun visor, boots, socks, sweatshirt and gloves, and was unable to locate any hairs that were consistent with the victims (D-Ex. 56, 57, 58).[56]

Additionally, the jury did not hear testimony as to extensive serological and DNA testing conducted by FDLE. The jury did not hear available testimony that an FDLE expert examined multiple items belonging to Mr. Brooks, and that none of them tested positive for blood.[57]

2. Another Suspect

During the trial, the jury did not hear testimony that prior to the State's interest in Mr. Brooks and Walker Davis, there was another prime suspect in this case, Gerrold Gundy. The jury did not hear that shortly after the victims were found, a confidential informant told the police that he/she had seen Gundy riding earlier that same day with the white female driver in the

[55]FDLE received vacuum sweepings from the victim's car and from the clothing of both victims, and there was no match to Mr. Brooks (D-Ex. 56, 57, 58).

[56]And the jury did not hear that a caucasian hair was found in the victim's palm yet no testing was conducted on it.

[57]Among the items tested were Mr. Brooks' tee-shirt, boots, socks, visor, jogging pants and wallet (D-Ex. 73, 90). Further, numerous items from Mr. Brooks' backpack were tested without any positive results: a cellular phone, phone battery, contact lens case, deodorant stick, toothbrush, Bic pen, Listerine gel tube, Motorola plug, cassette case, receipts, plane ticket, boxer shorts and another tee-shirt (D-Ex. 90).

car found at the crime scene (D-Ex. 104). The jury did not hear that, shortly after the victims were found, a K-9 dog was called to the crime scene by the Crestview Police Department and that it was directed to track footprints at the scene (D-Ex. 101). The dog proceeded to lead police to the doorstep of where Gundy resided with his grandmother (D-Ex. 104), and where no evidence or testimony placed Mr. Brooks. According to a police report:

> At 0010 hours Lieutenant Worley arrived on the scene and the crime scene was turned over to him. At 0011 hours Lieutenant Worley requested dispatch to notify the Florida Department of Law Enforcement. At 0155 hours the Crime Scene Analyst (FDLE), Jan Johnson arrived on the scene. Lieutenant Worley also requested a K-9 Officer from Florida Game and Fish. K-9 Officer Jenkins arrived on scene at 0241 hours. **Lieutenant Worley advised Officer Jenkins and me to use the K-9 to follow a set of shoe track impressions on Railroad Avenue at the intersection of South Booker Street. The shoe track impressions were located inside the crime scene.** Officer Jenkins put the K-9 on the shoe track impressions. The K-9 followed the track west on Railroad Avenue from the crime scene. At the intersection of Railroad Avenue and South Lincoln Street the K-9 took a south turn onto South Lincoln Street. From this point, the shoe track impressions were tracked to Martin Luther King, Jr. Avenue. The K-9 then turned west onto Martin Luther King, Jr. Avenue and went to South Lloyd Street where he turned south on South Lloyd Street. The K-9 {sic} the followed a track to the intersection of Gordon and Martin Luther King, Jr. Avenue where he went north onto Gordon Street. From Gordon Street, **the K-9 went west on Grimes Street to 209 Grimes Street where we made contact with Lieutenant Worley and Investigator Selvage.**

(D-Ex. 101)(Emphasis added).

Further, in accordance with another report, this one by Lieutenant Worley,[58] the jury was not informed that:

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[58]Lieutenant Worley was in charge of the investigation in this case.

> 25 April 96
>
> At 0313 hours Investigator Terry Selvage rode with me to 201 Grimes Avenue, the home of Mrs. Orabell Stanley, Gerald Gundy's grandmother. Mrs. Gundy had a six foot chain-linked fence surrounding her yard and the gates were locked. I then called the operator service and had them call Mrs. Stanley and ask her to come outside. **As Investigator Selvage and I waited, he located a partially smoked Marlboro Light cigarette on the grassed right of way at the western edge of the concrete driveway. Investigator Selvage stated that an opened pack of the same brand cigarettes were inside the victim's car. I located a boot type track on the dirt part of the eastern right of way by the concrete driveway. I asked Officer Robert King over the radio to describe the track he was securing on Railroad Avenue. King stated that there was two tracks. One was a tennis shoe style, and the other a boot style track.** I then spoke with Mrs. Stanley, who stated Gerald was not home when asked. I then asked Mrs. Stanley where he was staying. Mrs. Stanley stated that Gerald called her once today and he was staying with his cousin, but she did not know his name. **I asked Mrs. Stanley for permission to search her home and she declined.**
>
> I heard over my police radio that the Game and Fish Officer I had requested was tracking the shoe tracks from the scene and were traveling towards Grimes Street. I waited in my vehicle and then I observed the Officer following the tracking dog. **The dog trailed the gate to gate of Mrs. Stanley's home.** I then requested the game officer, Donald Jenkins, to explain the dogs actions to me. **Officer Jenkins stated the canine was indicating the track was trailed to the gate at Mrs. Stanley's entrance gate, and ended, indicating the person entered the yard.**

(D-Ex. 104)(emphasis added).

The jury was never informed of even more incriminating evidence against Gundy. According to yet another police report dated April 25, 1996:

> Talked to CI/10 and she said that Petra Moore told her that Gundy was victim's friend or boyfriend.
>
> GUNDY !!
>
> 1) **Three witnesses putting him in vehicle at 1730**

hours.

2) Dog Trail.
3) **Conflicts in statement.**
4) His brand of cigarette at scene.
5) Victim's brand at suspect's gate.
6) **Denial of knowing victims.**
7) **Witnesses say she was his girlfriend.**

(D-Ex. 105; see also D-Ex. 106) (emphasis added).

3. Evidence that Mr. Brooks Could Not Have Committed the Murders

During Mr. Brooks' trial, the State tried to establish that the murders occurred in the vicinity of 8:30 p.m.[59] State witnesses claimed to have seen the victim's car parked at the crime scene at about this time.[60] Further, around this time, Irving Westbrook testified that he saw two men without shirts on walking on the street nearby, and that one had a limp (T. 1143-44). Another State witness, Kea Bess, stated that she saw Walker Davis and another male near the crime scene that night (T. 1506). Bess testified that she saw her cousin, Westbrook, a few minutes later (T. 1510).

While the jury heard the aforementioned testimony, it did not hear exculpatory and conflicting information demonstrating that Mr. Brooks could not have committed the murders. As far as the jury knew, the last time Mr. Brooks was seen at Davis' residence at Eglin Air Force Base, a lengthy distance from

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[59]The exact time of death could not be ascertained by the medical examiner. What is known is that after a 911 call was made, the police were at the scene at 11:46 p.m. (D-Ex. 35).

[60]Irving Westbrook testified that he saw the victim's car between 8:00 and 8:30 p.m. (T. 1136). Charles Tucker, who was with Westbrook at the time, testified that he saw the car at about 8:30p.m. (T. 1388).

Crestview, was at 7:00 p.m. on the night of the murders. Paul Keown testified that he sold Mr. Davis a waterbed on April 24, 1996, and that he helped Davis set it up at Davis' residence (T. 1364-65). Keown testified that he arrived at Davis' residence around 5:30 and that Mr. Brooks was present at the time (T. 1365). Also, while Keown was there, two women were at the residence and then left (T. 1365-66).[61] Keown stated the he left around 7:00 p.m. (T. 1366).

Given these circumstances, the jury was left with the impression that Mr. Brooks and Davis had plenty of time to get picked up by Carlson, drive to Crestview, and to commit the murders. However, what the jury did not hear was that, according to a police report, Mr. Brooks and Davis were still by Davis' residence between 8:45 and 9:00 p.m. on the night of the murders. The jury also did not hear that there was no sign of Rachel Carlson even being with them at this time, or of them having a car. According to a police report dated April 25, 1996, a witness, Laconya A. Orr, of 16-B Wright Drive, Eglin AFB, Fl., stated that between 8:45 and 9:00 p.m., Davis and a "skinny, shorter black male" came to her house looking for her husband, who was not home at the time (D-Ex. 54). Orr further related that the two men left on foot (D-Ex. 54).

