

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-979

LOWER TRIBUNAL NO. 2005-CF-15549

DONALD LENNETH BANKS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

*On Appeal from the Circuit Court, Fourth
Judicial Circuit, in and for Duval County, Florida*

*Honorable Hugh A. Carithers
Judge of the Circuit Court, Division CR-D*

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Mr. Banks' motions for post-conviction relief filed under Florida Rule of Criminal Procedure 3.851.

Donald Banks will be referred to as "Mr. Banks," "Banks," or "Appellant." The State of Florida will be referenced as "Appellee" or "the state." The record on direct appeal will be referenced as "R," preceded by the volume number and followed with the page number: (1 R 1.) The supplemental record on direct appeal will be designated as "SR." The record on appeal generated for 3.851 proceedings will be referenced as "PCR," and the supplemental record on postconviction appeal, will be designated as "SPCR."

STATEMENT OF THE CASE

On December 15, 20005, Donald Banks was charged by indictment with one count of First-Degree Murder and Armed Robbery; the state sought death. (1 R 18.)

Banks proceeded to trial on the murder charge only. Jury selection and opening statements occurred on May 27, 2008. (8 R 4; 9 R 224, 236.) The state's case-in-chief began May 28, 2008; the state presented: Lead Det. Bodine (9 R 252; 10 R 578); Rebecca Bencini, the victim's neighbor (9 R 264); Karen Smith, an evidence technician with Jacksonville Sheriff's Office (JSO) (9 R 274); Sudie Johnson, Mr. Banks' former girlfriend (9 R 347); Florida Dept. of Law

Enforcement (FDLE) shoe impression expert, Tom Buoungiorne (9 R 390); JSO latent print examiner, Richard Kocik, (10 R 409); FLDE latent print examiner, William Tucker (10 R 433); FDLE DNA analyst, James Pollock, Jr. (10 R 455); and Dr. Jesse Giles, a forensic pathologist. (10 R 532.)

The defense presented two witnesses: Michael Bencini, Mr. Banks' neighbor (11 R 622); and the defendant, Mr. Banks. (11 R 627.) Closing arguments occurred on May 29, 2008. (11 R 690, 700, 728.)

The jury found Mr. Banks guilty of first-degree murder on May 30, 2008. (5 R 832; 11 R 784.) Penalty phase occurred on June 17, 2008. The state presented victim impact witness, Betty Gedrottis. (14 R 865.) Det. Larry Kuczkowski established a prior violent felony. (14 R 868.) The defense presented Mr. Banks' father, Donald Banks (hereinafter "Senior") (14 R 875) and psychologist, Dr. Harry Krop. (14 R 880.) The jury recommended Death by a vote of 10-2 (14 R 961) and answered a special interrogatory that Banks played a significant role in the homicide of the victim. (5 R 848.)

The court followed the jury's sentencing recommendation. (5 R 855.) It determined that Banks had a substantial involvement in the murder (6 R 994) and found the following mitigation: (1) low IQ (very little weight); (2) a deficit in Banks' brain—mild to moderate frontal lobe impairment (moderate weight); (3) anti-social traits (little weight); (4) Banks was not the only participant in the

murder (not proven, no weight); (5) Banks had a difficult youth (little weight).¹ (6 R 999-1000.) The court found three aggravating factors: (1) prior violent felony (very great weight); (2) HAC (very great weight); (3) CCP (great weight). (6 R 994-98.) The state sought the financial gain aggravator, but it was not proven. (6 R 998.)

Mr. Banks timely raised six claims on direct appeal.² This Court affirmed conviction and sentence on June 3, 2010. Banks v. State, 46 So. 3d 989, 1001 (Fla. 2010). Banks filed a petition for writ of certiorari with the United States Supreme Court (USSC), which was denied on March 21, 2011. Banks v. Florida, 131 S.Ct. 1689 (2011).

Mr. Banks filed his initial 3.851 Motion for Postconviction Relief on March

¹ The court gave this mitigator “little weight” because Banks failed to demonstrate that childhood abuse or drug use “played a role in the murder.” (6 R 1000.)

² (1) the court erred in denying Banks’ cause challenges to prospective juror “C”; (2) the court erred in allowing the state to strike three black men for reasons that

² (1) the court erred in denying Banks’ cause challenges to prospective juror “C”; (2) the court erred in allowing the state to strike three black men for reasons that were not race-neutral; (3) the court erred in allowing the state to present DNA evidence without statistical information demonstrating the significance of the information; (4) the court erred in denying Banks’ motion for mistrial when Studie Johnson implicated Banks in an unrelated crime on cross-examination; (5) the court erred in allowing the state to show a video in penalty phase of Banks committing an unrelated offense to purportedly support the prior violent felony aggravator; (6) the court erred in finding the CCP aggravator. Banks v. State, 46 So. 3d 989, 994-95 (Fla. 2010).

16, 2012. (2 PCR 127-230.) Banks presented 13 postconviction claims.³ (2 PCR 127-228.) The court granted evidentiary hearing on claims 1-11. (3 PCR 450-52.) Evidentiary hearing occurred on July 22-24, 2013 (10 PCR 1671-1721; 11 PCR 1722-1921; 12 PCR 1922-2008) and November 13, 2013. (12 PCR 2393-2121.) The trial court issued an Order denying relief on March 21, 2014. (8 PCR 1143-1169.) Notice of appeal was timely filed after rehearing. (8 PCR 1172-82, 1228-29.)

STATEMENT OF THE FACTS

The police discovered Linda Volum's remains on March 10, 2005 after her

³ (1) Ineffective assistance of counsel (IAC) for failing to move to suppress evidence found in Banks' apartment that was secured through an illegal search and seizure without a warrant; (2) IAC for failing to object to DNA evidence introduced without population statistics as required under Brim; (3) IAC in cross-examination of Sudie Johnson where he opened the door to evidence of an unrelated crime; (4) IAC for failing to object to improper prosecutorial comments implying that Banks was guilty of an uncharged sexual battery on the victim; (5) IAC for failing to object to introduction of hospital records through an improper custodian; (6) IAC for failing to investigate and call witnesses in the guilt phase of trial; (7) IAC for failing to object to instances of prosecutorial misconduct in guilt and penalty phase; (8) IAC in failing to retain shoeprint and latent print experts and an independent medical examiner; (9) IAC in failing to impeach Sudie Johnson eliciting testimony that she was angry at Banks and failing to impeach Detective Bodine regarding the victim's friendly relationship with Banks and the victim's questionable lifestyle and nefarious acquaintances; (10) IAC in failing to utilize its DNA expert to test untested evidence and call the expert at trial; (11) IAC in penalty phase; (12) IAC for failing to object to a variance in the indictment concerning the principal jury instruction; (13) Cumulative error.

car was involved in an accident – four black males were witnessed fleeing from her vehicle after it crashed. (1 R 1; 9 R 256, 261.) Mr. Banks became a suspect on March 24, 2005 when his live-in girlfriend, Sudie Johnson, told the police he was involved. (1 R 2.)

