IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,959

MICHAEL MORDENTI,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Mordenti's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied Mr. Mordenti's **claims** without holding a hearing of any kind.

The following symbols will be used to designate references to the record in this instant cause:

"R." -- record on direct appeal to this Court;

"PC-R." -- record on 3.850 appeal to this Court;

"App." -- indicates that record omissions still exist.

REQUEST FOR ORAL ARGUMENT

Mr. Mordenti has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. 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 and the stakes at issue. Mr. Mordenti, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

The Circuit Court for the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida, entered the judgment of convictions and death sentence at issue. Mr. Mordenti was indicted by the grand jury in Hillsborough County, Florida, on March 14, 1990 (R. 1591-1593). He was charged with first-degree murder and conspiracy to commit first degree murder.

Mr. Mordenti's jury trial commenced July 8, 1991. The jury found Mr. Mordenti guilty of both counts. The penalty phase took place on July 29, 1991. The jury rendered a sentencing verdict of death by a vote of eleven to one (R. 1499). On September 6, 1991, the Court sentenced Mr. Mordenti to death (R. 1547). The trial court entered written findings (R. 1774).

The Supreme Court of Florida affirmed Mr. Mordenti's convictions and sentences. Mordenti v. State, 630 So.2d 1080 (Fla. 1994). Mr. Mordenti filed a petition for writ of certiorari in the United States Supreme Court, which was denied on June 20, 1994. Mordenti v. Florida, 114 S. Ct. 2726 (1994).

On September 2, 1995, Mr. Mordenti filed a motion to vacate judgments of convictions and sentences with special request for leave to amend. (PC-R. 24). On September 30, 1996, the circuit court denied Mr. Mordenti's motion to vacate without granting a hearing of any kind. (PC-R. 216).

On October 17, 1996, Mr. Mordenti filed a motion for rehearing. (PC-R. 277). The circuit court denied the motion for

rehearing on January 7, 1997. (PC-R. 407). As a result, Mr. Mordenti filed notice of appeal to this Court.

SUMMARY OF ARGUMENT

1. Mr. Mordenti is entitled to a Huff hearing on all of the claims raised in his Rule 3.850 motion. The trial court erred in summarily denying this motion without giving Mr. Mordenti the benefit of argument on any of his claims contrary to Huff v. State.

2. Mr. Mordenti is entitled to a full evidentiary hearing on all the claims raised in his Rule 3.850 motion. Mr. Mordenti pled specific, detailed claims for relief which are legally sufficient and are not conclusively refuted by this record.

3. Mr. Mordenti has been denied access to the files and records in the possession of certain state agencies which pertain to his case. Such materials have been withheld in violation of Chapter 119, Fla. Stat., the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, the Eighth Amendment, and the corresponding provisions of the Florida Constitution.

4. Requiring Mr. Mordenti, a death sentenced individual, to file a motion under Rule 3.851 one year after his conviction has become final violates his rights of due process and equal protection of the law under the Eighth and Fourteenth Amendments to the United States Constitution.

5. Mr. Mordenti was denied effective assistance of counsel at the guilt and penalty phases of his trial. Counsel failed to

adequately investigate and prepare a defense, and to challenge the state's case. Counsel was also rendered ineffective by the actions of the state and the trial court.

6. Mr. Mordenti's proceedings were prejudicially tainted by the erroneous admission of hearsay.

7. Mr. Mordenti's Sixth, Eighth and Fourteenth Amendment rights were violated because no reliable transcript of his capital trial exists. Therefore, reliable appellate review was and is impossible.

8. Mr. Mordenti was denied a fair and impartial trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments because the trial court permitted the state to introduce gruesome and shocking photographs.

9. Mr. Mordenti's rights under the Sixth, Eighth, and Fourteenth Amendments were violated when defense counsel failed to adequately question potential jurors about their views on the death penalty and failed to ensure an impartial jury.

10. Mr. Mordenti was denied effective assistance of counsel and his right to be judged by a jury truly representative of the community in violation of the Sixth and Fourteenth Amendments through trial counsel's ignorance of basic decisions such as State v. Neil, State v. Slappy, and Batson v. Kentucky.

11. Mr. Mordenti was deprived of his right to remain silent in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

12. The trial court erroneously instructed Mr. Mordenti's jury on the standard by which they must judge expert testimony.

13. The trial court erred when it permitted Mr. Mordenti's jury to hear alleged co-conspirator statements. The court erred in failing to properly instruct the jury.

14. The state's use of misleading testimony and improper argument violated the constitutional rights of Mr. Mordenti under the Sixth, Eighth and Fourteenth Amendments. Mr. Mordenti's counsel was ineffective for not objecting to the improper conduct by the state.

15. In the penalty phase of Mr. Mordenti's trial, the prosecutor's argument was improper, inflammatory and the prosecutor argued non-statutory aggravating factors to both the judge and the jury. This argument and the sentencing court's reliance on it rendered Mr. Mordenti's conviction and resulting death sentence fundamentally unfair and unreliable in violation of the Sixth, Eighth and Fourteenth Amendments.

16. Mr. Mordenti's judge failed to consider mitigating factors which were clearly set out in the record in violation of the Eighth and Fourteenth Amendments.

17. The failure to present to Mr. Mordenti's sentencing jury evidence of his good record while awaiting trial deprived Mr. Mordenti of a reliable sentencing determination under the Eighth and Fourteenth Amendments to the United States Constitution.

18. Mr. Mordenti's death sentence was tainted by unconstitutionally vague instructions to the jury and by improper application of the statutory aggravators of "cold, calculated, and premeditated" and "heinous, atrocious, and cruel" contrary to United States Supreme Court holdings in Espinosa v. Florida and Richmond v. Lewis, and in violation of the Eighth and Fourteenth Amendments.

19. Mr. Mordenti's jury was repeatedly misled as to the real weight of his responsibility in the sentencing process in violation of the Eighth and Fourteenth Amendments.

20. The penalty phase jury instructions unconstitutionally shifted the burden to Mr. Mordenti to prove that death was inappropriate, and the judge employed the same erroneous standard in sentencing. To the extent that trial counsel failed to object or argue, he rendered ineffective assistance of counsel.

21. Florida's statute setting forth the aggravating circumstances to be considered in a capital case is facially vague and overbroad in violation of the Eighth and Fourteenth Amendments. The facial invalidity of the statute was not cured in Mr. Mordenti's case because the jury did not receive adequate guidance. As a result, Mr. Mordenti's sentence of death is premised upon fundamental error that now must be corrected.

22. Mr. Mordenti is innocent of the death penalty.

23. Mr. Mordenti was denied his rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the

Florida Constitution, when the prosecutor impermissibly suggested to the jury that the **law** required that it recommend **a** sentence of death.

24. The rule prohibiting Mr. Mordenti from interviewing jurors to determine if juror misconduct has occurred denies Mr. Mordenti equal protection under the law and violates the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution.

25. Juror misconduct occurred in the guilt and penalty phases of Mr. Mordenti's trial in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

26. Florida's capital sentencing scheme is unconstitutional on its face and as applied in this case.

27. Mr. Mordenti's trial court proceedings were fraught with procedural and substantive errors. He did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. These errors cannot be harmless when viewed as a whole.

ARGUMENT I

MR. MORDENTI IS ENTITLED TO A HUFF V. STATE HEARING ON HIS RULE 3.850 CLAIMS.

Mr. Mordenti timely filed his initial post-conviction motion on September 2, 1995, as mandated by law. (PC-R. 24). Mr. Mordenti initiated these proceedings so he could effectively litigate his claims and compel compliance with his Chapter 119 requests.

On September 30, 1996, the trial court summarily denied the motion without holding a hearing of any kind. (PC-R. 216-231). The trial court held no status hearing at which Mr. Mordenti could compel reluctant state agencies to comply with Chapter 119. The trial court attached nothing to the order denying relief. Despite the argument of the state in its response conceding that a hearing was proper, the court refused to grant a hearing. (PC-R. 216-231).

Under Huff v. State, 622 So.2d 982 (Fla. 1993), this Court held:

> Because of the severity of punishment at issue in a death penalty postconviction case, we have determined that henceforth the judge must allow the attorneys the opportunity to appear before the court and be heard on an initial 3.850 motion.

Huff v. State, 622 So.2d at 983.

Contrary to Huff, this procedure was not followed. As a result, Mr. Mordenti was not given "fair notice and a reasonable opportunity to be heard." See, Huff at 983, quoting Scull v. State, 569 So.2d 1251, 1252 (Fla. 1990). This cause should be

remanded back to the circuit court for an opportunity to conduct a Huff hearing in accordance with the law.

ARGUMENT II

MR. MORDENTI IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS 3.850 CLAIMS.

On September 2, 1995, Mr. Mordenti filed his first Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend and for Evidentiary Hearing. He pled detailed issues which this Court has held require an evidentiary hearing.

On September 30, 1996, the Hillsborough County trial court summarily denied the motion without granting a hearing of any kind. (PC-R. 216-231). The trial court held no status hearing at which Mr. Mordenti could compel the reluctant state agencies to comply with Chapter 119. The trial court attached nothing to the order denying relief.

A trial court has only two options when presented with a Rule 3.850 motion: "either grant appellant an evidentiary hearing, or alternatively attach to any order denying relief adequate portions of the record affirmatively demonstrating that appellant is not entitled to relief on the claims asserted." Witherspoon v. State, 590 So.2d 1138 (4th DCA 1992). A trial court may not summarily deny without "attach(ing) portions of the files and records conclusively showing the appellant is entitled to no relief," Rodriquez v. State, 592 So.2d 1261 (2nd DCA, 1992). See also Brown v. State, 596 So.2d 1026, 1028 (Fla. 1992).

The law strongly favors full evidentiary hearings in capital post-conviction cases, especially where a claim is grounded in factual as opposed to legal matters. "Because the trial court denied the motion without an evidentiary hearing and without attaching any portion of the record to the order of denial, our review is limited to determining whether the motion conclusively shows on its face that [Mr. Mordentil is entitled to no relief." Gorham v. State, 521 So.2d 1067, 1069 (Fla. 1988). See also LeDuc v. State, 415 So.2d 721, 722 (Fla. 1982).

Some fact-based post-conviction claims by their nature can only be considered after an evidentiary hearing. Heinev v. State, 558 So.2d 398, 400 (Fla. 1990). "The need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record. When a determination has been made that a defendant is entitled to such an evidentiary hearing (as in this case), denial of that right would constitute denial of all due process and could never be harmless." Holland v. State, 503 So.2d 1250, 1252-53 (Fla. 1987). "Accepting the allegations . . . at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing." Lightbourne v. Dugger, 549 So.2d 1364, 1365 (Fla. 1989).

Mr. Mordenti has pled substantial, factual allegations which go to the fundamental fairness of his conviction and to the appropriateness of his death sentence. "Because we cannot say that the record conclusively shows [Mr. Mordentil is entitled to

no relief, we must remand this issue to the trial court for an evidentiary hearing." Demps v. State, 416 So.2d 808, 809 (Fla. 1982) (citation omitted).