Additionally, the jury did not hear that, according to a police report dated April 27, 1996, a witness named Tim Clark

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[61]The two women were Alicia Howell and Tricia Maddix (T. 1375). Howell testified that she went by Davis' residence at about 5:00 p.m. to retrieve her sunglasses (T. 1375).

saw the victim alive and well between 9:00 and 10:00 p.m., a time which also would have precluded Mr. Brooks from having committed the murders:[62]

> INTERVIEWED BY BARROW/PITTS
>
> Clark stated that on Tuesday, 23 April 26, or Wednesday, 24 April 96. He was working in his office at the First National Bank of Crestview. **Sometime between 2100-2200.** Clark stated that he went across the street to the Post Office and saw the Carlson's car stopped at the stop sign at Wilson and Oakdale but the car was pulled over to the opposite side of the road from which she was going. A tall black male was leaned over the car talking to her. The black male turned around and looked at Clark as he crossed the street to the Post Office. **Clark stated that he could see the driver of the car who he identified as Rachel Carlson. Clark stated that {sic} saw the Carlson's picture in the newspaper this morning and realized that was the same female he had seen that night talking to the black male.** Clark described the black male as about 6 feet tall, medium dark-skinned with very short hair wearing a green pull over shirt. We showed him a picture of

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[62]At trial the State presented evidence of Mr. Brooks and Davis' whereabouts during this time frame. According to the State, they were at Melissa Thomas' residence in Crestview, and at 9:22 p.m., Davis made a phone call to Rochelle Jones (T. 1527 1565). Thereafter, Jones, who worked at the Eglin Air Force Base hospital with Davis, drove to Crestview at Davis' request (T. 1543, 1566-67). Jones picked up Davis and Brooks from the Credit Union in Crestview (T. 1567, 1570). This was substantiated by the fact that Glenese Rushing, who banks at the Eglin Federal Credit Union, went there on the night of the murders to get some money from the ATM machine (T. 1471, 1472). She saw two men across the street get in a car (T 1476). The bank records established that her withdrawal occurred at 9:53 p.m. (T. 1483).

After leaving Crestview, Rochelle Jones was stopped for speeding by a Trooper Tiller, who testified that he issued her a ticket for driving with a suspended license (T. 1583, 1585). The citation was issued at 10:20 p.m. (T. 1586). Trooper Tiller also testified that there were two males in the front seat and children in the back (T. 1584). Because her license was suspended, Trooper Tiller allowed Davis to drive (T. 1585).

> Jerrold Gundy but he could not be sure if that was him. We showed Clark {sic} as **picture of Carlson and he stated that was definitely the woman he had seen in the car. Clark also identified the four door red Nissan as the car she was driving that night.**

(D-Ex. 49)(Emphasis added).

The jury was also never informed that according to a follow-up police report dated April 28, 1996:

> EVENT SUMMARY
>
> INTERVIEWED BY PITTS
>
> Witness [Clark] was shown photo of Walker Davis and his cousin, Lamar Brooks to see if he could identify one of them as being the black male that the victim was talking to outside the bank on {sic} Wednesday, 24 April 96. Witness also stated that he went back and checked the program he was running on the computer **and did confirm that it was Wednesday, 24 April 96 that he saw the victim outside the bank. Witness could not identify the black male from the photos that he was shown.**

(D-Ex. 49)(emphasis added).

Consistent with this information, the jury also did not hear that two other witnesses were in the vicinity of the murders after 9:30 p.m. and saw a car matching the description of the victim's, with a white female, alive, sitting in the car; a black male getting out of the back seat; and a baby seat in the rear passenger seat.[63] Later, these witnesses drove by the area again and saw police cars at the scene.

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[63]Shannon Chambers gave a statement to the police (See Doc. 44, 103) to this effect and testified at Davis' trial. While her time frame varied from her statement and trial testimony, even at its earliest it excluded Mr. Brooks from having been able to commits the crimes. Kenny Smith also testified similarly at Davis' trial.

4. **Stolen Vehicle**

The jury was not informed that a stolen pickup truck was a suspect vehicle in the murders. According to a police document dated April 29, 1996:

> REQUEST TRANSMISSION TO SOUTHEASTERN STATES
>
> WE HAVE RECEIVED AN ANONYMOUS TIP THAT A GREEN NISSAN PICKUP TRUCK WAS RECOVERED SOMETIME BETWEEN SUNDAY AND TODAY. THE TRUCK MAY HAVE HAD BLOOD OR BLOOD SPLATTER INSIDE THE VEHICLE AND/OR POSSIBLY ON THE EXTERIOR. A VEHICLE MATCHING THIS DESCRIPTION IS CURRENTLY A SUSPECT VEHICLE IN A DOUBLE HOMICIDE THAT OCCURRED IN OUR CITY. ANY AGENCY RECOVERING A VEHICLE OF THIS TYPE IS ASKED TO CONTACT THE CRESTVIEW POLICE DEPARTMENT INVESTIGATIONS DIVISION ATTENTION LIEUTENANT JEROME WORLEY (904) 682-4157 OR PAGER NUMBER (904) 833-0239.

5. **Polygraph**

An additional issue arose during the postconviction evidentiary hearing concerned D-Ex. 17, which contained documents relating to a polygraph examination of Melissa Thoms. At trial, Thomas testified that on the night of the murders, Davis and Brooks came to her house around 9 p.m. (T. 1525). Both men wore black nylon pants, but she could not recall what type of shirts they had on (1527-28). The State asked Thomas, "Do you remember telling Agent Haley that Lamar Brooks came out of the bathroom in shorts?" She responded, "I don't remember." (T. 1533).

Later, the State called Agent Haley, who testified over objection that Thomas had stated to him, "When Lamar Brooks arrived at her house he was wearing black jogging pants and a dark colored shirt, and when he went into the bathroom and came out he was wearing shorts and he was carrying backpack." (T.

2157). The State subsequently used this statement in its closing argument to establish that Mr. Brooks had changed clothes shortly after the murder:

> The evidence is reliable, it fits with all the other evidence that comes before her [Thomas] and that comes after her. Now, again, Mr. Szachacz [defense counsel] says well, she said they had a backpack. That's right, she told Dennis Haley, "Lamar Brooks went in that bathroom with a backpack and he came out in shorts. He was in long dark pants before he went in and he came out in shorts."

(T. 2434).

Trial counsel Szachacz testified at the evidentiary hearing that he did not recall receiving the documents regarding a polygraph examination of Melissa Thomas as contained in D-Ex. 17 (PC-R. 7037-38).[64] During her polygraph exam, which was administered by Special Agent Tim Robinson, Thomas was asked if she noticed if Mr. Brooks changed clothes, to which she answered "No." Robinson opined that Thomas was truthful in her answer (D-Ex. 17). Szachacz testified to the relevance of this evidence:

> [T]here's an insinuation that if the jury believed that he changed clothes, that he did so for a reason. To hide blood or get rid of evidence. And if Ms. Thomas testified with some more strength that she now does not remember that he didn't change clothes, then that might help the jury believe in his innocence.

(PC-R. 7056).

C. ANALYSIS

In its order, the circuit court addressed this issue as an ineffective assistance of counsel claim, and not a Brady claim,

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[64]Conversely, assistant state attorney Elmore testified that he had D-Ex. 17 in his possession and that he turned it over to defense counsel (PC-R. 393-94).

on the basis that defense counsel generally testified that they were aware of the evidence (PC-R. 1267).[65] The court proceeded to find that counsels' decision not to present the evidence in question did not constitute ineffectiveness (PC-R. 1255). In arriving at this determination, the court relied primarily on counsels' testimony that their inactions were based on a tactical decision (See, e.g, PC-R 1255). The court proceeded to find that counsels' strategy was not unreasonable (PC-R. 1257).

Mr. Brooks submits that the circuit court's determination is erroneous as a matter of fact and law. First, as to the evidence involving Gerrold Gundy, the circuit court determined that "[i]t was a reasonable strategic decision not to pursue Jerrold Gundy as an alternative suspect at trial. It is not unreasonable to avoid the danger of presenting a defense that could be rebutted, as such a defense would inevitably cause the defense to lose credibility with the jury." (PC-R. 1261). Here, the circuit court ignored the fact that trial counsel told the jury in his opening statement that they would learn about the cigarette outside the door of the victim's car and that the same brand was outside Gundy's residence; that they would learn all about Gundy and that witnesses told the police that they saw Gundy with the victim on the night that she was murdered; and that they would learn about the K-9 tracking dog that was brought to the scene and led the police officers to Gundy's residence (T. 1101-05).