The Trial: Banks and Volum had a friendly relationship. (11 R 628-31.) Ms. Volum struggled with drug and alcohol addiction. (10 R 569-574; 11 R 630, 632.) She met Banks in their Arlington neighborhood and began buying drugs from him. (11 R 629, 634.) She allowed him to sell drugs from her home. (11 R 631.) She traded things, such as her laptop computer, jewelry, and sex with Banks, for drugs. (11 R 632, 635.) Ms. Volum had pawned her computers in the past. (10 R 600; 11 R 606.)

According to Banks', he spent the day in question with Ms. Volum. They drove her car to Winn-Dixie to get beer and cigars. (11 R 637, 639.) Ms. Volum had been drinking and had difficulty using her debit card at Winn-Dixie. (11 R 640.) They went back to her apartment, drank, had sex, and did drugs; Banks sold drugs. (11 R 640-41.) Banks cut three or four of his fingers on a glass crack pipe at some point during the day.⁴ (11 R 642.) A dealer named "Bo" came by. (11 R 646.) Bo and Banks took Volum's car and ATM card (with her consent) to an ATM machine then went to the Northside to get more drugs to sell. (11 R 644-47.)

⁴ He cut himself on the leg about three or four days before. (11 R 642.)

When Banks tried to use the ATM card, he was unsuccessful. (9 R 259.) Ms. Volum did not accompany them because she was too drunk. (11 R 647.) Banks and Bo returned to Volum's house and sold more drugs. (11 R 648.) Then Banks walked home with Ms. Volum's laptop (which she pawned to him in exchange for drugs). (11 R 646, 648, 650.) Banks left Ms. Volum with Bo alive. (11 R 649.)

Forensic evidence was presented that Banks was in Volum's apartment, bled there, and had sex with the victim. (e.g. 10 R 416, 426 477-84.) A bloody latent print was found at the scene that was not matched to either Banks or the victim. (9 R 417, 426.)

Sudie Johnson testified that Banks told her he murdered Ms. Volum Banks gave her Ms. Volum's laptop computer, and that when he pulled the laptop from a green pillowcase she saw some bloody clothes underneath. (9 R 353.) Banks told her some details about the murder. (9 R 355, 359, 360-61.) Despite the gravity of Banks' supposed declarations, Johnson did not call the police.

Banks denied making any inculpatory statements to Ms. Johnson. He said Johnson implicated him because she was upset with him. (11 R 677-78.)

The Penalty Phase: The state presented victim impact evidence (14 R 865) and a videotape, via Det. Kuczkowski, of someone (allegedly Banks) stabbing another individual at a convenience store. (14 R 868.)

The defense presented brief telephonic testimony of Banks' Senior, who said

he and Banks' mother divorced when his son was "under seven" years old. Senior served in Vietnam. He was not there for Banks as a child and, therefore, felt somewhat responsible for the instant crime. (14 R 875-77.)

Psychologist, Dr. Harry Krop, testified that he evaluated Mr. Banks. He reviewed the guilt phase trial transcripts, "relevant depositions," witness statements, "extensive police reports," school records, medical records, jail records, and spoke with some family members. (14 R 882-3.) He determined that Banks was depressed, even suicidal, but thought it was "situational" in nature. (14 R 890.) Banks has an IQ of 74—in the lowest fifth or sixth percentile of the population. (14 R 890.) There was a discrepancy between the verbal and non-verbal IQ, suggesting a learning disability, but he did not test for a learning disability. (14 R 890-91.) The neuropsychological exam revealed mild to moderate issues in the frontal lobe portion of the brain, which is responsible for things like planning, problem solving, and impulse control. (14 R 891-92.) Banks self-reported alcohol abuse and two head injuries. (14 R 893.) Dr. Krop diagnosed Banks with a cognitive disorder NOS, history of substance abuse, borderline intellectual functioning, and anti-social traits. (14 R 894.)

The Evidentiary Hearing:

Penalty phase counsel: Michael Edwards, the penalty phase attorney, did not hire a fact investigator or a mitigation specialist. (11 PCR 1908). Counsel "did it

[him]self.” The only help he had in gathering mitigation was from Banks’ uncle, Dane Banks, who located some witnesses. (11 PCR 1909-10.) Edwards did not think he needed a mitigation specialist:⁵ “not being arrogant, but I can do the same job.” (11 PCR 1916). However, he was unfamiliar United States Supreme Court precedent and capital defense materials like the 2003 ABA guidelines, stating that the ABA guidelines are guides to what is reasonable in penalty phase investigations, and that it is recommended every capital defense team should include a mitigation specialist. (11 PCR 1916-1919.)

Edwards only presented two witnesses in the penalty phase, and sought only five mitigating factors. (12 PCR 1922.) Edwards “would have liked to have” other mitigation. He wanted a family member to testify about Banks’ lack of support as a youth. (12 PCR 1977). He “couldn’t find a witness” to talk about the bad neighborhoods that Banks grew up in. (11 PCR 1986-87.) He would have liked to present information concerning Banks’ socioeconomic status growing up. (11 PCR 1993.) He only knows who Kurt Banks, Banks’ uncle, is from reading Banks’ 3.851 motion. (11 PCR 1986.)

⁵ Edwards also did not think a mitigation specialist could have helped with getting Banks’ mother to testify, but during the evidentiary hearing, mitigation specialist Sara Flynn explained she had absolutely no difficulty finding and interviewing many witnesses that Edwards did not even look for or investigate. (14 PCR 2493.) Nor did Ms. Flynn have any difficulty in getting Banks’ mother to testify. (14 PCR 2434.)

Edwards claimed to have spoken with Banks' Senior, twice on the phone and once "when he arrived to testify." (12 PCR 1985). However, Senior testified telephonically, so counsel's recollection that he met with Banks Senior in person was wrong. (14 R 875.) Although Edwards briefly spoke with Banks' mother, Mary Patterson, on the phone, he did not call her as a witness – he thought that she was in New Jersey even though she was living in Jacksonville. He did not speak with Ms. Patterson about Banks' childhood, mental illness, and father, because he "didn't get that far with her." (11 PCR 1986, 1987.)

Edwards did not discover that Banks' natural father had a violent temper and destroyed all the furniture in the home. (11 PCR 1995.) He did not know that Banks would return from visits from his father's house devastated because his father was too involved in his drug addiction. (11 PCR 1995.) He did not know that after Banks was released from the New Jersey Youth House at 15, his mother suggested that authorities take him back there. (11 PCR 1996.) The reason he did not present any evidence of Banks' struggle with drug addiction from a young age was that "frankly, not having lay witnesses to present this information." (11 PCR 2003.)