Under Rule 3.850 and this Court's well-settled precedent, a post-conviction movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Hoffman; Lemon; O'Callaghan; Gorham. Mr. Mordenti has alleged facts which, if proven, would entitle him to relief. Furthermore, the files and records in this case do not conclusively show that he is entitled to no relief.

The trial court's denial of Mr. Mordenti's Rule 3.850 motion stands in stark contrast to the clear and unmistakable requirements of law. It makes no use of the record or files in this case to show conclusively that Mr. Mordenti is not entitled to relief. It attempts no analysis whatsoever. The order ignores the express requirements of Rule 3.850 and is oblivious to the substantial body of caselaw from this Court holding that courts must comply with the rule and, at least, conduct a hearing. Huff v. State, 622 So.2d 982 (Fla. 1993).

As in Hoffman, this Court has "no choice but to reverse the order under review and remand," 571 So.2d at 450, and order a full and complete evidentiary hearing on Mr. Mordenti's 3.850 claims.

ARGUMENT III

ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. MORDENTI'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT., THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Mr. Mordenti filed his Rule 3.850 motion on September 2, 1995. The motion pled sufficient facts to require the trial court to order an evidentiary hearing. The pleading also outlined Mr. Mordenti's difficulty in pleading his claims because of the state's failure to comply with Chapter 119 public records requests. Claim II of the Rule 3.850 motion informed the trial court that Mr. Mordenti was requesting a hearing to gain the court's assistance in acquiring the public records that were being withheld. (PC-R. 90-94).

Mr. Mordenti's only remedy at that point in the proceedings was to file a motion to compel to litigate these issues. However, this remedy was removed as an option by Judge Padgett's order denying relief. (PC-R. 221).

Capital post-conviction defendants are entitled to Chapter 119 records disclosure. State v. Kokal, 562 So.2d 364 (Fla. 1990) ; Jennings v. State, 583 So.2d 316 (Fla. 1991); Hoffman v. State, 613 So.2d. 405 (Fla. 1992); Mendyk v. State, 592 So.2d 1076 (Fla. 1992). This Court has extended the time period for filing Rule 3.850 motions after Chapter 119 disclosure. See Jennings; Kokal. In these cases, sixty (60) days was afforded to

litigants to amend Rule 3.850 motions in light of newly disclosed Chapter 119 materials.

The state's failure to provide the requested records has delayed Mr. Mordenti's post-conviction investigation and made it impossible for him to fully plead and raise any violations which may become apparent from the records he seeks. The failure to comply with Chapter 119 law constitutes external impediments which have thwarted Mr. Mordenti's efforts to establish he is entitled to post-conviction relief. The matter must be remanded to permit Mr. Mordenti an opportunity to pursue Chapter 119 materials.

ARGUMENT IV

REQUIRING MR. MORDENTI, A DEATH SENTENCED INDIVIDUAL, TO FILE A MOTION UNDER RULE 3.851 OF THE RULES OF CRIMINAL PROCEDURE ONE YEAR AFTER HIS CONVICTION HAS BECOME FINAL VIOLATES HIS RIGHTS OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER THE EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

On January 1, 1994, Rule 3.851 of the Florida Rules of Criminal Procedure went into effect. Under this rule capital defendants are allowed one year from the date their conviction becomes final to file a motion to vacate Judgement and Sentence under Rule 3.850 of the Florida Rules of Criminal Procedure. Rule 3.851, which sets out this time requirement, is unconstitutional on its face and in its application since it denies Mr. Mordenti due process and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States

Constitution. Rule 3.851's time requirement also violates Article I, §§ 2, 13 and 21 of the Florida Constitution.

Rule 3.851 carves out a class of persons, criminal defendants sentenced to death, and treats them differently from all other persons seeking relief under Florida's post-conviction procedure for no legitimate reason. This is a violation of Article 1, §2 of the Florida Constitution as well as the Fourteenth Amendment to the United States Constitution.

By depriving Mr. Mordenti of sufficient time to investigate and at the same time overloading Mr. Mordenti's counsel with an unprecedented number of cases, the State has also deprived him of his right to access to the courts.[1] The United States Supreme Court in a long line of cases beginning with Griffin v. Illinois, 351 U.S. 12 (1956), Lane v. Brown, 372 U.S. 477 (1963), Rinaldi v. Yeager, 384 U.S. 305 (1966), Bounds v. Smith, 430 U.S. 817 (1977) recognized the right of convicted inmates to unrestricted access to courts in order to use established avenues for seeking post-conviction relief.

The Florida Constitution requires that the courts of this state be open to every person. See Article I, § 21, Florida Constitution. Even the Florida Supreme Court in the comment to

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[1]In various meetings contemplating the adoption of Rule 3.851 it was determined that the Florida Supreme Court affirms about 20 capital cases a year. Based on this estimate the funding decisions were made by the Florida Legislature, and the Florida Bar Association. This projection contemplated that Mr. Mordenti's counsel's office would receive two new capital cases per month. As pointed out above, the current affirmance of 47 cases more than doubles the projected number.

Rule 3.851 provides that if Mr. Mordenti's counsel is not fully funded, this restrictive time limit under Rule 3.851 is unjustified. It has been abundantly clear in the last six months, that the office of CCR, particularly the middle region, is grossly underfunded.

Additionally, this restrictive rule effectively suspends Mr. Mordenti's right of habeas corpus. In discussing the procedural aspects of Rule 3.850, the Florida Supreme Court has said:

> In the case of State v. Bolyea, 520 So.2d 562, 563 (Fla. 1988), we recognized that Rule 3.850 is a "procedural vehicle for the collateral remedy otherwise available by writ of habeas corpus." Accordingly, in approaching the present case, we must be mindful that the right to habeas relief protected by article I, section 13 of the Florida Constitution is implicated here.

Haaq v. State, 591 So.2d 614, 616 (Fla. 1992). Because Rule 3.850 implicates the right to habeas corpus found in Article I, § 13 of the Florida Constitution, the procedural rules surrounding Rule 3.850 must be consistent with the right to habeas corpus. The restrictive time requirements adopted by Rule 3.851, not applicable to any person but capital petitioners, does not promote fairness and effectively suspends Mr. Mordenti's right to petition for a writ of habeas corpus.

ARGUMENT V

MR. MORDENTI WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE MR. MORDENTI'S CASE TO CHALLENGE THE STATE'S CASE, AND FAILED TO ZEALOUSLY ADVOCATE ON BEHALF OF HIS CLIENT. AS A RESULT, A FULL ADVERSARIAL TESTING DID NOT OCCUR. COUNSEL'S PERFORMANCE WAS DEFICIENT. THE COURT AND STATE RENDERED COUNSEL INEFFECTIVE. THEREFORE, MR. MORDENTI'S CONVICTIONS AND DEATH SENTENCE ARE UNRELIABLE.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 668 (citation omitted). Strickland v. Washington requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice. Mr. Mordenti pleads each in the instant motion. Given a full and fair evidentiary hearing, he can prove each. He is entitled, at a minimum, to an adequate evidentiary hearing on these claims.

The State's case against Mr. Mordenti was circumstantial at best. There was no eye-witness, no murder weapon found, no physical evidence linking Mr. Mordenti to the murder of Thelma Royston.[2] In fact, Mr, Mordenti had an alibi capable of verification by several people. Defense counsel failed to

[2]Isabel Reger, the victim's mother, testified at trial. Ms. Reger was allowed to give a description of the murderer. Her description did not fit Mr. Mordenti.

thoroughly investigate Mr. Mordenti's alibi, failed to present corroborating evidence and failed to call witnesses who could verify Mr. Mordenti's whereabouts the night Thelma Royston was murdered. Defense counsel's performance fell well below the constitutional standard and mandates that Mr. Mordenti be granted relief.

Each of the errors committed by Mr. Mordenti's counsel is sufficient, standing alone, to warrant relief. Each undermines confidence in the fundamental fairness of the guilt-innocence determination. The allegations are more than sufficient to warrant an evidentiary hearing. See Fla. R. Crim. P. 3.850; Lemon v. State, 498 So.2d 923 (Fla. 1986). At such a hearing, Mr. Mordenti can establish what his motion has alleged: that the unreasonable errors, omissions, and failings of his trial counsel, singularly and collectively, are more than sufficient to warrant relief.

Attorneys John Atti and Richard Watts represented Mr. Mordenti at trial.[3] Mr. Mordenti was not provided effective assistance of counsel by his attorneys. Additionally, trial counsel was prevented from providing effective assistance of counsel by the interference of the trial court and prosecutorial misconduct.

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[3] In 1993, Mr. Atti resigned his membership in the Florida Bar in lieu of disciplinary proceedings. He was prohibited from seeking readmission for five years. (See, The Florida Bar v. John Leonard Atti, Case No. 81,422 (April 22, 1993)). Mr. Mordenti's counsel requested information from the Florida Bar concerning Mr. Atti (See, Claim II). As of the date of this pleading, the Florida Bar has not responded to this request. As a result, Mr. Mordenti's counsel is prevented from fully developing this claim and related issues.

The State's key witness, Gail Mordenti, testified at trial against Mr. Mordenti. Ms. Mordenti was divorced from Mr. Mordenti at the time of Thelma Royston's death and at the time of Mr. Mordenti's trial. Ms. Mordenti alleged that she and Larry Royston[4] conspired with Mr. Mordenti to kill Thelma Royston, Larry's wife. Ms. Mordenti testified that Larry Royston approached her with his desire to kill his wife Thelma. Gail Mordenti testified that she was nothing more than a middleman -- a go-between for Larry and the murderer. Pursuant to a deal with the State, the defendant's ex-wife was completely immune from prosecution. Ms. Mordenti testified that she tried to solicit individuals to carry out the murder of Thelma Royston but was unsuccessful. She then testified that she was able to convince her ex-husband, Mr. Mordenti to murder Thelma Royston. She alleged Larry Royston was willing to pay money. She alleged that Mr. Mordenti later demanded $17,000 and that Larry Royston paid Mr. Mordenti the money.[5] She claimed she delivered the money.

Defense counsel failed to investigate these matters. Defense counsel failed to investigate Gail Mordenti's financial dealings and records. These records showed that she stood to gain the most financially from this murder plot. These facts went directly to her motivation for testifying against Mr.

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[4]Larry Royston was a suspect from the beginning. He was charged with the murder and died before trial.

[5]Gail Mordenti's testimony regarding these issues was inconsistent with other statements. Defense counsel failed to effectively impeach her.

Mordenti. Defense counsel failed to fully investigate the nature and circumstances of her divorce from Mr. Mordenti. Defense counsel did not investigate Gail Mordenti's romantic relationship with Larry Royston, nor Thelma Royston's background. Defense counsel failed to fully investigate the Royston's financial situation. More importantly, counsel failed to establish that Mr. Mordenti did not need the money that was supposedly the motive for this murder. These matters were critical to attack the alleged conspiracy and essential to the presentation of an effective defense. They went unexplored.

Gail Mordenti testified at trial that as part of the conspiracy to kill Thelma Royston, she and Mr. Mordenti went to a hotel to check out Thelma Royston. Defense counsel failed to perform a full investigation into hotel records, witnesses at the hotel, and phone records. Counsel's failure to do so was unreasonable.