[65] As to Thomas' polygraph, the court found credible the testimony showing that the State provided this information to the defense (PC-R. 1267).

Contrary to their postconviction testimony, Funk and Szachacz clearly intended at trial to make Gundy a feature of the defense and to pursue him as an alternative suspect at trial. Despite being aware of Elmore's style to try to limit what you were able to get out on cross by narrowing or tailoring his direct (PC-R. 7044), their intent was to present this evidence through the State's witnesses. However, these plans were thwarted, and trial counsel was seemingly caught flatfooted. But rather than present this pertinent information in their own defense, as reasonable counsel would have done, trial counsel instead attempted to preserve the issue for this Court's review on appeal by proffering the evidence. Counsel informed the court that "this would be the proffer of Investigator Worley. These are the questions I wanted to ask on cross, but based on your previous ruling, you indicated you would not let us get into that." (T. 2236). Trial counsel proceeded to elicit the following proffered testimony from Investigator Worley:

> Q You did some other things as part of your investigation that you did not talk about on direct, right?
>
> A Yes, sir.
>
> Q One of the things that you did was you went to the crime scene?
>
> A Yes, sir.
>
> Q And at the crime scene you spoke to a confidential informant person that was labeled confidential informant No. 10?
>
> A Yes, sir, I did.
>
> Q Okay. You also went to a residence, 201 Grimes Avenue?

A   Yes, sir, I did.

Q   And 201 Grimes Avenue is not on this map here, is it?

A   No, sir.

Q   But 201 Grimes Avenue is within a half mile of the corner of South Booker and Martin Luther King, right?

A   How far?

Q   Within a half mile, approximately a half mile?

A   Approximately, yes.

Q   Getting back to the scene, you were at the crime scene, you told us that, right?

A   Right.

Q   And you observed the red vehicle in its location?

A   Yes, sir.

Q   You also observed a partially smoked cigarette butt that lay to the west of the vehicle approximately ten inches from the driver’s door?

A   Yes, sir.

Q   Okay, and there was an investigator named Terry Selvage who was also with you parts of that night, right?

A   Yes, sir, he was.

Q   And you and Investigator Selvage road in a vehicle to 201 Grimes Avenue from the crime scene?

A   Yes.

Q   And while you were -- the purpose of you doing that was to attempt to speak with a Jerold Gundy?

A   Yes, sir.

Q   At that residence, 201 Grimes, one of the things you observed was a chain link fence that

surrounded the residence, and there was a gate blocking the driveway, right?

A Right.

Q And that gate was closed and locked?

A Right.

Q You attempted to make contact with the owner of the residence to speak with the people inside?

A Right.

Q Now, while you were waiting outside that gate, Investigator Selvage located a partially smoked Marlboro Light cigarette at the edge of the driveway, remember that?

A Yes, sir.

Q Now, those were Marlboro Lights. Do you remember the same brand of cigarettes, Marlboro Lights, being located and noted and video taped in Rachel Carlson's car in her door handle?

A I don't recall, but I'm sure it's on the lab forms and inventory from the vehicle.

Q Okay. Did you look inside the vehicle at all when you were there at the crime scene?

A I didn't physically go in and search the vehicle. I looked into the vehicle.

Q So if other witnesses have testified that they had found a cigarette pack in that door handle, you wouldn't dispute that, right?

A No.

Q Also while you were at the driveway there at 201 Grimes, you and Investigator Selvage located a boot type track on a dirt area next to the driveway?

A Yes.

Q And you made note of that?

A Yes, sir.

Q While you were there you asked for permission to search that home, right?

A Right.

Q And you were not -- you didn't get to go into the home and search it that night?

A No, we didn't.

Q To go back to the confidential informant, at the crime scene on South Booker you spoke to a person that was identified -- that you have identified as a confidential informant?

A Yes.

Q You asked her questions about what she saw?

A Right.

Q As a result at 3:13 in the morning, you went back to 201 Grimes Avenue? Let me clear that up. From the crime scene you didn't go directly to Grimes, right?

A No.

Q you went to Eglin Air Force Base first?

A Right.

* * * *

Q So from the crime scene you went to Eglin Air Force Base, from Eglin back to 201 Grimes?

A Right.

Q And that was because of the information you were given by the confidential informant?

A Right.

Q And you went back to that area to speak with -- well, that was Jerold Gundy's residence, correct?

A Well, his grandmother's.

Q Jerold Gundy's grandmother lived there?

A Right.

Q And so did Mr. Gundy from the information you had?

A Right.

Q You went back there to speak with Mr. Gundy, to question him, right?

A Yes.

Q The confidential informant that you spoke to, in fact, had identified Jerold Gundy as someone who had --

* * * *

Q Did the confidential informant identify Jerold Gundy as a person that had been in that car that was on South Booker as part of the crime scene?

A No.

Q The confidential informant never told you that Jerold Gundy had been in that car?

A What her words were, I couldn't swear to it, but she believed that that was Jerold Gundy is what she told me.

* * * *

Q Do you have your report with you?

A Yes.

Q I can just show you mine if that's easier, sir. Do you have it?

A Yes.

Q I'm on Page 2. It was that section that you just read. About halfway down it says CI 10 then returned to me and stated that the car contains a child seat, and Jerold Gundy was in the front passenger seat this same day riding with the white female driver. This took place at 1:40 hours.

A Right.

Q That's in our report, right?

A Yes.

* * * *

Q Do you recall seeing -- while you were at 201 Grimes Avenue, do you recall seeing the tracking dog come to the residence?

A Yes.

Q And there was a K-9 officer with that dog, correct?

A Yes.

Q It was your agency that requested the assistance of that officer and his K-9?

(T. 2237-48).

While the aforementioned testimony was important enough for counsel to proffer into the record to preserve the issue for appeal, counsel inexplicably failed to present it to the jury by calling Worley as a witness in the defense case. As a result of trial counsels' deficient performance, the jury never heard evidence which counsel believed to be critical. Counsels' attempts at the evidentiary hearing to minimize the value of evidence that counsel previously highlighted to the jury resembled more a *post-hoc* rationalization of counsels' conduct than an accurate description of their deliberations. Wiggins v. Smith, 123 S.Ct. 2527, 2538 (2003).

With regard to trial counsels' failure to present the aforementioned forensic evidence, the court found that counsel argued a lack of evidence in closing argument to the jury (PC-R. 1258-59). The court determined that "[r]ather than putting on witnesses or other evidence and losing the final closing argument, the Defense was able to argue to the jury the reasonable inference that that the lack of blood and hair evidence introduced at trial shows that such evidence did not exist." (PC-R. 1259). The court concluded that such a tactic was not unreasonable (PC-R. 1259).

In arriving at its determination, the circuit court again overlooked the fact that trial counsel told the jury in his opening statement that they would hear this evidence, thus establishing that, contrary to their evidentiary hearing testimony, counsel wanted it placed before the jury.[66] Moreover, the court ignored the fact that when counsel was unable to place it before the jury through cross-examination, counsel proffered it for the record. As Funk stated at the trial, "the appellate court needs to read this" (T. 1913).

Trial counsel proffered testimony that the police collected an empty Newport cigarette pack found near the crime scene and it was photgraphed, packaged up and sent to be tested for prints (T. 1909-11). Counsel proffered testimony that the following items that came from Mr. Brooks were submitted for testing: a New York Yankees sun visor, a white T-shirt, a pair of brown boots, two pair of white socks, a pair of sweatpants, a black wallet and contents, a brown nylon backpack, a motorola phone and battery, a contact lens case, a Brut deodorant stick, a purple toothbrush, a gray/white Bic pen, a cigarette lighter adapter cord, a cassette tape case, a toothbrush and case, two Jay's Sandwich Shop receipts, bluejean shorts, boxer shorts, a gray cloth cutting, a Hilfiger T-shirt, a Western Union receipt, an airplane ticket, a green Bic pen, a listerine Tooth Gel tube, a black sweatshirt,

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[66]For instance, counsel informed the jury that they would learn that cuttings were taken from Thomas' couch where Mr. Brooks sat and Luminol was used to test for blood, yet there was no indication of blood (T. 1107).

and a Northwest Airlines boarding pass and invoice (T. 2060-63). Trial counsel proffered that there was no blood on any of these items:

> Q So is it fair to say that all of the items that I just listed and you agreed were submitted to you, you did not find any blood on any of those items?
>
> A There were no indications for blood or no staining, whichever applied for each item.