Edwards did not know that Banks suffered with a learning disability or that his mother took him to a psychologist for six months, but stopped because it was too expensive. He did not know whether Banks' mother worked or what her

income was when Banks was a child. (11 PCR 1989-90.) He did not recall reading a document indicating that Banks lived in a deteriorating neighborhood and had to sleep on his landlady's couch because he upstairs apartment burned. (11 PCR 1992.) He did not recall reading that Banks and his friends slept in an abandoned house. (11 PCR 1992.)

Edwards also did not recall speaking with his experts about whether Banks qualified for the statutory mitigation factors of extreme emotional disturbance and inability to conform his conduct to the requirements of the law. (11 PCR 2071.) He conceded he could have requested the two statutory mental mitigating factors and did not bring these up in the Spencer hearing. (11 PCR 2072.) Edwards said he was concerned about the potential for the jury's negative reaction to documents concerning Banks' adolescence, but could not think of any reason why he did not introduce these documents in Spencer hearing, (11 PCR 2072.) He conceded he did not correlate his requested mitigator, ASPD, with Banks' social history or mental disorders, nor offer any rationale to the jury explaining why Banks developed antisocial traits. (11 PCR 2073.)

Edwards agreed that an attorney should spend a minimum of 300 hours preparing for penalty phase (11 PCR 1919) but he admitted he spent only about 106 hours on Banks' case, 34 of which were spent in court. (12 PCR 2068.) Edwards billing indicates that he spent less than two hours total speaking with

mitigation witnesses. (9 R 1490-91.)

Guilt phase counsel: Refik Eler, guilt phase counsel, did nothing in the way of penalty phase investigation. (10 PCR 1693, 1685, 1693; 11 PCR 1729.) He agreed that the ABA guidelines are “always” “good to follow” when conducting a penalty phase investigation. (10 PCR 1702.) He believes mitigation specialists are “very helpful” and remarked that his current office (Public Defender’s Office) has a team of them. (10 PCR 1706.)

Michael Hurst, an investigator, assisted Eler. (10 PCR 1682-83.) Neither Hurst, nor Eler’s paralegal, assisted with mitigation. (10 PCR 1683-84.) Banks’ penalty phase was initially handled by attorney Richard Selinger, who withdrew, and was replaced by Michael Edwards. (10 PCR 1682, 1690.)

Eler does not know why his co-counsel, Mr. Edwards raised ASPD (antisocial personality disorder) as a mitigating factor, and knows that the FSC views ASPD negatively. (11 PCR 1735). He agreed that ASPD can be viewed by the jury as something very bad, because it ASPD “sounds bad,” and “the prosecutor get[s] up there and argue[s] that this person is antisocial, he may or may not do well in long-term incarceration, it’s problematic.” (11 PCR 1736). Eler does not remember the defense trying to link ASPD with something that occurred in Banks’ life, like his childhood or a cognitive disability.” (11 PCR 1737.)

Alan Chipperfield: Mr. Chipperfield was Banks’ attorney for an unrelated armed

robbery case and initially represented Banks in the instant case. (14 PCR 2399.) He conflicted off this matter because Ms. Volum once interned at his office. Banks' mother, Mary, willingly talked with him and answered all of his questions. (14 PCR 2407-08.) Mary told him Banks' father had mental health problems like PTSD from Vietnam. Mary was upset with Banks for getting into trouble and indicated that she had problems with him in the past. Mary talked about her family. (14 PCR 2423.) She did not want to get involved, but remained open for future conversations and provided a contact number. (14 PCR 2424.) Chipperfield discovered that Mary was one of several children, meaning there were lots of people to talk to. Mr. Chipperfield did not talk to them because he knew he could not handle Banks' capital case. (14 PCR 2409.)

Chipperfield's investigation in the instant case was "not at all" complete when the subsequent attorney took over. (14 PCR 2409.) He he had done "just a little bit" of mitigation investigation. (14 PCR 2407.) The investigation was "absolutely at the beginning," and there would have been "much, much more to do." (14 PCR 2410.) If Mr. Chipperfield had remained on the case, he would have traveled to New Jersey, where Banks grew up, and would have met with Banks' family members face-to-face. (14 PCR 2410.) He does not recall speaking to Mr. Edwards or Mr. Eler about Banks' case. (14 PCR 2411.)

Chipperfield has never presented ASPD as a mitigating factor "and I don't

know how I would begin to do that.” (14 PCR 2412). Juries do not look favorably upon ASPD because “it’s all bad things...unless you could argue that it’s something that a person was both with and it’s not his fault.” (14 PCR 2412.)

Sara Flynn: Ms. Flynn has been a licensed clinical social worker and mitigation specialist for 16 years working on cases in numerous states, including Kentucky, Virginia, North Carolina, Georgia, Alabama, Mississippi, Louisiana, and Florida. (14 PCR 2425-27.) She has worked on over 150 capital cases, including the resentencing in U.S. v. Graham. (14 PCR 2429.) Ms. Flynn is qualified to render mental health diagnoses. (14 PCR 2430.)

Ms. Flynn conducted a social background investigation in Banks’ postconviction. She flew to New Jersey to interview Banks’ paternal family members. Many of them were never spoken to by defense counsel despite that they were still living in the same houses as when Banks was growing up. (14 PCR 2433.) Banks’ uncle, Dane Banks, drove her around to people’s houses and would have done this with trial counsel had he been asked. (14 PCR 2434.) On the father’s side, Flynn conducted face-to-face interviews of Kurt Banks (uncle); Donald Banks Senior (father); Shar-day Edwards (half-sister); Arlene Edwards (father’s girlfriend); Carol Dunn; and Dane Banks (uncle):

I literally met everybody that was available in New Jersey and went to everyone’s house and so I was very—I was very informed as to what it was like for him as far as his environment was concerned and the people he was with.

(14 PCR 2433-35.) While she as there, Ms. Flynn visited the areas where Banks grew up. Irvington New Jersey, where his mother moved after divorcing Senior, was full of drugs and crime. A narcotics task force arrested people on a regular basis right next to where Banks attended middle school. Flynn explained how these facts were relevant to Banks' life:

[A]nd that's exactly when [Banks] started getting involved in the street life, is when he started going to that school, which is literally on the other side of the street from where most of these arrests were being made in that area, a lot of heroin, a lot of cocaine, a lot of marijuana.

(14 PCDR 2442.) Flynn observed two drug deals when she was in New Jersey visiting Banks' family member, and saw a memorial in front of a house where a drug dealer pushed his girlfriend out of a window while she was holding a baby, killing them both. "[T]hat's the kind of neighborhood it is." (14 PCR 2443.) There were a lot of drugs, drug dealers, prostitutes, and crime, and it has been that way for the last 30 years. During Ms. Flynn's visit, Banks' family would not let her walk around alone. "[T]hat's the way the neighborhood was then, that's the way it is now. I don't think things have change much at all" (14 PCR 2443.)