Mr. Mordenti had an alibi, but defense counsel however failed to adequately investigate Mr. Mordenti's alibi. This alibi was capable of corroboration and verification. On the night Thelma Royston was killed, Mr. Mordenti was at an auto auction with his companion, Anna Lee. They were seen by others. Afterwards, Mr. Mordenti and Anna Lee went to a restaurant. Defense counsel failed to secure the presence of the waitress who served Mr. Mordenti and his companion and failed to present her testimony at trial. Counsel's failures were unreasonable.

Defense counsel also failed to fully investigate two witnesses who were near the Royston farm at the time of Thelma's death. These men gave descriptions of suspects which did not fit Mr. Mordenti. At least one of these witnesses said he **saw** two men, one with gray hair and one with dark hair who was at least six feet tall. These conflicting descriptions went without emphasis to the jury. Mr. Mordenti is a small man standing approximately 5'5" to 5'6". Although the testimony was read into evidence, defense counsel failed to secure the presence of these important witnesses at trial. Defense counsel also failed to investigate and secure the presence of the second man who could verify the description. This testimony would have been independent corroboration of Mr. Mordenti's alibi. Defense counsel had no reasonable strategic reason for failing to present any of this evidence.

The record of Mr. Mordenti's trial confirms the lack of preparation and investigation conducted by his attorneys. This deficient performance by counsel permeated every stage of Mr. Mordenti's trial, denied him a adversarial testing, and prejudiced Mr. Mordenti. At trial, counsel failed to conduct an adequate voir dire; failed to object to the introduction of inflammatory and improper evidence; failed to present adequate arguments to the jury; and failed to request appropriate jury instructions. Strickland v. Washinston. Mr. Mordenti should be given an evidentiary hearing to establish his claim.

The centerpiece of the state's case was the immunized testimony of Gail Mordenti. Gail Mordenti's statements to the jury that it was her ex-husband who conspired to murder Thelma Royston and shot her at her horse barn on the night of June 7, 1990 went virtually unchallenged by the defense.[6] Gail Mordenti's motives for identifying Michael Mordenti as the killer are extremely suspect. Defense counsel failed to effectively cross-examine and impeach Gail Mordenti in many respects including her financial situation, her relationship with Larry and Thelma Royston and numerous inconsistencies in her testimony. For example, Gail Mordenti testified that Mr. Mordenti told her that he shot Thelma Royston in the head and that "she put up quite **a** fight" (R. 637). The State emphasized this alleged statement and relied upon it in the penalty phase. Defense counsel however failed to effectively impeach her with the fact that none of the hairs purportedly to be Thelma Royston's collected from the crime scene were damaged or frayed (R. 724-726). Gail Mordenti's statement that she "put up quite a fight" went unchallenged by the defense counsel's failure to impeach her

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"The State relied heavily on the fact that Gail Mordenti said that Mr. Mordenti told her that he shot Thelma Royston. The State reasoned that since law enforcement withheld publicizing the fact that Thelma Royston was shot, that Gail Mordenti must have been telling the truth when she said that Michael told her he shot Thelma. The State was simply hoodwinked by Gail Mordenti. It is no surprise that Gail Mordenti knew Thelma Royston was shot since Gail **was** inextricably intertwined in a conspiracy to kill Thelma Royston from the very beginning. The fact is, Gail knew Thelma was shot because she knew of the plan before it happened, not because of any involvement by Mr. Mordenti.

with the physical evidence that showed she was lying. Defense counsel also failed to effectively argue this point to the jury.

Counsel also failed to impeach Gail Mordenti with her inconsistent testimony. For example, Gail testified she made a thirteen minute cellular phone call to Mr. Mordenti's business and then handed the phone to Larry Royston (R. 632). This alleged phone call was the State's only link between Mr. Mordenti and Larry Royston. Defense counsel failed to point out that Mordenti and Associates was an active business enterprise that employed many people. There is no independent evidence of when this call was made or the subject of any conversation. The State's case depended upon the credibility of Gail Mordenti and what she said. Thus, it was critical for defense counsel to effectively impeach her and show the jury that she **was** lying. Defense counsel failed to point out the inconsistencies between Gail Mordenti's version of the cellular phone call and Glenn Donnell's testimony. Glenn Donnell **was** the State's eyewitness to the phone call. Their versions of the phone **call are** inconsistent.

Defense counsel also failed to point out inconsistencies between Gail Mordenti's trial testimony and previous statements she made under oath. For example, defense counsel failed to impeach Gail Mordenti by pointing out inconsistencies regarding the circumstances of her hotly contested divorce from Mr. Mordenti. He failed to investigate how Ms. Mordenti came to possess the .22 caliber gun, and the alleged amount of sums of

money used in the conspiracy. Defense counsel failed to adequately cross-examine Mr. Mordenti's ex-wife's motivation and financial plight at the time of the murder plot. This failure was due to counsel's failure to investigate and prepare witnesses. Furthermore, defense counsel's ineffectiveness in cross-examining and impeaching Gail Mordenti is demonstrated by his attempt to refer to her in his closing argument. In his argument, defense counsel attempted to use a previous statement made by Gail Mordenti. Defense counsel wanted to show the jury the inconsistencies between her statements. The State objected on the grounds that the defense attorney had never properly introduced the statement into evidence and Gail Mordenti had never acknowledged making the statement. Because counsel had not properly admitted the statement, the trial court precluded the defense from using this statement in his closing argument on the grounds that it was not in evidence (R. 1223-1234). Defense counsel was ineffective or was rendered ineffective by the trial court's ruling.

Additionally, defense counsel failed to investigate and present to the jury the circumstances of the ex-wife's deal with the State in exchange for her testimony at trial. Defense counsel failed to effectively present this to the jury. Counsel was aware that Gail Mordenti received complete immunity for her testimony against Michael Mordenti. It was only when she was taken into police custody and made a deal for immunity that she became available to testify. Gail Mordenti was never charged or

brought to trial for her substantial involvement in the murder of Thelma Royston. Counsel failed to fully investigate the circumstances surrounding the grant of immunity and Gail Mordenti's motive for her testimony. This information was essential in impeaching this key state witness, and ensuring Michael Mordenti received effective assistance of counsel. Without her testimony, the State knew it had no case.

The state called Horace Barnes, an inmate in federal prison to testify at trial. Defense counsel was woefully unprepared for this witness. In the middle of the state's case just prior to calling Mr. Barnes to the witness stand, defense counsel informed the judge that he had never interviewed Barnes. The following colloquy took place:

> MS. COX: The State would call Horace Barnes of the --
>
> MR. ATTI: Your Honor, may I approach the Bench?
>
> THE COURT: Sure.
>
> (thereupon, the following conversation was had at the Bench out of the hearing of the jury):
>
> MR. ATTI: Your Honor, Horace Barnes is a federal -- in federal custody. As a witness, I understood he was not going to be called, and I have not had the opportunity to talk to him at all.
>
> MS. COX: He was on the witness list. He asked me one time if he thought I was going to call him. I said no, and last week I told him yes, I was going to call him.
>
> MR. ATTI: That certainly didn't give me enough time. She indicated that to me on Friday.

THE COURT: Why didn't you tell me before now?

MR. ATTI: I didn't know he was going to be called.

THE COURT: I thought you just said he was going to be called on Friday.

MR. ATTI: She told me the week before he wasn't going to be called before.

THE COURT: If she told you on Friday, you should have taken it he was going to be called, and you would have had the opportunity to talk to him. Why didn't you tell me before we got to this stage?

MR. ATTI: I wasn't sure he was going to be called, Your Honor. I would still like to talk to him for even a couple of minutes.

THE COURT: You were on notice. He's on the witness list; tells you on Friday he's going to be called.

MS. COX: The other witness --

THE COURT: Who is the other witness?

MS. COX: -- is Lynn Louis. I think he's going to say the same thing.

MR. ATTI: You mean Tracy Leslie.

MS. COX: Tracy Leslie. I'm sorry, Tracy Leslie.

THE COURT: I don't know who that is. Is that somebody else?

MR. ATTI: That's another federal prisoner who again, it was my understanding **was** not going to testify, and I am hearing for the first time that she's going to testify.

MS. COX: Well, I told him Friday that I brought them both down and that I hadn't decided definitely whether she was going to testify. I brought her down. I was going to talk to her and make that decision, but she's on the witness list.

MR. ATTI: That was my understanding about her and Horace Barnes. The decision hadn't been made whether they were going to testify. This is the first time today that I'm finding out .

MS. COX: I may have said that. I wasn't saying definitely they were going to testify. I brought them down thinking they were going to testify. I brought them down thinking that they might.

THE COURT: Okay. Well, let's take a recess and I'll give you an opportunity to take some time. How much time do you think you need?

MR. ATTI: Five minutes.

THE COURT: Oh, sure, that's fine.

MR. ATTI: Just a brief time. I hate to have a witness come on that I have no idea what they are going to say.

THE COURT: Why don't I recess for about twenty minutes?

MR. ATTI: That's more than enough. Thank you very much.

(R. 727-730) (emphasis added). The trial judge allowed defense counsel a brief recess to talk to both Barnes and Leslie. This was the first and only time defense counsel attempted to talk to these witnesses. It is unreasonable for a defense counsel in a capital murder trial to be so unprepared. Defense counsel did absolutely no investigation regarding these witnesses. Such performance is deficient, unreasonable and prejudicial. This is particularly true here because Barnes made inadmissible, irrelevant and highly prejudicial statements that were elicited by the prosecutor:

Q: And about when did you first meet Michael Mordenti?

A. I met him back in November or October.

Q. Of what year"

A. '89, ma'am.

Q. And at that time, how did Mr. Mordenti introduce himself?

A. He let me know he was in the mob.

(R. 747).

Defense counsel objected in the following manner:

MR. ATTI: Your Honor, the question how you got to know somebody, is not what I expected to be the answer I would have obtained [sic] before he started answering.

THE COURT: Tell me the basis of your objection.

MR. ATTI: This is Williams Rule material we're talking about.

THE COURT: In the mob?

MR. ATTI: That's an association with a criminal activity.

THE COURT: What is the relevance of it?

MS. COX: Your Honor, it goes to show that he had the ability to come up with somebody else to help him do this crime. I mean -- and also, he has said that he was a hit man.

MR. ATTI: Your Honor, all this testimony is Williams Rule violation. It's all bad acts they are trying to bring in through Mr. Barnes.

THE COURT: And when did this occur?

MS. COX: In October or November of 1989. He told him that he was a hit man and he was in the mob.

THE COURT: And what are you offering it for, for what purpose?

MS. COX: Evidence of his guilt, basically his acknowledgment that he was a hit man. Number one, by saying that he was in the mob goes to show that he would have the ability to find somebody else.

THE COURT: 1'11 sustain the objection regarding the mob. If he asks the question about the hit man, I guess that may be relevant to show the fact that acknowledges his guilt.

MR. ATTI: Your Honor, it also -- Mr. Barnes -- 1 just talked to him five minutes **ago** -- indicated Mr. Mordenti was joking when he said that, because Mr. Barnes made an indication that he wasn't joking when he told him that he was a gangster and that he wanted Mr. Mordenti to know that he wasn't kidding like Mr. Mordenti was. So, I don't think that's relevant to be brought in. He doesn't know anything about the murder of Thelma Royston.