(T. 2064). And counsel proffered testimony from Agent Bettis regarding items seized for testing from Mr. Brooks when he was arrested in Chester (T. 2211-14).

Trial counsel never presented the evidence to the jury, despite recognizing its immense value, "There was a bloody, bloody, bloody scene and in my opinion, the person or persons that did this would have blood all over them, including their clothing. And that was part of our theory in this case was that there was no blood found anywhere on Mr. Brooks." (PC-R. 7077-78). Yet, instead of presenting actual available evidence, counsel argued inferences to the jury. Of course, argument does not constitute evidence. Trial counsel failed in their duty to present "an intelligent and knowledgeable defense." Cunningham v. Zant, 928 F.2d 1006, 1016 (11th Cir. 1991). The circuit court's finding that it was reasonable for counsel to argue based on inferences as opposed to actual available evidence is erroneous as a matter of law.

With regard to the "Caucasian hair" in Carlson's palm, the circuit court stated that Mr. Brooks presented no evidence that counsel was deficient by not having a hair tested if it outwardly

appeared to be the victim’s own hair; and that Mr. Books failed to demonstrate that the hair could have been DNA tested (PC-R. 1259). Moreover, the circuit court found that “[t]he Defendant has not met his burden of demonstrating a reasonable probability the result of the trial would have been different had the hair been tested further or if evidence of this Caucasian hair had been presented at trial.” (PC-R. 1260).

As the circuit court did throughout its order, it erroneously failed to conduct a cumulative analysis of the evidence which the jury did not hear. Moreover, the circuit court’s determination is erroneous in that it overlooked the fact that trial counsel could have used this evidence to argue reasonable doubt. As this Court explained in Hoffman v. State, 800 So. 2d 174, 180 (Fla. 2001):

> Whether Hoffman was in fact in that motel room was an important issue that the jury had to resolve. Therefore, any evidence tending to either prove or disprove this fact would be highly probative. Hair evidence found in the victim's clutched hand could tend to prove recent contact between the victim and a person present in that room at the time of her death. **With the evidence excluding Hoffman as the source of the clutched hair, defense counsel could have strenuously argued that the victim was clutching the hair of her assailant, *but* that assailant was not Hoffman.**

(Emphasis added). Here, reasonable counsel could have used the evidence, as this Court explained in Hoffman, to strenuously argue that the victim was clutching a hair belonging to the assailant, and that by virtue of not being Caucasian, Mr. Brooks could not be the assailant.

As to the timeline witnesses, the circuit court again

erroneously deferred to trial counsels' after-the-fact justifications. According to trial counsel Funk, the timeline was fixed with the state trooper's citation and the phone call at Melissa Thomas' house (PC-R. 6957). Funk believed that the timeline was going to leave you nowhere in terms of helping Mr. Brooks or casting doubt on the government's theory of what happened (PC-R. 6957). However, it is precisely because the timeline for when Mr. Brooks could have committed the murders was narrow, that it was incumbent upon reasonable counsel to present available evidence demonstrating that Mr. Brooks could not have committed the crimes in this time frame. Yet, trial counsel failed to subpoena LaConya Orr, despite the fact that her testimony would have made it difficult to place Mr. Brooks in Crestview in time to commit the murders.[67] Trial counsel failed to present evidence that Tim Clark told police officers that he saw the victim alive between 9 and 10 p.m., evidence which would have again excluded Mr. Brooks from having committed the murders.[68] And trial counsel failed to presented evidence that

[67]In denying this issue, the circuit court relied on Funk's testimony that he thought the jury would see through it in stating that it would not second guess this reasonable strategic decision (PC-R. 1262). However, there is no indication that Orr was a biased witness or somehow had a stake in the case. She was just another of the many witnesses that the police interviewed. The only difference is that her testimony conflicted with the State's timeline. Here, counsels' strategic decision was anything but reasonable.

[68]When presented with Tim Clark's statements during the postconviction evidentiary hearing, trial counsel fashioned an excuse that he would not be helpful, and the circuit court subsequently found that "counsel was not ineffective for failing to call Tim Clark as a witness, as his testimony clearly would

other witnesses, including Chambers, saw the victim alive after Mr. Brooks could have committed the murders. Contrary to trial counsels' testimony, had they not performed in a deficient manner, the time could have won the day for the defense (See PC-R. 6945).[69]

As to the green Nissan pickup truck, the circuit court determined that Funk and Szachacz's assessments of the evidentiary value of the truck were not unreasonable under the circumstances, and that Mr. Brooks failed to demonstrate that any further investigation of the truck would have rendered this evidence admissible or probative to the murders of Rachel Carlson and Alexis Stuart (PC-R. 1265).

The court's analysis is erroneous in that it again ignores the fact that trial counsel actually wanted to get this information into evidence at trial. Unable to do so during

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not have been beneficial to the defendant." (PC-R. 1263). Again, trial counsels' after the fact rationalizations don't change the fact that Clark made these statement to the police. Counsel could have inquired of the police as to these statements, or they could have introduced them as impeachment of Clark if he denied making them on the stand. Either way, there was no reasonable basis for counsel not to present these statements to the jury.

[69]As to the witnesses who saw the victim alive later in the evening, the circuit court relied on counsels' testimony that they had been significantly impeached at the Davis trial (PC-R. 1264). According to the court, counsel is not ineffective where they decide not to present a witness with questionable credibility (PC-R. 1264). Again, trial counsels' reasoning smacks of nothing more than a post-hoc rationalization. Had counsel performed effectively, this testimony when viewed cumulatively with all of the other evidence that counsel failed to present, would have established a reasonable probability of a different outcome.

cross-examination, counsel proffered this evidence:

> Q Okay. Also as part of our investigation, did you learn of a green Nissan truck that was stolen from Crestview on Sunday, the Sunday before the crime?
>
> A I'd have to refresh my memory on that too because I don't recall that.
>
> * * * *
>
> Q You had learned that a green pickup truck had been stolen and had blood in it, right?
>
> A According to this, yeah.
>
> Q Did you investigate that?
>
> A Yeah, someone did, not necessarily me, but it was investigated.
>
> Q I need to be more specific with the proffer. This green pickup truck was reported stolen from Crestview on Sunday, and that Sunday would be before April 24th, correct?
>
> MR. ELMORE: April 29th was Monday if that helps.
>
> A Right, but I'm -- the 29th or 28th, I'm not sure.
>
> Q Do you know whether the blood that was in that truck was ever compared to the blood of Rachel Carlson and/or her baby?
>
> A No, I don't.

(T. 2244-46). Thus, at the time of trial, counsel presumably recognized that the efficacy of the police investigation was certainly information that was relevant to Mr. Brooks' defense. This fact does not chance simply because of counsels' subsequent excuses for their deficient performance.[70] Here, the circuit

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[70]During the postconviction evidentiary hearing, Szachacz testified that he was aware of the BOLO that had been sent out about the stolen vehicle, but he saw no way to connect the BOLO in any useful way in the defense (PC-R. 7047, 7074). Funk

court erred in relying on counsels' post-hoc rationalizations, as they are rebutted by the trial record.

As to Melissa Thomas, the circuit court found that her testimony was "not truly inconsistent" with her statements made in her polygraph examination or Agent Haley's testimony (PC-R. 1266). Thus, according to the court, "The Defendant has not shown that counsel was ineffective for not introducing Melissa Thomas' polygraph or her prior statement that the Defendant did not change clothes." (PC-R. 1266). Here, the circuit court's order seemingly overlooks trial counsel's testimony that he would have utilized the polygraph or the information contained therein, but that he did not recall receiving the document from the State (PC-R. 7037-39).

As to the Giglio clam regarding Haley's testimony, the court stated that "the mere fact that Melissa Thomas gave a statement during her polygraph that was inconsistent with Agent Haley's testimony as to another statement made by Thomas does not mean Agent Haley's testimony was false or that the prosecution knew it was false." (PC-R. 1266). Here, the circuit court misapplied the law, as a Giglio violation is not limited solely to actual falsehoods; misleading information can equally constitute a Giglio violation. See e.g., United States v. Bagley, 473 U.S. 667, 684 (1985); Alcorta v. Texas, 365 U.S. 28, 31 (1957); Troedell v. Wainwright, 667 F. Supp. 1456 (S.D. Fla 1986) quoting

testified he never received anything that linked the vehicle to the homicides (PC-R. 6950).