On the mother's side, in Jacksonville, Ms. Flynn conducted face-to-face interviews of Banks' mother, Mary Patterson, Crystal Williams (maternal aunt), Greg Williams (uncle), Ronald Williams (uncle) and other uncles and cousins. She visited Mary's home in Jacksonville and had had absolutely no problem contacting

Mary or getting her to participate in the case. (14 PCR 2434.) All the witnesses Flynn spoke to opened their homes to her and were willing to testify. (14 PCR 2493.)

Flynn testified in detail regarding her interviews with Banks and his family members. She stated that there “wasn’t much” of a penalty phase in his case, and the attorneys could “have done so much more.” (14 PCR 2470.) The “new” mitigation discovered in postconviction could have been used at trial. Additionally, all the mitigation available now should have been developed and provided to Dr. Krop so that he “[w]ould have the benefit of knowing what he was really looking at.” (14 PCR 2470.) Dr. Krop had “very little” available to him when he was working on Banks’ case because his attorneys did not do that much. (14 PCR 2470.)

Over the course of her career as a mitigation specialist Flynn has never argued ASPD as a mitigating factor. (14 PCR 2472.) She explained, “you’re going to find reasons for the child’s behavior[...] no one is just born antisocial. (14 PCR 2473.)

All told, Ms. Flynn found evidence supporting 100 mitigating factors in Banks’ case. (10 PCR; 1545-49; 14 PCR 2474.)

Mary Patterson: Mary Patterson is Banks’ mother. She “got married June 2, right before I turned 16.” (13 PCR 2181.)

I had [Banks] at 16. I really, you know, I was—it was a mistake. I really didn't want to be mother at 16. But my mother was very passionate about, you know, there's no abortions, you're going to have the baby and she kindly called Lenny's father [Senior], because he had went to boot camp, and told him that when he come home definitely we going to get married.

(13 PCR 2207.) Banks Senior was 19 going on 20 when Donald was born, and was not around for the birth because he was in the service. (13 PCR 2180.) “When Lenny [Banks] started talking and walking, I wanted him to call me by my nickname. I didn't want to be called mommy...” (13 PCR 2207.)

Senior came back from Vietnam “scarred, a little bit crazy...” (13 PCR 2181.) He had memories about Vietnam and nightmares. He “came back just paranoia [sic]”, he was very destructive and wanted to argue a lot. He was not the same person she knew in high school. He was “totally messed up in the head.” (13 PCR 2181-82). He used to keep baseball bats at the door because it was “like somebody is always over his shoulder.” (13 PCR 2185.) He tore up the house. He destroyed a brand new table set and would replace it, only to break it again. (13 PCR 2182.) He was “a lunatic.” (13 PCR 2184.) He was leaving a “bad impression on [young Banks] because my son is looking at his father acting like this.” “[Banks] was right there with [us]” every time it happened. (13 PCR 2184.)

Senior was also doing drugs when he got back from Vietnam. He admitted to Mary that he was using – he did not do it around her, but he was high when he got home. (13 PCR 2187.) “[I]t was upsetting because...we knew he was doing,

you know, drugs and cocaine and it was – he was just really out of control.” (13 PCR 2182-83.) Young Banks was in the household when this was going on. (13 PCR 2187.) Mary reports that Senior is still doing cocaine to this day. “My brother from New Jersey informs me that [Senior] walks the streets with [his] nose running. Just never ends, just ridiculous.” (13 PCR 2187.) He was a “junkie” when they were married and “[he’s] a junkie today.” (13 PCR 2193.)

Mary was scared of Senior. “[O]ne time he had me up against the wall and like he wanted to try to hit me, but...my brothers definitely informed him if he ever put his hands on me he wasn’t going to see the next day.” (13 PCR 2186.) It was still frightening because he was tearing up things and throwing things around the house. (13 PCR 2186-87.) Senior threatened to kill Mary when young Banks was “around.” (13 PCR 2189.) Senior told her “I better not never be near him if he’s sick or dying or he think he dying because he would definitely take me with him.” (13 PCR 2189.) Banks was a very loving little boy and would listen to his father because “he didn’t want to get hit.” (13 PCR 2189-90.)

The destruction continued “over and over.” She “didn’t want my son to be raised up...with that type of father. So I – I left.” (13 PCR 2182.) She “had to leave, I couldn’t take it anymore.” (13 PCR 2183.) Mary would leave Senior, one time moving to Georgia for a month, only to come back. (13 PCR 2184.) Within thirty days of moving back in with Senior, “everything” started all over again. (13

PCR 2181, 2184.) She finally left Senior for good because she did not want to be in an abusive relationship. Senior needed to see a psychiatrist because he was “crazy” but he refused. Young Banks was seven when she left. (13 PCR 2191.)

After the separation she did not have much contact with the Banks family, and moved out of Jersey City. (13 PCR 2193-94.) Mary’s mother also died around this time, which was upsetting because Banks was very close to his grandmother, they lived with her and he called her “mommy.” (13 PCR 2194.)

Child support “was a joke.” (13 PCR 2195.) Banks’ father immediately quit his job and went off the books so he did not have to pay. (13 PCR 2196.) She never received any money from him. (13 PCR 2196.) She paid the bills by herself, or she and her sister would split rent and “if I had a boyfriend that moved in, then we all paid bills together like that.” (13 PCR 2196.)

Mary knows Banks was “really hurt” when she and his father got a divorce— “he couldn’t handle it.” (13 PCR 2190.) He looked up to his father. (13 PCR 2193.) Mary recalls taking Banks to a psychologist because “I was trying to find out what was wrong. I wanted to see what was wrong and if I could help him because I noticed his father scarred him.” (13 PCR 2198.) She decided not continue the sessions after about six months because she did not notice a change in behavior. (13 PCR 2198.)

Although Banks initially blamed Mary for leaving his father, he eventually

saw how his father really was. Banks told Mary his father was “crazy” and that Senior was doing drugs. (13 PCR 2192-93.) “It really broke his heart. Lenny’s [Banks’] heart was broken.” (13 PCR 2193.)

Mary married Wray Bailey about two years after she divorced Senior. (13 PCR 2199.) Banks and Wray did not have a good relationship. Wray spanked Donald with a belt when he was misbehaving which Mary thought “made Lenny [Banks] hate him even more.” (13 PCR 2201.)