THE COURT: Again, as far as the mob business, I'm going to sustain any objection to that. I think it's probably highly prejudicial. I don't know what the relevance is. As far as his testimony that Mr. Mordenti told him that he was a hit man, I think that might be admissible as far as the guilt in this particular case, and admissions in this particular case. But the mob business -- not the mob business. I don't know how I can allow that. But --

MS. COX: Okay.

(R. 747-750) (emphasis added.)

Beside using the wrong legal basis for his objection, defense counsel never requested a curative instruction nor did he move for a warranted mistrial. The trial court itself acknowledged the "highly prejudiced" slur that should have been

corrected by defense counsel and the Court.[7] Moreover, this discussion occurred at the bench, out of the hearing of the jury. The jury never heard and never knew that the objection to "the mob" statement was sustained. Compounding his ineffectiveness, defense counsel never impeached Barnes about the alleged "mob" statement. At the bench, defense counsel said the statement was a joke but, defense counsel inexplicably failed to make this known to the jury. Instead, defense counsel asked Barnes only five questions, that revealed that Barnes was in federal custody on felony charges. Defense counsel never developed the circumstances surrounding Barnes' incarceration. Counsel completely failed to effectively impeach this witness in any manner. Such performance was unreasonable and fell below the constitutional standard. The jury was left with the false impression that Mr. Mordenti admitted that he was in the "mob." As the trial court agreed, Mr. Mordenti was prejudiced as a result.

Compounding these errors, defense counsel later requested the following jury instruction:

> "Had pressure or threat been used against the witness that affected the truth of the witness's testimony?"

(R. 1154, 1283). The jury was given this instruction. Defense counsel reasoned that Gail Mordenti was approached by police at 7:00 a.m. and that this was cause for the instruction. Defense

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[7] The State concedes defense counsel's ineffective assistance of counsel in its brief on direct appeal. (See appellee's brief at pages 14-15).

counsel, however never made that distinction or effectively presented that idea to the jury. Instead, with this instruction and the impermissible reference to the "mob" the jury **was** left with the false impression that Mr. Mordenti was associated with the "mob" and pressured witnesses. The error went uncorrected. In fact, the State capitalized upon these impermissible facts in closing argument and perpetuated the false theory that Mr. Mordenti was involved with "the mob" and pressured witnesses. It was only after the judge had already sentenced Mr. Mordenti to death, did defense counsel argue **a** motion for a new trial.[8] Regarding this issue the defense argued to the judge:

> MR. ATTI: If I just could go back to Horace Barnes for a minute on a comment Mrs. Cox made initially -- I took a deposition shortly before, the Court may remember, we had a recess just so I could take Mr. Barnes' deposition. At that time I recall Mr. Barnes saying Mr. Mordenti said that he was in the mob and Mr. Barnes said that he thought he was joking because Mr. Barnes said I'm a gangster and this was like Mr. Mordenti trying to be, you know, like talk to him like well, you're a gangster, I'm in the mob and that's really how Mr. Barnes presented it when he **was** in the deposition and then came out here and never got a chance to say that just said yeah, I met him because he said he was in the mob and that's why I was not prepared for him saying that he was in the mob. In the deposition room had said it jokingly, had thought he had said, you know, meant he was in the mob because I told him I was a gangster. This is Mr. Barnes saying that.

[8]Mr. Mordenti was not present at this proceeding. His constitutional rights were violated as a result (1538, 1550-1566). In addition, Mr. Atti never "deposed" Mr. Barnes. He spoke with him for twenty (20) minutes in the midst of the trial.

> THE COURT: Of course, you know, YOU had the opportunity to ask him that if YOU so desired. If you wanted to talk about it and go into it, you could have asked him regarding his stating it in a joking manner and you chose not to do that for right or wrong and, you know.
>
> MR. ATTI: Judge, I was afraid what he might say after that.
>
> THE COURT: Well, I understand what you're saying, but, I mean, you know, you did have that right and opportunity to do that.
>
> MR. ATTI: Judge, regarding also Mrs. Cox's statement that I had an opportunity to declare a mistrial at that time. The defense, Mr. Watts and I discussed that.
>
> THE COURT: Request a mistrial?
>
> MR. ATTI: Request a mistrial.
>
> THE COURT: Right.
>
> MR. ATTI: And it was actually our opinion and you have to understand Mr. Cox had told me that Horace Barnes was not going to testify and then decided during the trial that he was going to testify, it was our belief that it was an attempt by the state to get a mistrial. That's exactly why we didn't object to it at that time and that's why we didn't object to it at that time and that's the only response I have to that.

(R. 1562-1564) (emphasis added). Defense counsel's excuse for not requesting a mistrial was unreasonable. Defense counsel did not investigate or depose Mr. Barnes in writing and was unprepared to impeach him. However, if the State was intentionally goading counsel for a mistrial, it was prosecutional misconduct to do so. Mr. Mordenti was denied effective assistance of counsel.

Defense counsel also failed to properly investigate the circumstances of Barnes' allegations and motives for testifying

against Mr. Mordenti. The jury was entitled to know these circumstances. Whether through ineffective assistance of counsel, the State's failure to disclose impeachment evidence, misconduct or improper rulings of the trial court, the jury never heard evidence that would have shown the true motivation for Barnes' testimony. No adversarial testing occurred and Mr. Mordenti was prejudiced as a result.

Defense counsel also failed to effectively impeach other state witnesses. Many critical state witnesses were not cross examined. For example, Larry Flynn was the first law enforcement official to arrive at the crime scene and a State witness. Defense counsel had "no questions of this witness" (R. 341). On direct examination, Deputy Flynn was allowed to testify about the condition of the victim, crime scene and photographs. He was allowed to improperly give his opinion about Isabel Reger and Larry Royston's state of mind at the time of the offense. Despite all of this, defense counsel asked no questions of the witness and failed to make appropriate objections.

The defense also had "no questions" of state witness Margerie Garberson (R. 403). This witness was allowed to testify about her employment at the Royston farm, Thelma Royston's habits and her relationship with Larry Royston. She also was allowed to improperly testify about Larry Royston's plan to kill Thelma Royston and testified to other objectionable and inadmissible matters. Despite all of this, defense had no questions for this witness and failed to make appropriate objections.

The defense had "no questions" for state witness Fred Jenkins (R. 434). This witness was allowed to testify about a life insurance policy on Thelma Royston without proper foundation or showing of relevance. This testimony went unchallenged by the defense and without appropriate objection.

Special Agent Gerald Wilkes of the FBI testified for the state about ballistics and projectiles that could have been fired by State's exhibits ten (10) and twelve (12), .22 caliber semi-automatic pistols.[9] This witness never said it was Mr. Mordenti who fired the weapon, this witness was allowed to give an opinion without having been tendered as an expert by the State and not qualified by the judge. If this "expert's" opinion was to be believed then shell casings from the semi-automatic should have been found at the scene. None were. Incredibly, the defense "had no questions" for this witness and failed to make appropriate objections (R. 452).

John P. Riley, of the Metals Analysis Unit of the FBI, was allowed to testify about the metal composition of bullets. He also was allowed to give his opinion about his comparison of the bullets from the victim and a box of ammunition allegedly taken from Mr. Mordenti. Again, although the State never tendered this witness as an expert and the witness was never qualified by the judge, he gave an expert opinion to the jury. The defense had

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[9]Had counsel done a cursory cross-examination he would have emphasized to the jury how the murder weapon would not produce bullets with the bands and grooves present in Mr. Mordenti's collector guns.

"no questions" of this witness and failed to make proper objections (R. 481). Defense counsel failed to question this witness on relevant issues such as the number of bullets manufactured in a single lot. It was unreasonable for defense counsel not to question this witness, and challenge the State's theory.

Karen Kirk of the Hillsborough County Sheriff's Office recovered a weapon from Mr. Mordenti's ex-wife and transported her to jail. Defense counsel however, had "no questions" of this witness (R. 710). Defense counsel never attempted to elicit essential information about Gail Mordenti from this witness. Critical impeachment evidence was never presented.

Fred Long, a pawn broker, testified regarding the receipts for the sale of .22 caliber weapons. The defense had no questions of this witness either (R. 713).

Michael Malone, of the FBI hair and fiber division, was allowed to give opinion testimony regarding hairs and fibers found at the scene. Incredibly, this witness was permitted to testify that the absence of Mr. Mordenti's hair didn't mean that he wasn't there. There was no credible basis for this speculation. Likewise, there was no cross-examination of this witness even though his testimony proved that Gail Mordenti was lying when she said there was a fight (R. 727). Defense counsel failed to make proper objections.

Detective John King testified for the State from his unintroduced notes about telephone records (R. 745). Defense

counsel failed to cross-examine Detective King or object to the State not admitting King's notes. This testimony went unchallenged and defense counsel failed to make appropriate objections.

Other critical witnesses went unchallenged and were not effectively impeached. These witnesses include Glen Donnell, whose testimony was inconsistent with Gail Mordenti's. His motivation for testifying was never explored. In fact, defense counsel backed **away** from cross-examining Mr. Donnell regarding his financial motivations (R. 560-561). To the extent the trial court prevented the defense counsel from doing so, it **was** error to admit his testimony. Defense counsel also was ineffective for failing to secure Carl Elwood's presence at trial to impeach Glen Donnell.

Effective cross-examination of the State's witnesses was critical to Mr. Mordenti's case, especially due to the circumstantial nature of the case. Defense counsel allowed the State to present its theory of the case to the jury completely unchallenged. Even when defense counsel did ask questions of state witnesses, he had not done enough preparation to effectively impeach their testimony. His performance was deficient.

Throughout the trial, witnesses were allowed to speculate, give opinion testimony and interject facts of which they had no personal knowledge. Witnesses, including Gail Mordenti, were allowed to testify to allegations of uncharged criminal conduct

and collateral activities (R. 6540). Evidence was admitted without proper foundation and authentication. Defense failed to make appropriate objections to tape recordings played to the jury. At one point the trial judge interrupted the proceedings and pointed out that a state's witness was describing details of a photograph of the crime scene to the jury without the photograph having been admitted into evidence. The judge asked the defense whether there was an objection (R. 333). The State's direct examination of nearly all of it's witnesses was virtually entirely composed of leading questions. Inadmissible hearsay permeated the trial and went without objection. It wasn't until well into the State's case that defense counsel made his first hearsay objection (R. 505). (See Claim VI). Defense counsel's failure to object was deficient performance. Defense counsel had no strategic reason for his failures.

Defense counsel also failed to investigate or develop evidence concerning the failure of law enforcement officials to read Mr. Mordenti his Miranda rights. Mr. Mordenti never waived his Miranda rights, nor did he a knowing, voluntary, and intelligent waiver. See also Claim (XI). Instead, the jury was allowed to hear an alleged out-of-court statement made by Mr. Mordenti (R. 505). Defense counsel was ineffective for failing to adequately object. An evidentiary hearing is warranted.

Despite the overwhelming amount of pretrial publicity in this case, trial counsel failed to file a motion for change of venue. Trial counsel was ineffective for not doing so. Trial

counsel had no strategic reason for his failure. Mr. Mordenti is entitled to a hearing on this issue.