Donnelly v. DeChristoforo, 416 U.S. 637, 638 (1974)("As has been explained elsewhere, **'[t]he term 'false evidence' includes the 'introduction of specific misleading evidence important to the prosecution's case in chief . . . .'** ."(emphasis added). Here, despite knowing that Thomas was truthful in her response on the polygraph that Mr. Brooks did not change clothes, the prosecutor wanted the jury to believe otherwise.

D. CONCLUSION

This is a case which is based almost entirely on circumstantial evidence. This is a case in which a multitude of evidence has been thrown out as inadmissible by this Court and in which there is no longer a "confession" in evidence as to the guilt phase. When consideration is given to the wealth of exculpatory evidence that did not reach Mr. Brooks' jury, either because the State failed to disclose or because trial counsel failed to discover, confidence in the reliability of the outcome is undermined.[71]

In addition, cumulative consideration must be given to other instances of counsels' ineffectiveness (Ground II) as well as to the newly discovered evidence (Ground IV). See State v. Gunsby, 670 So. 2d 920, 923-24 (Fla. 1996). Mr. Brooks submits that when

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[71]Although the facts underlying Mr. Brooks' claims are raised under alternative legal theories -- i.e., Brady, Giglio, and ineffective assistance of counsel -- the cumulative effect of these facts in light of the record as a whole must nevertheless be assessed. As with Brady error, the effects of the deficient performance must be evaluated cumulatively to determine whether the result of the trial produced a reliable outcome.

the evidence presented throughout his capital postconviction proceedings is considered cumulatively, confidence in the outcome is undermined.

ARGUMENT II

MR. BROOKS WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE OF HIS CAPITAL TRIAL WHEN TRIAL COUNSEL FAILED TO PRESENT AVAILABLE EVIDENCE TO THE JURY DESPITE HAVING PROMISED TO DO SO IN HIS OPENING STATEMENT.

A. INTRODUCTION

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

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

466 U.S. 668, 685 (1984). In order to insure that a constitutionally adequate adversarial testing, and hence a fair trial, occur, defense counsel must provide the accused with effective assistance. Accordingly, defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 685. Where defense counsel fails in his obligations and renders deficient performance, a new trial is required if confidence is undermined in the outcome. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986).

B. INEFFECTIVE ASSISTANCE OF COUNSEL

In Mr. Brooks' case, trial counsel informed the jury during his opening statement that extensive evidence beneficial to Mr.

Brooks would be presented:

> Mr. Elmore came up for quite some time and he told you some things that he thinks the evidence is going to show. He didn't tell you everything. He won't be able to overcome their burden and here's why. You're going to hear from one of the state's witnesses who'll be presented to you as an expert witness.
>
> This expert witness will tell you that the person that committed this crime would have been very bloody. That's an expert witness that's going to tell you that. You're going to learn that there was no blood on Mr. Brooks, none, not a drop, not a speck, none any where, not on his shoes, not on his clothes, not on his face, none.
>
> There's more. You're going to learn that there was a cigarette found outside of Rachel Carlson's car, outside of the driver's side front door. There was a cigarette on the ground. We know that because at the time there was an officer named Malcolm Harrison.
>
> This officer, when he approached the scene made some very detailed notes. One of the details that he noticed was a used and extinguished cigarette right outside the door to her car. **You're also going to learn that that cigarette was tested for DNA and it excluded Mr. Brooks, excluded him as the person who had that cigarette in their mouth outside that door of Rachel Carlson's car. It wasn't him.**
>
> You're also going to learn some more about cigarettes. **Because the same brand of cigarette that was found outside that door of Rachel Carlson's car that night, that same brand was found at a residence less than or approximately about a half a mile away. That residence is 201 Grimes Avenue. The same brand of cigarette was found outside that residence at the gate.**
>
> Now, you haven't heard of another name yet. This gentleman's name is Jerold Gundy. You haven't heard about him. **Jerold Gundy lived at that time at 201 Grimes Avenue. You will learn that Jerold Gundy smokes that type of cigarette that was found outside of Rachel Carlsons's car. You will learn that the police officers in this case investigated. And when they investigated they were told that Jerold Gundy {sic} new Rachel Carlson and that Jerold Gundy –**
>
> * * * *
>
> MR. SZACHACZ: Ladies and gentlemen, you're going

to learn that the person that lived at that time at 201 Grimes Avenue who **used the same brand of cigarette that was found outside that car is Jerold Gundy. During the investigation Major Worley learned that witnesses told him that they saw Jerold Gundy with Rachel Carlson that night and that he knew Rachel Carlson.**

There's still more about cigarettes because Rachel Carlson smoked cigarettes. She smoked Marlboro Lights. During the investigation they found a pack of Marlboro Lights cigarettes in Rachel Carlson's car on the driver's door handle area next to a cigarette lighter. **A Marlboro Lights cigarette was also found in front of 201 Grimes Avenue at the gate to that residence.** The same brand of cigarette that Rachel Carlson smoked, approximately a half mile a way from the scene where she was found.

You're also going to learn that a dog, a K-9 dog was brought to the scene, a dog that tracks suspects and that this K-9 dog near the scene of the crime, near that car, tracked from a spot near that car to 201 Grimes Avenue.

You will also learn about a shoe imprint or a shoe impression that was seen and examined near that car on a dirt road, Railroad Avenue, thirty yards or so from the car. **They examined that impression and they took an impression and they seized this man's shoes. They didn't match. There was no match.**

You're going to learn all about South Booker Avenue in between Martin Luther King Boulevard and Railroad Avenue. It's a short section of road, a short section of paved road approximately the size of a football field, a hundred yards or so. Maybe a little bit longer, maybe a little bit shorter. You're going to learn about that road. That's where the car was found.

* * * *

You're also going to learn during this investigation that the police investigated a taxi cab company called City Taxi or City Cab, because somebody was picked up around 9:15 at night that looked suspicious and was brought to a residence on Lakeview Drive. Officer Selvage investigated that. He checked into numerous taxi cab companies before he found out that, yeah, there was somebody around that area that was picked up in a cab and driven to this residence on Lakeview Drive.

So, what did he do? Well, he went to Lakeview Drive and inquired. The person that lived there denied it and said, I was never in a cab. Nobody ever was dropped off at my house.

Mr. Elmore said that Rachel Carlson fought for her life. They examined, the investors in this case and the experts examined her fingernails. They took her fingernails and looked at them for any shred of evidence. They didn't find anything to connect to Mr. Brooks, no skin, none of his blood, none of his hair, no clothing that could be connected to Mr. Brooks, nothing.

Ladies and gentlemen, you're going to hear about the physical evidence or the lack of physical evidence in this case. You'll hear a lot about physical evidence. Physical evidence is unbiased, objective and trustworthy evidence. Physical evidence is more than mere words.

You're going to hear words from Mark Gilliam, a person who changes his story at least three times, a person who lies to cover himself, a person who threatened and pressured and even arrested and charged with perjury and put in jail for it. You're going to hear his words. His word is no good. His word is no good.

Let's get back to the physical evidence, the objective, unbiased, trustworthy evidence. **You're going to learn that at Melsssa Thomas' house they took cuttings from a couch because that's where Mr. Brooks sat. They tested for blood.**

They used a chemical called Luminol that detects the presence of blood. They didn't find any. They didn't find anything from the couch. They didn't find any blood. They didn't find anything to connect Mr. Brooks to Rachel Carlson. Nothing. The objective, unbiased, trustworthy evidence.

They searched Rochelle Jones' car. They tested her car. Remember Mr. Brooks was in her car at 10:23 that night. No blood was found in her car, no blood from Rachel Carslon, none, nothing to connect Mr. Brooks to Rachel Carlson.

(T. 1101-08)(emphasis added).

Despite making these many promises, and despite the fact that this evidence was available, the jury never heard this

information.[72] Thus, in addition to the jury being deprived of this critical evidence, trial counsel shifted the burden to his client by promising to prove things to the jury, and then counsel failed to meet this burden.