Banks started getting into trouble around the age of 13 or 14. He was “taken away” and sent to the Youth House. Mary did not know how to handle it. He was joyriding in cars and hanging out with the wrong crowd. (13 PCR 2202-04.) The Youth House told Mary “ [Banks] might have a mental problem or he might need some, you know, assistance with that.” (13 PCR 2205.) Mary assumed he was getting the help in the Youth house, but this was not the case. (13 PCR 2205.) Banks “definitely had a problem.” (13 PCR 2206.) “He definitely had a problem.” (13 PCR 2206.) He has “got a child mind.” (14 PCR 2218.)

Mary never visited Banks, sent him letters, or spoke to him on the phone when he was locked up – even when he was just a child. (14 PCR 2213.) She “can’t handle it.” (14 PCR 2220.)

Mary noted that Senior’s family was involved in drugs and crime. Senior’s brother, Kurt, had “issues with drugs” and “got locked up.” Senior’s brother, Dane

Banks, also had an issue with drugs, but got into a motorcycle accident and lost a leg, which “calmed him down a little bit” and probably “kept him out of being jailed. (13 PCR 2199.) Senior’s parents also drank a lot. (13 PCR 2199.)

Mary was living in Jacksonville during the pendency of Banks’ case and was available to testify at Banks’ trial. (13 PCR 2179.) She does not recall speaking to anyone from Banks defense team prior to trial, and did not know that Banks was sentenced to death until the postconviction mitigation specialist told her as much. (13 PCR 2178.) She recalls speaking to “Sara [Flynn]” who “came to my house” and one of Banks’ postconviction attorneys. They educated her about the process so she appeared at Banks’ 3.850 evidentiary hearing voluntarily. (13 PCR 2213.)

Shar-Day Edwards (paternal half-sister): Shar-day is Banks’ half sister – Donald Banks Senior is her father and her mother is Arlene Edwards. (13 PCR 2245.) Arlene was 16 and her father was 27 when the pair got together. (13 PCR 2247.) Shar-day is 14 years younger than Banks. (13 PCR 2251.)

Shar-day was told her father was shot in both kneecaps during his military service, and had to get both of them replaced. (13 PCR 2248.) When she was a child, Senior seemed to suffer from flashbacks. He “used to creep around the house as if he would hear something or hear somebody” and would booby-trap the doorknobs so he would know if people were coming. (13 PCR 2249.) He was paranoid. (13 PCR 2249.) He kept an old knife that “pretty much saved his life.”

He used it to kill an enemy that was coming after him. (13 PCR 2249.) “He seen a lot of people die and friends get killed.” “He had to kill people.” (13 PCR 2249-50.)

Senior has always had a problem with drugs – cocaine and heroin. (13 PCR 2250.) Shar-day was only 4 the first time she remembers seeing Senior use drugs. She saw her “father sticking something up his nose and sniffing it and I used to ask him, daddy, what’s that, and he would tell me a medicine for adults.” (13 PCR 2294.) She found drug paraphernalia around the house when she was a teenager. (13 PCR 2250.) Shar-day’s mother was a heroin addict. (13 PCR 2250-51.) Shar-day remembers attending treatment programs with her mother as a child. Arlene would “just go there and drink methadone.” Arlene was in the methadone program until Shar-day was about 15 or 16. (13 PCR 2252.) When Shar-day was 19, her Mom and Dad would openly smoke marijuana with her. (13 PCR 2253.)

Senior was violent. He had “mood swings and [Shar-day] couldn’t understand it.” (13 PCR 2258.) Senior would “lift me up and throw me into a wall or something and my mother would have to tell him don’t do it like that.” (13 PCR 2259.) Shar-day thought it was the “drugs causing the mood swings and start acting reckless...” “It really wasn’t my father. It was the drugs.” He would “just snap for no reason.” (13 PCR 2258.)

Shar-day thinks her father still “has a problem” with drugs. He tried

treatment but, “somehow I guess he wasn’t strong enough to stay off of it.” (13 PCR 2253.) Her grandfather used to drink a lot of beer (13 PCRE 2255), and one of her father’s brothers was doing drugs, as well as a couple people on her mother’s side. (13 PCR 2255.) Her family “had some type of animosity towards her father.” Her grandfather “felt like my father could have been so much better than what he was.” (13 PCR 2254.)

Banks spent time in his father’s household when he was growing up. (13 PCR 2255.) Arlene told her that Banks called her “mommy” and respected Arlene as if she was his own mother. (13 PCR 2256.) Banks was around when Shar-day was a little girl. When she was older, he was there whenever he was out of jail. (13 PCR 2255.) Banks knew about Arlene and Senior’s drug abuse: “he told me this was happening before we both was born.” (13 PCR 2257.) At one point, Shar-day started acting out – she became a “hard teenager” because she was affected by her parents drug use. (13 PCR 2258.)

Shar-day talked to Banks every day when he lived in Florida. (13 PCR 2260.) They talked about “everything.” (13 PCR 2259.) She could tell he was stressed because he was unable to find a job due to his criminal record. She explained that he had to start from scratch because he was incarcerated over half of his life and did not know how to cope. (13 PCR 2260-61.)

Banks’ attorneys phoned her prior to trial but the conversation only lasted

for about 20 minutes. “It was like hard for me to open because it was a sensitive— it was a sensitive subject.” (13 PCR 2264.) It was difficult to speak to a complete stranger about her family. However, she would have testified at Donald’s trial had she been asked to. (13 PCR 2264.)

Wray Bailey: Wray is Banks’ ex-stepfather. Wray met Banks’ mother, Mary, on the street one day in Jersey City. (14 PCR 2366.) He knew that Mary and Senior had an abusive relationship. (14 PCR 2371.)

Banks was about 8 or 9 when Wray entered the picture -- Banks was “kind of upset most times” and was not a social child. (14 PCR 2371.) Wray was “sure” Banks had mental problems: “I could tell you something was wrong there.” (14 PCR 2372.) “You could see [Banks] needed some help,” but, “I wasn’t his dad.” “[H]ow do you help somebody that you don’t know how to help?” (14 PCR 2373.) Banks struggled in school as well, and was having “every problem a kid could possibly have in school.” (14 PCR 2373.) Banks was missing class and was disruptive – “it was a mess.” Mary got called out of work a lot. If the school was getting Banks any help, he does not believe that it was adequate. (14 PCR 2374.)

Wray knew Banks “was damaged when I met him and the relationship he had with his paternal side was awful.” Banks “was broken” because “it was all hell” at Senior’s house. (14 PCR 2375.) He explained that Banks “wanted to be around [Senior]” and that Banks “always visited his dad,” “visitation was never

withheld,” but Wray and Mary would have to deal with Banks’ emotions afterwards. (14 PCR 2371-72.) Banks would return from his father’s house “just sullen” “[h]e’d go off into his room and just sulking [sic].” (14 PCR 2372.)