Mr. Mordenti was not informed of his constitutional right to testify. Mr. Mordenti wanted to testify at trial and informed the court of this fact (R. 1522). However, defense counsel failed to inform or prepare Mr. Mordenti for such testimony. Defense counsel's performance was deficient and denied Mr. Mordenti effective assistance of counsel and his right to testify.

Defense counsel also failed to investigate the Hillsborough County Medical Examiner's Office despite the fact that information was available to impeach Dr. Diggs.[10] Defense counsel failed to raise appropriate objections, move to strike and seek limiting instructions to prevent the admission of inadmissible testimony and evidence, failed to secure the presence of key witnesses at trial, and failed to request appropriate jury instructions. Defense counsel failed to adequately object to the prosecution's husband and wife team, failed to object to Juror Haight, and failed to object to the State's motion identifying the victim and argument by the State.[11]

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[10]No medical examiner was present at the crime scene before critical evidence was tainted and moved by law enforcement and emergency medical personnel. Defense counsel failed to point this out to the jury.

[11]The State concedes defense counsel was ineffective in many aspects in its brief on direct appeal. (See appellee's brief).

Confidence in the outcome of Mr. Mordenti's trial was undermined. Exculpatory evidence did not reach the jury. Either the State unreasonably failed to disclose its existence, or defense counsel unreasonably failed to discover it. Counsel's performance and failure to adequately investigate was unreasonable under Strickland v. Washington.

Defense counsel failed to know the law, and the State was able to convince the trial court to allow the admission of highly irrelevant and inadmissible evidence. There was no strategic reason for defense counsel's actions.

Counsel's omissions constitute prejudicially deficient performance. To the extent that the State's efforts impermissibly influenced the trial court to allow the introduction of this evidence, defense counsel's representation was rendered ineffective by the State's actions. An evidentiary hearing is warranted.

This Court can take into consideration that counsel's errors at Mr. Mordenti's guilt/innocence proceedings were cumulative. Ellis v. State, 622 So.2d 991 (Fla. 1993) and Kyles v. Whitley, 115 s. ct. 1555 (1995). Mr. Mordenti did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth amendments. See Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991); Blanco v. Singletary. The sheer number and types of errors involved in his trial, when considered as a whole, resulted in the unreliable conviction and sentence that he received.

Mr. Mordenti's jury was not provided the information which was necessary to ensure that a reliable adversarial testing occurred. Counsel's performance was unreasonable and prejudicial. The State and the trial court rendered counsel's performance ineffective. Confidence on the outcome is undermined. Rule 3.850 relief is appropriate. Mr. Mordenti is entitled at the very minimum to a hearing on the issues raised.

ARGUMENT VI

THE ADMISSION INTO EVIDENCE OF HEARSAY CLAIM.

At Mr. Mordenti's capital trial, witnesses were allowed to testify to inadmissible hearsay in violation of Mr. Mordenti's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (See Claim IX). For example, Detective John King was allowed to testify that Mr. Mordenti allegedly said he didn't know Larry Royston (R. 498). (See also Claim IX). These statements were inadmissible hearsay. Moore v. State, 530 So.2d 61, 63 (Fla. 1st Cir. 1988) ("Exculpatory statements made by a defendant who chooses not to testify at trial constitute inadmissible hearsay not within any of the exceptions to the hearsay rule").

The admission of impermissible, inadmissible and highly prejudicial hearsay was pervasive throughout Mr. Mordenti's trial. In fact, defense counsel's first hearsay objection does not appear until well into the State's case (R. 505). For example, Isabel Reger's testimony is riddled with hearsay, but from defense counsel failed to object. Trial counsel failed to

object to the hearsay testimony of Larry Flynn, Sherri Loofelholz, and Marjorie Garberson. Margorie Garberson was allowed to speculate that the police felt that her life was in danger (R. 402). Glenn Donnell, who was dating Gail Mordenti, was allowed to testify that she was afraid of Michael Mordenti (R. 549). His motivation went without objection from the defense. The amount of inadmissible hearsay allowed in the State's case against Mr. Mordenti is inexplicable.

The admission of these statements denied Mr. Mordenti the fundamental fairness essential to any criminal trial under the Eighth and Fourteenth Amendments. The absence of this fairness fatally infected Mr. Mordenti's trial. Lisbena v. California, **314 U.S.** 219 (1941).

On this claim alone, or in conjunction with his other claims, Mr. Mordenti is entitled to relief. At a minimum, an evidentiary hearing is required, because the files and records do not conclusively demonstrate that Mr. Mordenti is not entitled to relief.

ARGUMENT VII

NO RELIABLE APPELLATE REVIEW CLAIM.

The due process constitutional right to receive trial transcripts for use at the appellate level was acknowledged by the Supreme Court in Griffin v. Illinois, 351 U.S. 12 (1956). An accurate trial transcript is crucial for adequate appellate review. Id. at 119. The Sixth Amendment also mandates a complete transcript.

Complete and effective appellate advocacy requires a complete trial record. A trial record should not have missing portions. For example, the trial record does not include a hearing held on October 10, 1990 or a transcription of audio tapes played to the jury. At times, discussions at sidebar were not transcribed. With the record provided, it is impossible to know what actually occurred.

Entsminger v. Iowa, 386 U.S. 748 (1967), held that appellants are entitled to a complete and accurate record. Lower courts rely upon Entsminser. The concurring opinion in Commonwealth v. Pricker, 487 A.2d 346 (Pa. 1985), citing Entsminser, condemned the trial court's failure to record and transcribe the sidebar conferences so that appellate review could obtain an accurate picture of the trial proceedings.

The record in this case is incomplete, inaccurate, and unreliable. Confidence in the record is undermined. Mr. Mordenti was denied due process, a reliable appellate process, effective assistance of counsel on appeal, and a meaningful and trustworthy review of his conviction and sentence of death. Mr. Mordenti's statutory and constitutional rights to review his sentence by the highest court in the State upon a complete and accurate record are being denied in violation of the Sixth, Eighth and Fourteenth Amendments.

In addition, Mr. Mordenti asserts that his former counsel rendered ineffective assistance in failing to assure that a proper record was provided to the court.

An evidentiary hearing and thereafter Rule 3.850 relief are appropriate.

ARGUMENT VIII

INTRODUCTION OF PREJUDICIAL EVIDENCE CLAIM.

The prosecution was permitted to introduce into evidence numerous gruesome photographs that were inflammatory, cumulative, and prejudicial, and admitted solely to inflame the passion of the jurors based on impermissible factors. These included photographs of the victim's body taken at the scene of the crime.

The admission of these photographs permitted the state to elicit the passion of the jurors by shocking them with graphic pictures. The probative value of these photographs was not only outweighed by their prejudice, but these photographs were cumulative to each other. Their graphic content was further emphasized through the testimony of witnesses and stressed by the state in the penalty closing argument.

The prejudicial effect of the photographs undermined the reliability of Mr. Mordenti's conviction and death sentence. The photographs themselves did not independently establish any material part of the state's case nor were they necessary to corroborate a disputed fact. The trial court's error in admitting these photographs cannot be considered harmless beyond a reasonable doubt. Chapman v. California, 87 S. Ct. 824 (1967); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Use of these gruesome photographs, which were cumulative, inflammatory, and appealed improperly to the jury's emotions,

denied Mr. Mordenti a fair trial in violation of Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Relief is proper and should be granted. To the extent that trial or appellate counsel failed to raise this issue, Mr. Mordenti was denied effective assistance of counsel. An evidentiary hearing is warranted.

ARGUMENT IX

THE INEFFECTIVE ASSISTANCE OF COUNSEL AT VOIR DIRE.

The Court committed fundamental error by allowing the potential jurors to sit on the jury, without adequately discovering their opinions about the death penalty, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Witherspoon v. Illinois, 391 U.S. 510 (1968); Witt, 469 U.S. at 423-24. Here, as in Witherspoon, "In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die." Witherspoon, 391 U.S. at 521.

To the extent that defense counsel failed to question jurors about important areas, discover and remove biased jurors counsel rendered deficient performance. Defense counsel was ineffective for failing to remove Jurors Haight, Baker and Mordenti. As a result, confidence in the outcome is undermined.

An evidentiary hearing is required as the files and records do not conclusively demonstrate that Mr. Mordenti is not entitled to relief.

ARGUMENT X

MR. MORDENTI WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND HIS RIGHT TO BE JUDGED BY A JTJRY TRULY REPRESENTATIVE OF THE COMMUNITY.

During jury selection the prosecutor attempted to strike prospective juror Ruby Cutler for cause. The judge denied that request (R. 228). The prosecutor then exercised a peremptory challenge to excuse Ms. Cutler. The following discussion then took place:

> THE COURT: Ruby Cutler.
>
> Mr. Atti?
>
> MR. ATTI: She's okay, Judge.
>
> MS. COX: Your Honor, we're going to strike her.
>
> MR. WATTS: Could I ask for a reason? She's a negro.
>
> THE COURT: Okay. You need to give me some reason why the defense feels that the challenge is being exercised for racial reasons.
>
> MR. WATTS: I can't, Judge, sorry. I'll withdraw that request.
>
> THE COURT: Okay. The only--you only reason for saying that is that she is black?
>
> MR. WATTS: She's a Negro. I can't go any further than that, Judge. I can anticipate the State's response, so I won't even request that. We'll move on. Thank you.

(R. 237-238).

Trial counsel's failure to pursue his objection was ineffective representation. Trial counsel failed to know the requirements of State v. Neil, 457 So.2d 481 (Fla. 1984), and

Batson v. Kentucky, 476 U.S. 79 (1986). Had he known these fundamental cases, he would have known what to request of the court. Failure to know such basic law is deficient performance and unreasonable.

Trial counsel was unfamiliar with the basic law in this area. Had trial counsel learned the basics in this area he would have been aware of his obligations under Slappy, 522 So.2d at 20. The law requires more of trial counsel than merely making his motion and settling back to an observer role. Trial counsel must actively "contest these reasons" offered by the state for peremptory challenges against black jurors, Happ v. State, 596 So.2d 991 (Fla. 1992).

Examining a prosecutor's questions and statements during voir dire are a relevant part of this inquiry, United States v. Battle, 836 F.2d 1084, 1085 (8th Cir. 1987). "[A] pattern of discriminatory strikes, the prosecutor's statements during voir dire suggesting discriminatory purpose, or the fact that white persons were chosen for the petit jury who seemed to have the same qualities as stricken black venire persons" all can be considered, United States v. Young-Bey, 893 F.2d 178, 180 (8th Cir. 1990).

If trial counsel had acted effectively he would have notified the court of the need for a Batson hearing and challenged any reasons advanced by the state. Then the Neil process could have proceeded as intended. "The trial court may not simply accept, at face value, the state's rebuttal. Rather,

the State's explanation must be an uncontested fact, supported by the record, or supported by observations of the trial judge placed in the record." Williams v. State, 547 So.2d 179, 180 (4th DCA 1989).

Trial counsel's ignorance of this basic law of jury selection was ineffective representation. "This lack of professional competence constitutes ineffectiveness within the meaning of Strickland." Harrison v. Jones, 880 F.2d 1279, 1281 (11th Cir. 1979).

ARGUMENT XI

MR. MORDENTI'S RIGHT TO REMAIN SILENT WAS VIOLATED.