C. ANALYSIS

In its order, the circuit court determined that "counsels' decision not [to] present evidence during the guilt phase, and to strategically focus its attack on whether the State has proven its case beyond a reasonable doubt, was not 'deficient'. This is particularly true considering the arguments presented by counsel during closing argument attacking the strength of the State's case while essentially 'raising the specter' of Gundy." (PC-R. 1269). As to prejudice, the court stated, "The Defendant has not shown that there is a reasonable probability the result of the trial would have been different had counsel introduced such evidence or made a different opening statement." (PC-R. 1271).

Mr. Brooks submits that the circuit court's determination is erroneous in that it never actually addresses the content of counsel's opening argument. This is not just a question of strategy or whether counsel should have done more in defense of his client. Rather, this is a case in which counsel promised the jury that it would hear extensive exculpatory evidence and

[72] Instead, trial counsel ended up proffering this evidence to the judge outside the jury's presence (T. 1908-16, 2060-64, 2210-14, 2237-50).

then failed to deliver on that promise.[73]

In order to insure that an adversarial testing and, hence a fair trial, occurs, certain obligations are imposed upon defense counsel. United States v. Gray, 878 F.2d 702 (3rd Cir. 1989). Courts have recognized that in order to render reasonably effective assistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). "'Reasonable performance of counsel includes an adequate investigation of facts, consideration of viable theories, and development of evidence to support those theories.'" Hill v. Lockhart, 28 F.3d 832, 837 (8th Cir. 1994)(quoting Foster v. Lockhart, 9 F.3d 722, 726 (8th Cir. 1993)).

Here, trial counsel failed in his obligation to Mr. Brooks. It appears that trial counsel may have been under the erroneous impression that he could present all of the evidence through

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[73]When trial counsel discussed Gundy during his opening statement, the prosecutor objected on the basis of hearsay (T. 1102-03). In response, trial counsel Szachacz stated that he could get the evidence in, and if not, the State could jump all over it in its closing:

> MR. SZACHACZ: It's opening statement. I can get that evidence in. I guess Major Worley's report learned these things in his investigation. There are several ways, one or two ways I can get that in. He spoke with that CI and I think I can ask him about that. That's why I mentioned that in my opening statement. If it doesn't come in, he gets to jump all over it in closing argument.

(T. 1103). Trial counsel did not get the evidence in.

cross-examination, even where it exceeded the scope of direct examination. However, ignorance of the law is no defense. Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991). "[S]o called 'strategic' decisions that are based on a mistaken understanding of the law, or that are based on a misunderstanding of the facts are entitled to less deference." Hardwick v. Crosby, 320 F.3d 1127, 1185-86 (11th Cir. 2003)(citation omitted)(note omitted). A tactical or strategic decision is unreasonable if it is based on a failure to understand the law. Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991).

As the State pointed out, when trial counsel attempted to elicit information from an expert regarding cuttings taken from Melissa Thomas' couch, "**If he wants to put on a defense case like the one he explained in opening, then he should have to put it on through his witnesses, not through mine, especially when I stayed away from it on my direct examination.**" (T. 1535)(emphasis added).[74]

Subsequently, when trial counsel attempted to elicit information regarding Gundy on cross-examination, the following occurred:

> Q As part of your investigation in this case, did you come to know the name Jerold Gundy?
>
> A Is that how I came to know the name of --
>
> MR. ELMORE: **I object, far outside the scope.**
>
> COURT: **It is, sustained.**

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[74]The Court agreed with the State's argument (T. 1535-1537).

(T. 1606)(emphasis added). The trial court explained to counsel that he could present this evidence in his own case:

> So more than likely depending on the questions, of course, that are asked, **I'll let you get into that in your case in chief if you want to.**
>
> MR. SZACHACZ: Get into what?
>
> COURT: The areas that you just talked about.
>
> MR. ELMORE: All the extra stuff you wanted.
>
> COURT: Yeah, the Gundy stuff that you're talking about.
>
> MR. SZACHACZ: you're going to let me get into that?
>
> COURT: No, no.
>
> MR. ELMORE: Not in the case in chief.
>
> COURT: In your case.
>
> MR. SZACHACZ: I hear him.
>
> MR. ELMORE: That's what he said. I just wanted you to know.
>
> COURT: **In other words you can put on your own witnesses in the case that you put on, let's put it that way, and I'm comfortable with that.** That's probably what I'd do. Now, of course, if Bobby says something that does open the -- starts talking about Gundy or something like that, then that's different, but I mean if he's going to do what he says he's going to do, **then if you have a case that you want to put on, you'd have to put your witnesses on then, but I won't let you put in on to -- exceeding what I consider the scope of direct.**

(T. 2206-07)(emphasis added).

A similar situation occurred at another point during trial counsel's cross-examination:

> Q Okay. Robert Hursey, he's the -- is he a microanalyst with Florida Department of Law Enforcement?

A I believe so, yes. I believe out of the Tallahassee laboratory.

Q And he had sent you three rooted hairs for your analysis.

MR. ELMORE: Judge, I object, this is beyond the scope.

THE COURT: I'm not sure if it is yet.

MR. ELMORE: May we approach?

SIDE BAR CONFERENCE:

MR. ELMORE: Judge, I limited my examination to specific exhibits. Mr. Funk wants now to get into other exhibits --

THE COURT: **It's the same thing we were doing yesterday If that's where you're going, I'm going to let you call him as a witness, regardless of the fact that you might think I'm keeping you from calling a witness, but I'm keeping the cross and also the redirect based on the previous testimony. In other words, I don't want you to exceed direct.**

MR. FUNK: Yes, sir.

* * * *

A There were some hairs forwarded and I did attempt a DNA analysis on them, yes.

Q Okay, you attempted and you could not, right?

A I could not get a type.

Q Okay. There were also some items submitted to you that you typed, and there's a laundry list that gave -- of items coming from Mr. Brooks right? September 30, '96 report might help you, if you get that.

A Would you know my submission number? I've got about fourteen submissions.

MR. ELMORE: **Judge, I'm going to object. This is beyond scope.**

THE COURT: **It is. Sustained.**

Q When you answered yes to the question that you were able to type other things submitted to you

that had not been asked of you, is that what you were talking about?

MR. ELMORE: Judge --

MR. FUNK: He answered yes to that, Judge. He answered yes, without objection.

THE COURT: **The objection, I let you go with one question that seemed to be innocuous to me at that time about the hairs, but I don't want you to exceed direct, because that's where you're going. I'm not going to let you do it.**

MR. FUNK: It's the same objections, Judge, my inability to cross-examine this guy on things that he's already told him he did.

THE COURT: Okay. So we got that straight? You know that, where we are? Okay.

MR. ELMORE: Thank you, Judge.

(T. 2053-57)(emphasis added).[75]

Despite knowing what they promised the jury, and despite learning of the fact that they couldn't get this evidence in through cross-examination, counsel never presented a defense. Thus, to Mr. Brooks' detriment, not only did the jury never hear the evidence it was promised, trial counsel failed to meet the burden they had shifted to Mr. Brooks to establish his innocence.

Trial counsels' deficient performance prejudiced Mr. Brooks. Strickland. This is a case which is based almost entirely on circumstantial evidence. This is a case in which a multitude of evidence has been thrown out as inadmissible by

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[75]And, when counsel attempted to question a witness regarding his investigation at Thomas' house, the prosecutor objected as beyond the scope and the court sustained the objection (PC-R. 1905-06).

this Court and in which there is no longer a "confession" in evidence as to the guilt phase. Mr. Brooks submits that, with the addition of the evidence which the jury did not hear, the errors in this case can no longer be rendered harmless. Rather, confidence is undermined in the outcome.

In addition, cumulative consideration must be given to other instances of counsels' ineffectiveness (Ground I), violations of Brady/Giglio (Ground I), as well as to the newly discovered evidence (Ground IV). See State v. Gunsby, 670 So. 2d 920, 923-24 (Fla. 1996). Mr. Brooks submits that when the evidence presented throughout his capital postconviction proceedings is considered cumulatively, it is clear that relief is warranted.