Banks’ dad was a drug abuser – Wray knows people who sold drugs to Senior. (14 PCR 2376.) He heard that Banks’ father abused Mary and abused his girlfriend (Arlene). (14 PCR 2376.) When Wray lived in Senior’s neighborhood, he witnessed fights between Senior and his girlfriend in the streets. (14 PCR 2376.) “It was just a destructive lifestyle over there. Nobody was achieving anything other than destroying their lives, I guess...which is why we moved.” (14 PCR 2376.)

Wray explained that Mary came from a big family. Everyone (including Wray, Banks, Mary, and her siblings) all lived under the same roof in a two-bedroom apartment, trying to “make do [sic].” (14 PCR 2378.) Mary was “more or less the mother of everybody. There was a lot of stress there.” (14 PCR 2368.) Mary also brought stress into their relationship by bringing old boyfriends to the house. (14 PCR 2378.) Mary did not spend a lot of time with Banks. They did not do things like see movies together or go shopping together. (14 PCR 2382.)

Mary was on public assistance when Wray met her. (14 PCR 2369.) After she became employed, both she and Wray worked a lot. (14 PCR 2369.) Mary “always had a flare for the extravagant, but...she wasn’t able to afford it.” (14 PCR

2378.) “It’s like she never had and always wanted more. That is what I mean materialistic. She was always – it was always in excess” and they could not afford it. (14 PCR 2379.) They could never save for a house because she was always spending the money and accumulating credit card debt. (14 PCR 2379.)

Both Wray and Mary smoked marijuana everyday. (14 PCR 2380.) Wray lost a job in 1987 because he failed a drug test. (14 PCR 2379.) Banks was aware of their drug use. (14 PCR 2380.) Wray also struggled with a gambling addiction around 1992 -1993. At that point, Banks was in and out of detention centers. (14 PCR 2381.)

Banks’ defense team did not contact Wray at the time of trial, but he would have testified had he been asked. (14 PCR 2383-84.)

Kurt Logan Banks: Kurt Banks is Banks’ uncle who lives in Orange, New Jersey. (13 PCR 2133.) He testified about his brother, Donald Banks (Senior) and Mary’s lack of parenting. “[A]fter his mother and father broke up, you know, they was like I don’t care at all no more for the boy, you know. I guess they tried to do the best they can, but it didn’t look like it from other people’s eyes.” (13 PCR 2148.) Kurt testified that Banks looked up to him and that he spent time in prison for armed robbery and had a drug problem with marijuana and cocaine. (13 PCR 2153-55.) Kurt stated that nobody from the defense team contacted him at the time of Banks’ trial and he would have been willing to testify. (13 PCR 2154.)

Sudie Johnson: Sudie was Banks' girlfriend for about a year. He was never violent with her; they planned to get married and have a family. (13 PCR 2267-68.) Banks kept a diary where he wrote about history, the afterlife, and aspirations about having a good job, a wife, and children. (13 PCR 2271-72.) Banks suffered with reoccurring nightmares. He did not handle stress well. (13 PCR 2275.) Money was a source of anxiety in their relationship, and they had a hard time paying bills. (13 PCR 2276-77.)

Dr. Dudley: Dr. Richard Dudley has been a psychiatrist in since 1975. (14 PCR 2494.) He is licensed in New York and board certified by the America Board of Psychiatry. (14 PCR 2497.) His practice is about half clinical and half forensic – he also teaches. (14 PCR 2495.)

Based on his contact with Banks, his review of the collateral records, and review of family interviews,⁶ Dr. Dudley made numerous findings and diagnoses, including: (1) severe trauma-related difficulties in the form of an anxiety disorder with trauma-related sympathies⁷; (2) personality disorder characterized by

⁶ Dr. Dudley read Banks' juvenile records, Department of Corrections records, school records, material from Dr. Krop, and the mitigation records from Ms. Flynn, including Flynn's interview notes from Banks' family members. (14 PCR 2501.) He spent 12 hours with Banks over two days. (14 PCR 2502.) He performed a psychiatric examination and interview focused on Banks' history; the symptoms Banks exhibited over the course of his life; and Banks' current functionality. (14 PCR 2503.)

⁷ Trauma is an experience in which people feel so physically threatened and

difficulties and instability in a broad range of areas, including attachment, mood, mood regulation, mood stability, impulsivity and an unstable sense self; (3) substance abuse disorder; (4) cognitive and intellectual difficulties, including frontal lobe issues⁸ and a history of learning disabilities; (5) Depression (14 PCR 2504-05); (6) Statutory mental mitigator of extreme emotional disturbance at the time of the crime (15 PCR 2538-39) (7) Statutory mental mitigator that the capacity to conform his conduct to the requirements of the law was substantially impaired at the time of the crime.⁹ All of these issues originated in Banks' childhood and "just kind of stacked up and continued throughout the rest of his life" and existed at the time of the homicide because he did not get the appropriate treatment when the problems began. (15 PCR 2535-37.)

Dr. Dudley explained that the interactions of Banks' various mental issues had an exponential rather than additive effect, which "collectively result[ed] in an extreme emotional disturbance." (15 PCR 2548-49.)

Concerning the "capacity to conform his conduct" mitigator, Dr. Dudley

vulnerable that someone is going to be seriously harmed, if not killed. Trauma is "decidedly different" than a situation that is stressful, frightening, or upsetting. (15 PCR 2551.)

⁸ What was most impressive to Dr. Dudley was Banks' mental inflexibility and inability to solve problems under pressure which he stated was "really kind of frontal lobe issue" (14 PCR 2505.)

⁹ The prosecution at the evidentiary hearing did not rebut these two statutory mitigators on cross-examination or in calling a rebuttal expert.

explained that Banks' numerous mental issues affected his ability to make reasonable, rational decisions, especially in stressful situations, and particularly when decisions must be made quickly. His capacity to control his behavior was impaired. (15 PCR 2539-40.)

Dr. Dudley explained in detail how Banks' various mental problems originated and interacted. He began by discussing hyperactivity. Upon close examination of the records and speaking with Banks and the people around him, it was apparent that Banks' hyperactive behavior was related to the trauma that he was enduring. Hyperactivity is common with kids exposed to the things that Banks was exposed to, especially where there is no nurturing, supportive, caring parent. (15 PCR 2607-08.) The trauma led to behavioral problems, including impulsivity and overreaction to everyday occurrences. (14 PCR 2509.) In cases like Banks', where a child is exposed to trauma and necessary parenting does not occur, the hyperactivity is not only psychological in nature, but it also is physiological in nature and affects brain development. (14 PCR 2508-09.)

Dr. Dudley explained that although Banks' drug use began as self-medication, because it helped alleviate his anxiety, he was particularly at risk for drug dependency due to his drug-infested environment and the multigenerational history of drug use in his family. (14 PCR 2514.) Banks' alcohol, marijuana, cocaine, and ecstasy use "certainly" contributed to his deterioration. (15 PCR

2560.)