Detective John King, a Hillsborough County Sheriff's Officer, testified at trial that Mr. Mordenti made a statement at the Pinellas County Jail. Detective King testified that Mr. Mordenti allegedly stated that he did not know Larry Royston (R. 503-505). Mr. Mordenti was never properly read his rights under Miranda v. Arizona, 384 U.S. 436 (1966).

The court erred in admitting this illegally obtained statement at trial. Defense counsel was ineffective for failing to investigate the circumstances surrounding Mr. Mordenti's alleged statements and **was** rendered ineffective of trial by the court's ruling, (See Claim V).

ARGUMENT XII

THE TRIAL COURT ERRONEOUSLY INSTRUCTED MR. MORDENTI'S JURY ON THE STANDARD BY WHICH THEY MUST JUDGE EXPERT TESTIMONY.

The trial court instructed the jury on expert

witnesses as follows:

> There were expert witnesses who testified. Expert witnesses are like other witnesses, with one exception. The law permits an expert witness to give his opinion.
>
> However, an expert's osinion is only reliable when qiven on a subject about which you believe him to be an expert.
>
> Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

(R. 1284-1285) (emphasis added). Defense counsel did not object to this instruction.

The Court's instruction was an erroneous statement of law. The decision of whether a particular witness is qualified as an expert to present opinion testimony on the subject at issue is to be made by the trial judge alone. Ramirez v. State, 651 So.2d 1164 (Fla. 1995) (citing Johnson v. State, 393 So.2d 1069, 1072 (Fla. 1980), cert. denied, 454 U.S. 882 (1981)). The Court's instruction permitted the jury to decide whether an expert was truly expert in the field in which the Court had already qualified him. This error was exacerbated by the State's failure to tender witnesses as experts who were allowed to give opinion testimony without the Court declaring the witness to be qualified as an expert. Among these witnesses were Gerald Wilkes, Jack Riley and Michael Malone. The Court erred when it permitted the jury to hear opinion testimony of these witnesses. Trial counsel's performance was ineffective.

Defense counsel failed to object to this erroneous instruction, and failed to offer an alternative instruction that

correctly defined the limits of the jury's discretion regarding expert witnesses. Counsel had no tactical or strategic reason for permitting the jury to be misinstructed. As a result, the outcome of the jury's deliberations is fundamentally unreliable. The prejudice to Mr. Mordenti is manifest. Relief is proper.

ARGUMENT **XIII**

THE TRIAL COURT ERRED WHEN IT PERMITTED THE JURY TO HEAR ALLEGED CO-CONSPIRATOR STATEMENTS OF LARRY ROYSTON.

Witnesses were allowed to testify to statements made by alleged co-conspirator Larry Royston. These statements constituted inadmissible hearsay. Mr. Mordenti's constitutional right to confrontation was denied. Since the statements were allowed, the Court should have properly instructed the jury on co-conspirator statements. The Court should have instructed the jury that "the conspiracy itself and each member's participation in it must be established by independent evidence" (See Fla. Stat. 90.803(18)(e)). The Court should have given this instruction prior to the introduction and admission of evidence. It was error not to do so. Trial counsel was ineffective for failing to object and failing to request appropriate instructions. An evidentiary hearing is required.

ARGUMENT XIV

THE STATE'S USE OF MISLEADING TESTIMONY AND IMPROPER ARGUMENT VIOLATED THE CONSTITTJTIONAL RIGHTS OF MR. MORDENTT UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The prosecutors' acts of misconduct both individually, and cumulatively, deprived Mr. Mordenti of his rights under the Sixth, Eighth, and Fourteenth Amendments.

Defense counsel rendered prejudicially deficient performance in failing to object to the prosecutor's inflammatory, prejudicial and misleading arguments. The prosecutor exceeded the boundaries of proper argument throughout Mr. Mordenti's case. As a result, Mr. Mordenti was denied a proper adversarial testing.

Gail Mordenti testified that she and Mr. Mordenti stayed at a hotel during the conspiracy to check out Thelma Royston. The prosecution failed to disclose the name of the hotel to the defense. Withholding this exculpatory evidence constituted prosecutorial misconduct. The prosecution's argument to the jury **was** misleading. The State also precluded the defense from requesting an instruction of "no previous criminal history" at penalty phase. The State threatened to use hearsay allegations of uncharged criminal conduct to rebut the instruction. Such action is improper. Defense counsel was ineffective for failing to fully investigate these matters and was intimidated by the State. He could not properly argue against the State because he had not conducted an adequate investigation into his client's background.

Whether it is due to prosecutorial misconduct, Gislio v. United States, 405 U.S. 150 (1972), or ineffective assistance of counsel, Strickland v. Washington, 466 U.S. 668 (1984), critical information was not properly put before the court or the jury, and was not properly investigated or contested. As a result, no adversarial testing of the state's case occurred. The resulting convictions and sentence of death are unreliable.

As a result of the State's misconduct, and defense counsel's deficient performance, Mr. Mordenti's case was not given a fair adversarial testing. Therefore, Mr. Mordenti's conviction and sentence is in violation of the United States Constitution. An evidentiary hearing is required.

ARGUMENT XV

MR. MORDENTI WAS DENIED AN ADVERSARIAL TESTING AT THE PENALTY PHASE AND SENTENCING, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). Strickland requires a defendant to plead and demonstrate (1) unreasonable attorney performance, and (2) prejudice. In this motion, Mr. Mordenti pleads each. Given a full and fair evidentiary hearing, he can prove each.

State and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty

to investigate and prepare available mitigating evidence for the sentencer's consideration. Hildwin v. Dugger, Nos. 76,145 & 82,321 (Fla. Jan. 19, 1995); Phillips v. State, 608 So.2d 778 (Fla. 1992); State v. Lara, 581 So.2d 1288 (Fla. 1991); Stevens v. State, 552 So.2d 1082 (Fla. 1989).

Counsel here did not meet these rudimentary constitutional standards. To the extent that the sentencing jury did not receive information because the prosecution failed to disclose it to defense counsel, Mr. Mordenti is also entitled to a new sentencing proceeding. Garcia v. State, 622 So.2d 1325 (Fla. 1993). In order to insure that an adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon both the state and the prosecutor. 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).

In Mr. Mordenti's capital penalty phase proceedings, substantial mitigating evidence, both statutory and nonstatutory, went undiscovered and was thus not presented for the consideration of the judge and jury, both of whom are sentencers in Florida. Espinosa v. Florida, 112 S.Ct. 2926 (1992).[12]

[12]Mr. Mordenti pleads both Brady and ineffective assistance of counsel relating to the penalty phase. Either defense counsel failed to discover, or the state failed to disclose, information which would have led to mitigating factors. Hildwin v. Dugger. An evidentiary hearing is required to discover where the breakdown occurred. In either case, the resulting death sentence was unreliable and the sixth and eighth amendments violated.

Inexplicably, significant mitigating evidence was presented to the judge at sentencing, but never presented to the penalty phase sentencing jury.

Michael William Mordenti was found guilty and sentenced to die by a judge **and** jury who knew very little about him. By trial counsel's own admissions, despite having a two week break between the guilt phase and the the penalty phase, he did little or no investigation into the life of Michael Mordenti. In fact, at the beginning of the penalty phase, counsel announced in open court that certain people had just arrived and he had not had the opportunity to meet or speak with them. Even more compelling is the fact that members of Michael's family, specifically his own daughter, were never contacted nor did they know that he **was** on trial for his life. Due to trial counsel's failure to adequately investigate and prepare for the penalty phase, the judge and jury were left with an incomplete picture of Michael's life.

Had trial counsel investigated Mr. Mordenti's life, he could revealed a man who was kind and willing to give to others. Mr. Mordenti was hardworking and a dedicated family man who lived his life simply so that others could live. The judge and jury did not know of Michael's dedication to his family. An unreliable death sentence was the resulting prejudice. As confidence in the result is undermined, relief is appropriate. Strickland v. Washington.

At the penalty phase before the jury, trial counsel failed to present substantial and available mitigation on Mr. Mordenti's

behalf. Defense counsel failed to investigate potential mitigation. Furthermore, defense counsel failed to prepare and investigate the witnesses who were presented at penalty phase. At one point, defense counsel admitted not having ever met some of the witnesses prior to the day he called them to testify (R. 1387). In fact, the penalty phase lasted only a half a day.

Defense counsel also failed to adequately inform and prepare Mr. Mordenti of his rights to testify. Trial counsel called a few character witnesses to testify to Mr. Mordenti's good character, yet without a tactic or strategy failed to present other mitigation. In Florida, the penalty phase jury is a co-sentencer, and therefore the jury must receive the available mitigating evidence in order to arrive at an individualized sentencing determination.

Additionally, defense counsel failed to protect Mr. Mordenti's right to proper appellate review. He also failed to a move for mistrial before the penalty phase when jurors had improperly engaged in conversations about the case and received information outside the evidence adduced at trial. Furthermore, defense counsel failed to object to dismissing alternate jurors before the penalty phase. The tainted jurors should have been replaced.

Defense counsel also failed to investigate Mr. Mordenti's background and prior criminal history so that he could suggest this as a mitigating circumstance. The State engaged in improper conduct and closing argument. This went unchallenged and without

objection by defense counsel. Defense counsel also failed to object to vague and overbroad instructions on aggravating circumstances. Defense counsel conceded the presence of aggravation in his closing argument (R. 1470). The record demonstrates Mr. Atti did not understand that non-statutory aggravating circumstances were impermissible. At one point, counsel asked the State what non-statutory aggravators it intended to on introduce (R. 1644). Defense counsel failed to object to the non-statutory aggravators at trial. Defense counsel was also ineffective when he allowed the judge to sentence Mr. Mordenti to death nearly a week before he argued his motion for new trial.[13]

At the sentencing hearing before the trial court, defense counsel presented mitigating evidence which Mr. Mordenti's jury never heard (R. 1510, 1533).

An evidentiary hearing is clearly warranted on this claim. Relief should issue.

ARGUMENT XVI

THE PROSECUTORIAL MISCONDUCT CLAIM.

During the state's penalty phase closing argument, the state implied that the jury should not consider mercy or sympathy when deciding Mr. Mordenti's sentence. Mr. Mordenti's counsel failed to object, obviously not understanding that sympathy and mercy

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[13]The State concedes defense counsel's ineffectiveness in its brief on direct appeal (See appellee's brief).

based upon mitigating evidence was permissible. Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985).

This closing argument "improperly appeal[ed] to the jury's passions and prejudices." Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). Such remarks prejudicially affect the substantial rights of the defendant when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 647 (1974).

The tenor of the state's closing argument in the penalty phase was an appeal to emotion rather than to reason. During his closing argument, the prosecutor emphasized the gruesome photographs of Thelma Royston to inflame the passions of the jury so it could recommend death. The prosecutor argued:

> What weight do we give the eyes of Thelma Royston in these pictures. What weight do you give the fear the victim experienced in those eyes?

(R. 1466-1467).

In urging the jury to recommend death, the prosecutor repeatedly strayed from arguments relevant to aggravating and mitigating circumstances, engaging in oratory deliberately intended to arouse the prejudice and passions of the jury. The prosecutor exhorted the jury to recommend the death penalty because it was required and "there is no alternative" (R. 1468).