ARGUMENT III

TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE AT THE PENALTY PHASE BY FAILING TO INVESTIGATE AND PRESENT AVAILABLE MITIGATING EVIDENCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, AND THIS FAILURE RENDERED MR. BROOKS' DECISION TO WAIVE PRESENTATION OF MITIGATING EVIDENCE INVOLUNTARY IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

A. INTRODUCTION

At the time of Mr. Brooks' penalty phase, counsel had an absolute obligation to investigate and prepare mitigation for his client. Wiggins v. Smith, 123 S.Ct. 2527 (2003); Rompilla v. Beard, 125 S.Ct. 2456, 2465-6 (2005); Porter v. McCollum, 130 S.Ct. 447 (2009); Sears v. Upton, 130 S.Ct. 3529 (2010). In order to establish that counsel's performance was deficient, a

defendant must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 688 (1984). Strickland's prejudice standard requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694.

Prior to commencement of the penalty phase, the trial court was informed that Mr. Brooks wished to waive the presentation of all mitigating evidence (T. 2613). The court questioned Mr. Brooks about this decision (R. 5196-5219). Thereafter, trial counsel presented a list of mitigation he believed applied to Mr. Brooks' case (R. 5194).

The State relied on the evidence it had presented in the guilt phase of the trial, and on the testimony of several victim impact witnesses. Trial counsel conducted no cross-examination, rendered no objections to the State's closing argument, nor did counsel present a summation.

The court thereafter asked for a sentencing memorandum from the State and Mr. Brooks. The State submitted one detailing the aggravation it believed the court should find and why it should minimize the mitigation that might apply (R. 5161-78). Counsel for Mr. Brooks did not file a memorandum. Subsequently, during the Spencer hearing, the State introduced the testimony of Terrance Goodman, who stated that Mr. Brooks indirectly admitted to killing the victims. Brooks, 918 So. 2d at 209. Goodman was not cross-examined by trial counsel.

B. ANALYSIS

In response to Mr. Brooks' postconviction claim that trial counsel rendered ineffective assistance at the penalty phase, the circuit court denied relief on the basis that counsel informed the court what mitigating evidence would be presented; Mr. Brooks knowingly, intelligently and voluntarily waived the presentation of mitigation; Mr. Brooks instructed his counsel not to present mitigation; and Mr. Brooks reaffirmed his decision on the record on several occasions (PC-R. 1272).

Mr. Brooks submits that the circuit court's determination is erroneous as a matter of law and fact. Counsel cannot advise or make a reasonable decision about that which he has failed to investigate. Nor can counsel's client make any "knowing" waiver of evidence of which he is unaware. In terms of waiving mitigation, in order for a defendant to do so, counsel "first must evaluate potential avenues and advise the client of those offering potential merit." Koon v. Dugger, 619 So. 2d 246, 249 (Fla. 1993). "Although a defendant may waive mitigation, he cannot do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision." Id.

In Rompilla v. Beard, 125 S.Ct. 2456, 2466 (2005), the United State Supreme Court stated:

> 'It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include

> efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.' 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.).

(Note omitted). The guidelines referenced by the Supreme Court make three points relevant to Mr. Brooks' case abundantly clear: 1) the lawyer has a duty to thoroughly and comprehensively investigate for the penalty phase; 2) the investigation must be promptly done; and 3) it makes no difference that the client does not want to present mitigation.[76] This point was later reiterated by the Supreme Court in Porter v. McCollum, 130 S.Ct. at 453. There, trial counsel blamed his lack of investigation on the fact that Porter was fatalistic and uncooperative, and Porter instructed counsel not to speak to his ex-wife or son. Id. at 453. According to the Supreme Court, "The decision not to investigate did not reflect reasonable professional judgment. *Wiggins, supra,* at 534, 123 S.Ct. 2527. Porter may have been fatalistic or uncooperative, but that does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation. See *Rompilla, supra,* at 381-382, 125 S.Ct. 2456." Id. at 453.

In Mr. Brooks' case, trial counsel failed to develop any mitigation whatsoever. Trial counsel apparently spoke to no one

[76] In Rompilla, 125 S.Ct. at 2460, the Supreme Court stated that defense counsel has an absolute duty to investigate, even when the defendant and/or his family suggest that no mitigating evidence is available.

other than Mr. Brooks and his parents (PC-R. 6925-26), nor did counsel consult with a mental health expert (PC-R. 6925). Thus, trial counsels' ignorance of valid mitigation, such as Mr. Brooks' lengthy battle with alcohol, was a direct result of the failure to investigate.[77]

At the evidentiary hearing, Funk testified that as to mitigation, he reviewed what prior counsel Beroset had (PC-R. 6925). Szachacz similarly testified that if they had been allowed to present mitigation, it would have been very similar to what Beroset put forward, other than they may have called live witnesses in lieu of letters (PC-R. 7091). It would have been a focus on the positive attributes of Mr. Brooks (PC-R. 7092).[78]

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[77]For instance, trial counsel Funk testified that no one suggested that Mr. Brooks was an alcoholic or anything like an alcoholic (PC-R. 6998). Yet, earlier, the prosecutor noted that at the first trial, Beroset had put on Mr. Brooks' military service as a mitigator (PC-R. 6995). It was impeached because Mr. Brooks had been disciplined for appearing in formation intoxicated; and he also had a DUI while in the military (PC-R. 6996). Clearly, any sort of minimal investigation or preparation should have alerted trial counsel that alcohol was a potential issue.

[78]As previously mentioned, prior to the commencement of the penalty phase, trial counsel presented a list of mitigation they believed applied to Mr. Brooks' case, and counsel stated that the defense would have called the same witnesses that Beroset had called (R. 5194-95). As to Mr. Brooks' family background, counsel would have presented that Mr. Brooks' is the only living son, his brother was killed in a car crash, he served in the Army, and he went to church regularly (PC-R. 5194). Other mitigation alleged by counsel included that Mr. Brooks had no significant prior criminal activity; his participation in the crime was minor; his age; he had a great potential for rehabilitation; Walker Davis' life sentence; Mr. Brooks had good jail conduct; and he acted appropriately in the courtroom (R. 5194-95).

Thus, rather than investigating and developing crucial evidence in mitigation, trial counsel was simply going to rely on the mitigation presented in the previous case by the previous trial attorney, despite the fact that it had already been rejected by Mr. Brooks' jury and judge.[79] Had counsel done the job they were constitutionally required to do, a wealth of mitigation was available that could have been presented.[80]

Importantly, counsel would have learned of the dramatic changes in Mr. Brooks following his service in the Gulf War. Mr. Brooks went from being a happy, funny, smart kid who was put together (PC-R. 6870, 7012, 7013), to an individual who was anxious, aggressive, agitated, paranoid, and isolated himself from his friends (PC-R. 7015) Mr. Brooks went from being an

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[79]In its sentencing order at the first trial, the court gave little weight to the statutory mitigators of no prior significant criminal history and the age of the defendant (R. 414). The court rejected the statutory mitigator of the defendant's minor role as an accomplice in the capital felony committed by another person (R. 414-415). The Court gave little weight to the following non-statutory mitigating circumstances: Davis' life sentence, Mr. Brooks' strong family background, his good character, and his military service (R. 415-416). The court gave some weight to the fact that Mr. Brooks is the only living son in his family due to the tragic death of his brother, his good jail conduct, and that he conducted himself appropriately during his trial proceedings (R. 416-17).

[80]At the very least, Mr. Brooks' counsel could have presented the mitigating evidence available at the Spencer hearing in much the same way postconviction counsel did at the evidentiary hearing. In doing this trial counsel would have afforded the court the opportunity to properly weigh the mitigating and aggravating evidence in this case. Without doing so the court was not apprised of the uniqueness of Mr. Brooks as required under Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982).

individual who didn't drink (PC-R. 7016), to one for whom drinking had become an all day event (PC-R. 6811, 7016). Mr. Brooks constantly carried alcohol with him in a backpack (PC-R. 6811, 7017). He would drink at breakfast instead of eating (PC-R. 6823, 7016). His friends considered him to be an alcoholic (PC-R. 7018-19, 6818).