Banks' cognitive difficulties, with regard to impulsivity and decision-making and mental flexibility, resulted in an inability to handle unexpected situations quickly. (14 PCR 2512.) Banks' low IQ and cognitive issues prevented Banks from developing normally, and the trauma related difficulties, together with the anxiety and hyper-reactivity and impulsivity further impaired the process. (14 PCR 2518.) The cognitive delays also interfered with the development of the part of the brain responsible for making reasonable decisions. Banks' substance abuse impacted this development as well. (14 PCR 2518.) As Banks' psychiatric difficulties became more severe, they further impeded his already low cognitive function. (15 PCR 2528.)

Banks' academic career was hindered because of his learning disabilities and personal life. He was very depressed and his behavior was "just all over the place." Dr. Dudley observed that Banks really started to fail academically in the seventh grade, which makes sense because the seventh grade requires high cognitive functioning, which Banks did not possess. (14 PCR 2519-20.) Despite Banks' mental health and cognitive issues, he received no interventions through the special education classes at school or in juvenile detention.

Because Banks was wholly unsupervised, and allowed to do whatever he wanted as early as 8 or 9 years of age, he took to the streets. (15 PCR 2525.) He

discovered joyriding after meeting a boy who taught him how to start cars. He was good at nabbing cars and this led to positive recognition in his peer group – positive recognition was something he had never had before. Banks ran into older drug dealers who incorporated him into their world. (15 PCR 2526-27.) Dudley explained the absence of parenting was extreme in Banks' case. Nobody gave Banks any positive attention, praised him, or rewarded him so when he received attention for something, he relished it. (15 PCR 2530-31.)

Dr. Dudley also discussed the impact of Banks' chronic incarceration. Banks was unable to develop skills ranging from normal human interaction to the ability to structure and organize his life outside of an institution. Dr. Dudley is familiar with the New Jersey Youth House and New Jersey Training School for Boys and knows that children there did not receive adequate intervention or counseling. (15 PCR 2529-30.) The impact of Banks' 20 years of incarceration during his formative years was dramatic. He could not function in the real world. Although he had goals such as obtaining a job and having a relationship, and tried very hard to achieve these things, he had no experience and no particular skills to market. (15 PCR 2533.)

Dr. Dudley reviewed Dr. Krop's report and neuropsychological testing, which indicated that Banks' suffered from some cognitive difficulties and depression and/or as suicidal ideation. (15 PR 2541.) Dr. Dudley agreed that Dr.

Banks had some damage to the frontal lobe, the area of the brain responsible for decision-making and problem solving. (15 PCR 2555.) Frontal lobe damage is “a fixed problem” because individuals lack the capacity for abstract conceptualization, which is required to be able to come up with real options. (15 PCR 2556.) Dudley opined that Dr. Krop “had very little information” available to him. (15 PCR 2542.) There was a lot more information available to Dudley than Dr. Krop, regarding critical aspects of Banks’ life of which Krop was wholly unaware. (15 PCR 2573-74.)

Dr. Dudley does not believe Banks’ has ASPD. Many of Banks’ qualities, such as his desire to connect with people, attempts to seek gainful employment, and desire to take care of himself are contrary to an ASPD diagnosis. (15 PCR 2541-42.)

Guilt phase counsel: Refik Eler was Banks’ guilt phase attorney. He said his caseload was “manageable” at the time of Banks’ case, but conceded that he left a law partnership to “hang his own shingle” during this timeframe. (10 PCR 1687.)

The defense theory was that Banks “knew Ms. Volum... sold her drugs before, they had engaged that evening in consensual sex, and that he cut himself while he was there,” but “had nothing to do with the homicide...” (10 PCR 1694, 1695.)

Banks’ girlfriend, Sudie Johnson, said she felt pressured or coerced into

allowing the officers into her house.¹⁰ (11 PCR 1739.) Banks, as a resident of the apartment, had standing to contest a search. (11 PCR 1740.) Police recovered an “NYC jacket, Ms. Volum’s computer, [and] some shoes that were allegedly said to be prints at the crime scene” from Banks’ apartment. (11 PCR 1748.) Johnson “could have said” that she “didn’t feel like she had a choice of letting them in because she had animals in the house and she was worried about her stuff getting destroyed.” (11 PCR 1740.) Eler could not recall whether the officers threatened to arrest her as an accomplice before entering her home. (11 PCR 1740.) Eler’s understanding of the law was that “they probably had probable cause so they probably wouldn’t have needed a warrant...” (11 PCR 1741.) “We could have, I guess, contested the search.” (11 PCR 1741.)

Eler knows that warrantless searches are presumed unlawful and that the officers did not have exigent circumstances to enter Banks’ home. (11 PCR 1742.) He was unaware that there were numerous armed and uniformed police officers at the house when they first requested Johnson’s consent to enter the home; that there was a crisis team present; he “might have been aware” that there was a surveillance van parked outside. (11 PCR 1742.) He understands that valid consent to search exists is determined under a totality of the circumstances. (11 PCR 1743.)

¹⁰ JSO officers entered Johnson and Banks’ home twice –once to arrest Banks for the William Johnson crime and a second time to search the home for evidence.

Eler tried to establish on cross-examination that Ms. Johnson was a “scorned woman” who found out that her boyfriend was having a relationship with the victim. (11 PCR 1759.) So he “pushed her, and pushed her” until it “came out” to the jury that she saw a video of Banks stabbing someone in an unrelated case. (11 PCR 1759-60.) Eler moved for mistrial because evidence of the unrelated violent crime was a “huge bump in the road” that was prejudicial to his case. However, the court thought he “stepped right into it and denied my mistrial, but gave a curative instruction.” (11 PCR 1760, 1763.) Mr. Eler agreed he probably invited the error. (11 PCR 1763.)

Mr. Eler recalled that Ms. Volum’s house was a “trap”¹¹ (11 PCR 1775); that Ms. Volum tacked a note to her door warning “crack-heads” to stay out of her house; and that she owed “Mr. Greenfield” \$1500. (11 PCR 1775-76.) There were some “other suspects” including Mr. Greenfield, the “black males” that had been in her car, and Mr. Mark Barnett. (11 PCR 1776.) Eler recalled that “Mr. Vancini,” the victim’s neighbor, noted a lot of traffic coming and going from the victim’s house. (11 PCR 1777.) Ms. Volum left a note that one of the individuals she owed money to (not Mr. Banks) could be physically dangerous. (11 PCR 1779.)

A Winn-Dixie employee saw Banks and Ms. Volum buy beer and cigars together the day of the crime. (11 PCR 1781.) Eler agreed this testimony

¹¹ A house used to servesell illegal drugs.

corroborated Banks' statements that Ms. Volum allowed him use her ATM card, that Banks and the victim were acquaintances, and may have engaged in consensual sex. (11 PCR 1782-1784.)