The prosecutor concluded his comments by urging the jury to recommend death based on the non-statutory aggravating circumstances that Thelma Royston was a homeowner, someone else

was involved in the murder with Mr. Mordenti, she was alone, in fear, and that death **was** not instantaneous (R. 1465-1469). The prosecutor impermissibly questioned Mr. Mordenti's life to the rest of society and implied that it was the jury's social responsibility to recommend death. The prosecutor argued:

> ....in weighing the value of someone's life, you need to see what the value of that person's life is to the rest of society. What value does a cold-blooded murderer have to the rest of society?

(R. 1467). The prosecutor also impermissibly argued and referred to Mr. Mordenti as a con-artist, conman and **a** used car salesman (R. 1460). The State conceded defense counsel's ineffectiveness in its direct appeal brief (See appellee's brief page 19).

In addition to urging the jurors to vote for death on the basis of impermissible factors, the prosecutor repeatedly told the jurors that the mitigating factors presented by Mr. Mordenti were not legitimate considerations. The prosecutor argued:

> Nothing that the defense can **say,** nothing that the defense can do can mitigate this murder.

(R. 1469).

These arguments and actions were intended only to inflame the jury. The remarks were of the type that the Florida Supreme Court has found "so egregious, inflammatory, and unfairly prejudicial that a mistrial was the only proper remedy." Garron v. State, 528 So.2d 353, 358 (Fla. 1988); Campbell v. State, 679 So.2d 720 (Fla. 1996).

Here, the prosecutors' arguments went beyond a review of the evidence and permissible inferences. They were intended to overshadow any logical analysis of the evidence and to generate an emotional response, a clear violation of Penry v. Lynaugh, 109 S. Ct. 2934 (1989). The Florida Supreme Court has called such improper prosecutorial commentary "troublesome." Bertolotti v. State, 476 So.2d 130, 132 (Fla. 1985).

The penalty phase of Mr. Mordenti's trial did not comport with these essential principles. Rather, the State introduced evidence that was not relevant to any statutory aggravating factors and argued this evidence and other impermissible matters as a basis for imposing death. The prosecutor's arguments were "of such a nature as to evoke the sympathy of the jury" and thus violated the rule intended "to assure the defendant as dispassionate trial as possible." Welty v. State, 402 So.2d 1159, 1162 (Fla. 1981).

The prosecutor's presentation of wholly improper and unconstitutional nonstatutory aggravating factors starkly violated the eighth amendment, and the sentencer's consideration and reliance upon nonstatutory aggravating circumstances prevented the constitutionally required narrowing of the sentencer's discretion. See Stringer v. Black, 112 S. Ct. 1130 (1992); Maynard v. Cartwrisht, 108 S. Ct. 1853, 1858 (1988). As a result, these impermissible aggravating factors evoked a sentence that was "an unguided emotional response," a clear violation of Mr. Mordenti's constitutional rights. Penry v.

Lynaugh, 109 S. Ct. 2934 (1989). Mr. Mordenti is entitled to relief.

ARGUMENT XVII

THE SENTENCING COURT ERRED IN REFUSING TO FIND AND WEIGH THE MITIGATING CIRCUMSTANCES SET OUT IN THE RECORD.

Sentencing judges **are** required to specifically address nonstatutory mitigation presented and/or argued by the defense. Campbell v. State, 571 So.2d 415 (Fla. 1990). The failure to give meaningful consideration and effect to the evidence in mitigation requires reversal of a death sentence. Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

Evidence was presented showing that Mr. Mordenti was kind, generous, good friend and a reliable employer. Mr. Mordenti was a fair business man. Mr. Mordenti's behavior in court was exemplary. Mr. Mordenti was sorry Thelma Royston **was** killed although he was not responsible for her death. The Court failed to find disparate treatment of equally culpable people (R. 1375-1434).

"When a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1990). See Maxwell v. State, 603 So.2d 490 (Fla. 1992).

To the extent that counsel failed to litigate this issue at trial or on direct appeal, Mr. Mordenti was denied effective

assistance of counsel. Mr. Mordenti is entitled to an evidentiary hearing and to relief.

ARGUMENT XVIII

THE NONSTATUTORY AGGRAVATING FACTORS CLAIM.

Aggravating circumstances specified in Florida's capital sentencing statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So.2d 882 (Fla. 1979) ; Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977); Proffitt v. Florida, 428 U.S. 242, 258, 96 S. Ct. 2960, 49 L.Ed.2d 913 (1976).

At the penalty phase, the State impermissibly argued that Mr. Mordenti was a con-artist, a con man and a used car salesman (R. 1460). The prosecution also impermissibly argued that Thelma Royston died at her house in her barn alone. The State impermissibly argued about the number of wounds she received and emphasized the gruesome photographs by asking the jury to look at her eyes. He argued that death was not instantaneous and compared the value of the victim's life to Mr. Mordenti's life. The prosecution impermissibly argued that to recommend life would be a reward to Mr. Mordenti and that he should not be able to look forward to parole (R. 1467-1468).

None of this was relevant to any statutory aggravating factor. It was "of such a nature as to evoke the sympathy of the jury" and thus violated the rule intended "to assure the defendant as dispassionate a trial as possible." Welty v. State,

402 So.2d 1159, 1162 (Fla. 1981). See Routly v. State, 440 So.2d 1257 (Fla. 1983); Knight v. State, 338 So.2d 201 (Fla. 1976).

The State encouraged the consideration of nonstatutory aggravating circumstances during closing argument in determining Mr. Mordenti's sentence. In addition, Mr. Mordenti's own defense counsel failed to understand that non-statutory aggravating factors are impermissible, for example See R. 1644. It must be presumed that the jury weighed these nonstatutory aggravating circumstances when sentencing Mr. Mordenti. See Espinosa v. Florida, 112 s. ct. 2926 (1992). This violated Mr. Mordenti's constitutional guarantees under the Eighth and Fourteenth Amendments by placing an extra thumb on the death side of the scale, and skewing the weighing process. See Stringer v. Black, 112 s. ct. 1130 (1992).

The Court improperly sentenced Mr. Mordenti to death by weighing nonstatutory aggravating circumstances during the court's sentencing. The Court also improperly relied on the already infirm jury recommendation.

ARGUMENT XIX

THE SKIPPER V. NORTH CAROLINA CLAIM.

The jury was not presented with evidence concerning Mr. Mordenti's good behavior during the 119 days he was incarcerated and the entire period of time that he was out on bond until his trial through sentencing. Mr. Mordenti was initially placed on house arrest but was then removed and allowed to resume his normal schedule. In fact, he was even issued a driving permit.

This evidence was mitigating and should have been considered by the jury to show that he was entitled to a sentence less than death. This failure denied Mr. Mordenti a reliable sentencing determination in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Skipper v. South Carolina, 476 U.S. 1 (1986) .

The failure of trial counsel to investigate and present this evidence denied Mr. Mordenti the effective assistance of counsel at trial in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Garcia v. State, 622 So.2d 1325 (Fla. 1993). The failure to present this issue on appeal also denied Mr. Mordenti effective assistance of counsel. Evitts v. Lucy, 469 U.S. 387 (1985).

ARGUMENT XX

THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR IS UNCONSTITUTIONALLY VAGUE.

The Court instructed Mr. Mordenti's sentencing jury that when considering aggravating circumstances it could consider:

> "the crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification". Cold, calculated and premeditated consists of a careful plan or prearranged design to kill. A pretense of moral justification on excuse that though insufficient to reduce the degree of homicide, nevertheless, rebuts the otherwise cold calculating nature of the homicide.

(R. 1491) . This instruction violates Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992);

Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwrisht, **486** U.S. 356 (1988), and the Eighth and Fourteenth Amendments to the United States Constitution. The jury instruction failed to give the jury meaningful guidance as to what was necessary to find this aggravating factor. Jackson v. State, 648 So.2d 85 (Fla. 1994).

To the extent that Mr. Mordenti's counsel failed to adequately object, Mr. Mordenti did not receive effective assistance of counsel under the Sixth Amendment of the United States Constitution. Trial counsel had the obligation to know the law, and failure to know the law regarding proper objections concerning jury instructions in capital cases falls below reasonably professional standards of representation. Starr v. Lockhart, 23 F. 3d 1280 (8th Cir. 1994); Strickland v. Washington, 466 U.S. 668 (1984). The State acknowledged defense counsel's ineffectiveness in the State's direct appeal brief at page 22. An evidentiary hearing is required on this claim, for the files and records by no means conclusively demonstrate that Mr. Mordenti is not entitled to relief.

ARGUMENT XXI

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE HEINOUS, ATROCIOUS, AND CRUEL AGGRAVATOR.

The trial court instructed Mr. Mordenti's jury on the "heinous, atrocious and cruel" aggravator:

> Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain

> with utter indifference to or even enjoyment of the suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless -- conscienceless or pitiless and was unnecessarily torturous to the victim.

(R. 1491). The State failed to prove the existence of this aggravator beyond a reasonable doubt. There was insufficient evidence to support the finding of this aggravating circumstance. Because the aggravating circumstance did not apply as a matter of law, it was error to submit it for the jury's consideration. Archer v. State, 613 So.2d 446 (Fla. 1993); Kearse v. State, 20 Fla. L. Weekly S300 (Fla. June 22, 1995).

Moreover, the jury instruction received by the sentencing jury in this case violated the Eighth Amendment because it was unconstitutionally vague. The instruction received by the jury was the exact instruction found to be unconstitutional in Shell v. Mississippi, 498 U.S. 1 (1990). See also Maynard v. Cartwright, 486 U.S. 356 (1988). To the extent that Mr. Mordenti's counsel failed to adequately object to the jury instruction at issue, Mr. Mordenti did not receive effective assistance of counsel under the Sixth Amendment of the United States Constitution. The State recognized defense counsel's ineffectiveness in its brief on direct appeal at page 18. Trial counsel had the obligation to know the law, and failure to know the law regarding proper objections concerning jury instructions in capital cases falls below reasonably professional standards of

representation. Starr v. Lockhart, 23 F. 3d 1280 (8th Cir. 1994) ; Strickland v. Washington, 466 U.S. 668 (1984). Mr. Mordenti is entitled to an evidentiary hearing on this issue, as the records and files in this case do not conclusively show that he is entitled to no relief.

ARGUMENT XXII

THE CALDWELL V. MISSISSIPPI CLAIM.

Throughout Mr. Mordenti's case, statements were frequently made about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase. The jury was told it merely recommended a sentence to the judge, their recommendation was only advisory, and that the judge alone had the responsibility to determine the sentence to be imposed for first-degree murder. The Court repeatedly informed the jurors that the Court had the "final decision" for deciding whether Mr. Mordenti would be sentenced to death.

The Court failed to instruct the jury that its recommendation would only be overridden in circumstances where no reasonable person could agree with it. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). The judge merely told the jury that in rare circumstances would the recommendation be overridden.