An adequate investigation would have provided a mental health expert with the necessary information to properly assess Mr. Brooks. Dr. Eisenstein, who was provided with Mr. Brooks' school and military records, as well as access to Mr. Brooks' friends and family (PC-R. 6855-56), testified to significant mental deficits:

> My first diagnosis of Mr. Brooks was Post-Traumatic Stress Disorder, chronic PTSD. The diagnosis for PTSD is made on the fact that he meets the criteria. PTSD is a diagnosis that used to be referred to as shell shock, combat battle. It's a diagnosis that the individual experiences some type of traumatic event and the event recurs continuously. He did report to his friend about seeing bodies. He was employed at blowing up of mines. It's very unclear as to what these experiences were. He did not tell me what they were. As a matter of fact, he hasn't really told anyone what those experiences were, but it's certainly -- it's my best clinical judgment that the behavior that we see in Mr. Brooks that changed after his return from Desert Storm was indicative that something significant occurred while he was there. Again, we're talking about his perception. His perception of reality. Now whether or not it occurred or whether or not he thought it occurred, or what he did see or didn't see really doesn't change the diagnosis because the diagnosis is based on his current behavior. And the current behavior certainly was consistent with an individual that had outbursts of anger, feelings of paranoia, feelings of being threatened, impaired relationships, being reclusive, being seclusive, not being able to talk about it. Whether or not it was experiences of trauma, whatever the experiences may be. But certainly the military combat, which is one of the classical symptomatologies that will create a change in

> an individual, especially when they were never treated for it. They weren't dealt with it. That certainly could explain his behavior. It certainly could explain the excessive amount of alcohol usage.
>
> Again, when one goes into the military, it is common that military combat -- military individuals will begin to start drinking. But there's drinking and there's drinking to the point to where he's an alcoholic. And there's drinking to the point where he's just totally numbing his feelings and his emotions and his reality testing. Whether or not he could tolerate alcohol or not to what extent, I don't know. But certainly he was drinking to the point to where all the time when he was seen he was drinking.
>
> So the diagnosis of Post-Traumatic Stress Disorder Chronic does fit and the various different -- again, the criteria for the diagnosis is met. I also diagnosed him with alcohol abuse, which again was documented both in the records, as well as collateral sources that identified that this indeed was a major problem.

(PC-R. 6858-60). Based on his evaluation, Dr. Eisenstein also concluded that Mr. Brooks suffered from an extreme mental or emotional disturbance and that his ability to substantially conform his conduct to the law at the time of the murders was substantially impaired (PC-R. 6862-63). And, according to Dr. Eisenstein, testing results were indicative of a brain disregulation or cognitive dysfunction (PC-R. 6850-51).

This combination of factors could have been presented by trial counsel to establish statutory as well as nonstatutory mitigating circumstances. Trial counsels' deficient performance prejudiced Mr. Brooks. Relief is warranted.

ARGUMENT IV

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. BROOKS IS INNOCENT OF THE MURDERS AND THAT HIS CONVICTIONS AND SENTENCES VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Jones v. State, 591 So. 2d 911 (1991), this Court adopted the standard for evaluating claims of newly discovered evidence. First, the evidence "'must have been unknown by the trial court, by the party, by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.'" Jones, 591 So. 2d at 916 (quoting Hallman v. State, 371 So. 2d 482, 485 (Fla. 1979). Second, "The newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial." Jones, 591 So. 2d at 915. To reach this conclusion, the court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial." Id. at 916.

In Mr. Brooks' case, the circuit court found the first prong of the Jones standard to be satisfied (PC-R. 1282, fn 16). The court also recognized the value of Ferguson's testimony, on its face, towards producing an acquittal on retrial:

> Mr. Ferguson testified at the evidentiary hearing held by the Court in March 2012. Mr. Ferguson's testimony is that he saw Rachel Carlson alive with Jerrold Gundy between 10:30 p.m. and 11:00 p.m. on the night of the murder. Such testimony, on its face, is beneficial to the Defense, in that it was established at trial that by 10:20 p.m., the Defendant and Walker Davis were in a car detained by law enforcement on State Road 123, away from the crime scene.

(PC-R. 1283).

However, the circuit court determined that, after considering his testimony, Ferguson was not worthy of belief (PC-R. 1283-84). The court found that Ferguson was thoroughly

impeached by the State at the evidentiary hearing, and that Gerrold Gundy was a credible witness (PC-R. 1284-86). As a result of these findings, the court found that the incredible testimony of Ferguson would not probably produce an acquittal on retrial (PC-R. 1286).

Mr. Brooks submits that the circuit court's determination is erroneous in that it is not supported by competent, substantial evidence. See Blanco v. State, 702 So.2d 1250, 1252 (Fla. 1997). In its order, the court failed to consider the substantial independent evidence corroborating Ferguson's testimony. For instance, the court overlooked the fact that the State's attempt to impeach Ferguson on the notion that he was in Crestview in 1999 and not 1996, was rebutted by the testimony of Elizabeth Hutchinson, who placed Ferguson in Crestview in 1996 (PC-R. 7478-79).[81] Moreover, while taking great pains to discredit Ferguson on his inability to recall minor details that he had previously remembered, such as the name of the woman he stayed with in Panama City, the court ignored corroborative information that Ferguson did not know Davis' real name at the time, that Ferguson and Davis did have a medical callout together, that Ferguson did relate his concerns to Sergeant Summers, and that Summers didn't do anything about it (PC-R. 7523-35, 7533-35).

Additionally, in finding Gundy to be credible as opposed to Ferguson, the court overlooked the fact that Ferguson's testimony

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[81]Hutchinson does not know Mr. Brooks or Davis, and she was getting no benefit for testifying (PC-R. 7491).

that Gundy was at Club Rachel's on the evening of the murders was supported by independent evidence. On January 25, 1996, Patrolman Ben Morgan of the Crestview Police Department took the following statement from Charles Tucker:

> ON 04-25-96 AT APPROXIMATELY 1625 HOURS, CHARLES EDMOND TUCKER CAME TO THE STATE ATTORNEYS OFFICE AND TOLD ME THAT HE NEEDED TO MAKE A STATEMENT ABOUT WHERE GERALD GUNDY WAS AT ON 4-24-96. **TUCKER STATED THAT GUNDY WAS AT RACHELS BAR AT 2030 HOURS**, WEARING A MICHAEL IRVIN DALLAS COWBOYS JACKET AND BLACK JEANS. TUCKER ALSO STATED THAT GUNDY WAS SITTING WITH SEVERAL OTHER PEOPLE IN THE FRONT OF RACHELS, BUT COULD NOT STATE WHOM THE OTHER PEOPLE WERE.

(D-Ex. 109)(emphasis added). At the postconviction evidentiary hearing, Gundy denied going to Club Rachel's on the evening of the murders (PC-R. 7467), while Ferguson insisted that he was there (PC-R. 7298-7300). As Gundy's testimony was contradicted by an impartial witness whose statement was made close in time to the crimes in question, the circuit court erred as to its credibility findings.

The circuit court's credibility finding in favor of Gundy is further strained by the fact that, while noting that Ferguson is a convicted felon (PC-R. 1284), the court ignored Gundy's eight felony convictions, including a crime involving dishonesty (PC-R. 7462). Moreover, the court ignored the fact that Ferguson had nothing to gain from his testimony, while Gundy certainly had a motivation to lie on the basis that Ferguson's testimony made Gundy a prime suspect in this case.

Additionally, the circuit court found Ferguson's testimony to be suspect based on the notion that he didn't know the date of the murder (PC-R. 1284-85). While the State advanced this theory

at the evidentiary hearing, it is nothing more than a red herring. Ferguson's recall of the incident in question was not based on a specific date, but on the fact that the afternoon after Ferguson saw Gundy with Carlson, he saw on the news that she had been found dead (PC-R. 7301-02).

Ferguson's testimony not only exonerates Mr. Brooks, it places another prime suspect, Gundy, with the victim on the evening of the murders. Under Jones, Mr. Brooks is entitled to a new trial because the evidence presented would probably produce an acquittal upon retrial.

In addition to the newly discovered evidence, cumulative consideration must be given to evidence that trial counsel unreasonably failed to discover and the State failed to disclose and present at the capital trial. State v. Gunsby, 670 So. 2d 920, 923-24 (Fla. 1996). Mr. Brooks submits that when the evidence presented throughout his capital postconviction proceedings is considered cumulatively, confidence in the outcome is undermined.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, Appellant, LAMAR Z. BROOKS, urges this Court to reverse the lower court's order and grant him relief in the form of a new trial and/or a new sentencing proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by electronic service to Charmaine

Millsaps, Assistant Attorney General, on this 12th day of April, 2013.

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CERTIFICATION OF TYPE SIZE AND STYLE

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