Under Florida's capital statute, the jury has the primary responsibility for sentencing. Its decision is entitled to great weight. McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982); Espinosa v. Florida, 112 S. Ct. 2926 (1992). Thus, suggestions

and instructions that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is free to impose whatever sentence he or she deems appropriate irrespective of the sentencing jury's decision, is inaccurate and is a misstatement of Florida law. Mann, 844 F.2d at 1450-55 (discussing critical role of jury in Florida capital sentencing scheme); Espinosa v. Florida, 112 S. Ct. 2926 (1992). Counsel's failure to adequately object to these comments, request curative instructions, and move for mistrial, constitutes deficient performance. Confidence in the outcome is undermined. An evidentiary hearing is required on this claim, for the files and records by no means conclusively demonstrate that Mr. Mordenti is not entitled to relief.

ARGUMENT XXIII

THE **MULLANEY** V. **WILBUR** CLAIM.

> The state must establish the existence of one or more aggravating circumstances before the death penalty [can] be imposed . . .
>
> [S]uch a sentence could be given if the State showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974) (emphasis added). This standard was not applied at the penalty phase of Mr. Mordenti's trial. Instead, the Court and prosecutor shifted to Mr. Mordenti the burden of proving whether he should live or die.

It is improper to shift the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances. Mullaney v. Wilbur, 421 U.S. 684 (1975).

Prosecutorial argument at Mr. Mordenti's penalty phase required imposition of the death sentence unless Mr. Mordenti not only produced mitigation, but also established that the mitigation outweighed the aggravating circumstances. The trial court then employed the same standard in sentencing Mr. Mordenti to death. See Zeigler v. Dugger, 524 So.2d 419 (Fla. 1988), cert. denied, 112 S. Ct. 390 (1991) (trial court is presumed to apply the law in accord with manner in which jury was instructed). The burden was on Mr. Mordenti to show that life imprisonment was the appropriate sentence because consideration of mitigating evidence was limited to only those factors proven sufficient to outweigh the aggravation. The State argued:

> Now, in this particular case, the state's aggravating factors have to be proven to you beyond a reasonable doubt, the same burden we had in the first part of this trial. And, in fact, today, we are coming back to you based on that evidence, based on this crime, we're coming back to you and saying this murder was so aggravating, it deserves the death penalty and those factors have already been proven to you beyond a reasonable doubt.
>
> The defense doesn't have that burden. They don't have that burden. But I submit to you that they have not overcome the vast weight of the aggravating factors that the state has presented to you in the trial of this case.

(R. 1457) (emphasis added).

and:

> So we have sat back and everyone has listened to what they have presented in mitigation and it doesn't overcome the facts of this murder. It does not overcome the aggravating factors we have in this case.

(R. 1459) (emphasis added).

The Court believed Mr. Mordenti carried the burden of proving whether he should live or die. The Court unreasonably believed that only mitigating evidence that rose to the level of "outweighing" aggravation need be considered (R. 1492). This is demonstrated in her sentencing order. To the extent that defense counsel failed to effectively litigate and preserve this issue, counsel's performance **was** ineffective. Mr. Mordenti is entitled to an evidentiary hearing on this issue as the records and files do not conclusively establish that he is entitled to no relief.

ARGUMENT XXIV

FLORIDA'S STATUTE ON THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD.

At the time of Mr. Mordenti's sentencing, the language of § 921.141 (5), Fla. Stat. (1991), which defined "cold, calculated and premeditated, " and "heinous, atrocious, or cruel," was facially vague and overbroad. Godfrey v. Georgia, 446 U.S. 420 (1980).

"[I]n a 'weighing' State [such as Florida], where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors [exist] ." Richmond v. Lewis,

113 S. Ct. 528, 534 (1992). A facially vague and overbroad aggravating factor may be cured where "an adequate narrowing construction of the factor" is adopted and applied. Id. However, for the violation of the Eighth and Fourteenth Amendments to be cured, "the narrowing construction" must be applied during a "sentencing calculus" free from the taint of the facially vague and overbroad factor. Id. at 535. In addition, "[N]ot just any limiting construction will do; a constitutionally sufficient one is required." Turner v. Williams, 35 F.3d 872, 880 (4th Cir. 1994) (emphasis in original).

The jury is a co-sentencer in Florida. Johnson v. Singletary, 612 So.2d 575 (Fla. 1993). "By giving 'great weight' to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor this court must presume the jury found." Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992). The indirect weighing of the facially vague and overbroad aggravators violates the Eighth and Fourteenth Amendment. Richmond, 113 S. Ct. at 534.

ARGUMENT XXV

MR. MORDENTI IS INNOCENT OF THE DEATH PENALTY.

The United States Supreme Court has held that, where a person is sentenced to death and can show innocence of the death penalty, he is entitled to relief for constitutional errors which resulted in a sentence of death. Sawyer v. Whitley, 112 S. Ct. 2514 (1992).

Innocence of the death penalty is shown by demonstrating insufficient aggravating circumstances so as to render the individual ineligible for death under Florida law. In this case, Mr. Mordenti's trial court relied upon two aggravating circumstances to support his death sentence: (1) cold, calculated, and premeditated; and (2) the crime was committed for pecuniary gain. (R. 1542-1543).

Mr. Mordenti's jury was given unconstitutionally vague instructions on cold, calculated, and premeditated. As a result, this aggravating circumstance cannot be relied upon to support Mr. Mordenti's death sentence.

The second aggravating circumstance -- "for pecuniary gain" is insufficient standing alone to establish death eligibility. This is especially true given the mitigation in this case.

These instructions were erroneous, vague, and failed to adequately channel the sentencing discretion of the judge and jury or genuinely narrow the class of persons eligible for the death penalty. In sum, insufficient aggravating circumstances exist to support Mr. Mordenti's death sentence.

Furthermore, Mr. Mordenti's death sentence is disproportionate. In Florida, a death sentenced individual is rendered ineligible for a death sentence where the record establishes that the death sentence is disproportionate. Here, the lack of aggravating circumstances coupled with the mitigating evidence render the death sentence disproportionate. Mr. Mordenti is innocent of the death penalty. To the extent that

trial or appellate counsel failed to adequately raise this issue, Mr. Mordenti **was** denied effective assistance of counsel. An evidentiary hearing is warranted.

ARGUMENT XXVI

THE IMPROPER PROSECUTORIAL ARGUMENT CLAIM.

During voir dire, the prosecutor repeatedly asked prospective jurors if they could vote for a sentence of death if the aggravating circumstances required that sentence.

The **law** does not require that a death sentence be imposed. In a capital sentencing proceeding, the law does not require the jury to recommend a sentence of death over life imprisonment. The law requires the jury to determine the existence of aggravating and mitigating circumstances weigh them against each other. The law requires the jury to consider the evidence introduced in both the guilt and sentencing phases of the trial, and after having done so, recommend an appropriate sentence.

The prosecutor misguided the jury into thinking that the law required one sentence over the other, when in fact, the proper question was whether, based upon the evidence regarding aggravating and mitigating circumstances, a juror would consider the appropriateness of a death recommendation.

The prosecutor mislead the jury into believing the recommendation of the jury was a simple counting process. The prosecutor implied that the jury should merely compare the number of aggravating circumstances in relation to the number of mitigating circumstances (R. 1458). If the number of aggravating

circumstances exceeded the number of mitigating circumstances, the prosecutor suggested to the jury the law required or called for a recommendation of death (R. 1468, 1469). The prosecutor told the jury it had no discretion in its recommendation:

> The people of the State of Florida now come before you and urge you to urge Judge Bucklew to use that sword to impose capital punishment, the death penalty, on this defendant for what he did because justice demands it. There is no alternative in this case whatsoever for that murder. There is no alternative.

(R. 1456) (emphasis added).

The prosecutor told the jury "there is no alternative." This is an incorrect statement of the law. Under Florida's sentencing scheme, the jury has complete discretion in choosing between life or death. "Mercy may be a part of that discretion." Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985). The prosecutor's argument in Mr. Mordenti's case is precisely the type of argument that violates due process and the Eighth Amendment. See Drake, 762 F.2d 1449, 1458-61 (11th Cir. 1985) (en banc).

The prosecutor's arguments also violated the Fourteenth Amendment, and this due process violation demands relief. Because an objection and motion for mistrial should have been made by Mr. Mordenti's counsel, Mr. Mordenti was denied his right to effective representation of counsel as guaranteed by the United States Constitution. See Strickland v. Washington, 466 U.S. 668 (1984). An evidentiary hearing is required, because the files and records do not conclusively demonstrate that Mr. Mordenti is not entitled to relief.

ARGUMENT XXVII

MR. MORDENTI'S COUNSEL IS TJNCONSTITTJTIONALLY PROHIBITED FROM INTERVIEWING JURORS.

Florida Rule of Professional Conduct 4-3.5(d)(4) provides that a lawyer shall not initiate communications or cause another to initiate communication with any juror regarding the trial in which that juror participated. This prohibition restricts Mr. Mordenti's ability to allege and litigate constitutional claims that would show that his conviction and sentence of death violate the United States Constitution. Powell v. Allstate Insurance co., 652 So.2d 354 (Fla. 1995). It is imperative that post-conviction counsel be permitted to interview jurors to discover if overt acts of misconduct impinging upon the defendant's constitutional rights took place in the jury room. This Court must grant relief or rule that this Rule is unconstitutional.

ARGUMENT XXVIII

THE JUROR MISCONDUCT CLAIM.

During the penalty phase, Juror Baker said she had discussions with Jimmy Muench, an attorney, for whom she was a witness in another trial. They discussed her jury duty on Mr. Mordenti's case. Mr. Muench said that the state attorneys, Mr. and Ms. Cox, were friends of his. Juror Baker also revealed that she heard information through conversations at work that Mr. Mordenti had been previously represented by Barry Cohen (R. 1321-1329). Juror #8 revealed that through conversations at his work place he learned that the co-defendant Larry Royston had killed himself (R. 1342). The juror misconduct that occurred in Mr.

Mordenti's trial violated his Sixth, Eighth and Fourteenth amendment rights and corresponding provisions of the Florida Constitution. Defense counsel was ineffective for failing to request removal and substitution of these jurors. Mr. Mordenti is entitled to relief.

ARGUMENT XXIX

THE CAPITAL SENTENCING STATUTE IS TJNCONSTITUTIONAL.

Florida's capital sentencing scheme denies Mr. Mordenti his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied in this case. Florida's death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. See Proffitt v. Florida, 428 U.S. 242 (1976). The Florida death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Eighth Amendment to the United States Constitution.

Execution by electrocution imposes physical and psychological torture without commensurate justification, and therefore constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner, and juries receive unconstitutionally vague instructions on the aggravating circumstances. See Godfrey v. Georsia; Espinosa v. Florida, 112 S. Ct. 2926 (1992).

ARGUMENT XXX

THE CUMULATIVE ERROR CLAIM.

Mr. Mordenti failed to receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The flaws in the system which convicted Mr. Mordenti of murder and sentenced him to death are many. They have been pointed out throughout not only this pleading, but also in Mr. Mordenti's direct appeal; and while there are means for addressing each individual error, the fact remains that addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death sentence. These errors cannot be harmless. The results of the trial and sentencing are not reliable. Rule 3.850 relief must issue.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Mordenti respectfully urges this Court to reverse the lower court, order an evidentiary hearing, and grant such other relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on September 29, 1997.

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