Alan Chipperfield: Mr. Chipperfield recognized a potential Fourth Amendment suppression issue in Banks' case regarding the search of Banks' home upon consent by then-girlfriend, Sudie Johnson. (14 PCR 2406.) Chipperfield thought there was "reason" to file a motion to suppress. (14 PCR 2414.)

Sudie Johnson: Ms. Johnson reported the following regarding Banks' arrest and the search of their apartment:

They told me if I did not let them in the house that they were going to force themselves in and their force would not be pretty and my items would be destroyed beyond means and with me being – working as hard as I had to assume a comfortable life for me and Mr. Banks, I did not want that. So I was – I was pretty much forced to let them in because they say that they – there have been times that they would enter a home and they would tear – they would ransack the place and get what they need to get to.

(13 PCR 2278.)

Kenyanna Smith: Ms. Smith was a checker at the Winn-Dixie on Arlington Road and Atlantic Blvd. who witnessed Banks and Volum together on the day of the crimes. (12 PCR 2112-17.) There did not appear to be any animosity between Banks and Ms. Volum. (12 PCR 2115.) Ms. Smith would have testified in Banks' trial had she been requested to do so. (12 PCR 2116.)

James Pollack, Jr.: Dr. Pollack is a senior forensic scientist in the biology DNA

section of FDLE in Jacksonville. (13 PCR 2311.) He conducted DNA testing in Banks' case. (13 PCR 2318.) He testified that he had to resubmit some of the items in Banks' case for retesting. (14 PCR 2336.)

Detective Pat Bodine: Det. Bodine, the lead investigator in the case testified as to his involvement in the search of Banks' home and the investigation leads in Volum's homicide. (12 PCR 2021-25.) He admits they were not actively seeking a warrant when they searched Banks' house. (12 PCR 2028.)

SUMMARY OF THE ARGUMENTS

I. Defense counsel for Mr. Banks rendered a deficient penalty phase performance where he neglected to uncover and present evidence substantiating 100 potential mitigators, including two statutory mitigators and significant mental mitigation. Counsel's failures in this regard undermine confidence in the outcome of Mr. Banks' sentencing proceeding.

II. Although Banks' live-in girlfriend, Sudie Johnson, admitted that she was pressured into allowing police into her home; that police threatened to destroy her property; that the police threatened to arrest her; and that her house was surrounded with law enforcement officers, including at least one police dog at the time of her consent; counsel failed to file a motion to suppress evidence collected from the Johnson/Banks home due to his misunderstanding of the law. Banks was prejudiced by this deficient omission and the outcome would have been different

had the suppression motion been filed, where evidence secured from Banks' home was critical in the state's case.

III. Counsel rendered ineffective assistance in failing to object to the state's presentation of damaging DNA evidence at trial without setting forth necessary population statistics as required under Florida law.

IV. Counsel was deficient in his cross-examination of Studie Johnson, the state's most important witness, who claims Banks confessed, where he opened the door to her declaration that she saw a video of Banks stabbing another person in an unrelated case. Confidence in the outcome of the trial is undermined where the jury deliberated with the knowledge that Banks stabbed another person during the same time period that he allegedly committed the instant crime.

V. Counsel was deficient in failing to confront Studie Johnson with significant impeachment on cross-examination, prejudicing the outcome of trial where undermining Johnson's credibility was Banks' only change of acquittal. Counsel was similarly ineffective in failing to question Det. Bodine on cross-examination regarding his investigations of numerous persons of interest, prejudicing the outcome.

VI. Counsel was ineffective in failing to present Kenyanna Smith, a witness who corroborated Banks' testimony that he and Ms. Volum were friends, had consensual sex, and that he had no reason to harm Ms. Volum.

VII. Counsel failed to object to numerous improper prosecutorial tactics such as repeated questions of Mr. Banks whether other witnesses lied on the stand and suggestions to the jury that a life recommendation would be an “easy way out” and “partial justice.” Counsel’s repeated failures to object resulted in fundamental error.

VIII. The errors in Banks’ case individually and cumulatively resulted in a fundamentally unfair trial.

STANDARD OF REVIEW

I - VII: Strickland claims present mixed questions of law and fact; this Court defers to the circuit court’s factual findings that are supported by competent substantial evidence but reviews the circuit court’s legal conclusions de novo. Stephens v. State, 748 So. 2d 1028, 1032 (Fla. 1999); Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004).

VIII: Where multiple errors are discovered in the jury trial, a review of the cumulative effect of those errors is appropriate because “even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors [may be] such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.” McDuffie v. State, 970 So. 2d 312, 328 (Fla. 2007).

ARGUMENTS

ARGUMENT ONE

THE TRIAL COURT ERRED IN DENYING BANKS' CLAIM THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN ITS PENALTY PHASE INVESTIGATION AND PRESENTATION IN VIOLATION OF HIS FOURTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLA. CONSTITUTION

Defense counsel presented exactly two witnesses in Banks' penalty phase: one of those witnesses, Banks' father, gave less than 5 total pages of telephonic testimony. (14 R 875-879.) The other, Dr. Harry Krop, testified Banks had anti-social traits and all the negative characteristics that came along with it. (14 R 890-94.) In contrast to what the jury heard (which was mostly negative), Banks presented significant, compelling mitigation in postconviction, including mental mitigation.

Where two jurors voted to spare Banks' life after hearing almost nothing mitigating, there is a reasonable probability that the sentencing outcome would have been different had counsel conducted a constitutionally adequate mitigation investigation and presentation for the juror's consideration, and/or the judge's consideration in Spencer hearing.

I. Applicable law

Claims of ineffective assistance of counsel in penalty phase are evaluated under the Strickland standard. Porter v. McCollum, 130 S. Ct. 447 (2009). As to

the deficiency prong, counsel has “an obligation to conduct a thorough investigation of the defendant’s background” in preparation for penalty phase. Id. (citing Williams v. Taylor, 529 U.S. 362, 396 (2000)) (internal citations omitted). “[A]n attorney’s obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated because this is an integral part of a capital case.”

With respect to the prejudice prong, a court must reweigh all the mitigation presented at trial along with mitigation presented in postconviction against the aggravation to determine whether there is a reasonable probability that the outcome of the penalty phase would have differed. Porter, 130 S. Ct. at 453. This evaluation must be ascertained from the perspective of the jury, and not merely be a reflection of the judge’s opinion. Id. 454-55.

II. Counsel was deficient in failing to conduct even a cursory mitigation investigation in Banks’ case

A. Failure to investigate

Despite that Banks’ guilt phase was “very difficult,” (10 R 1693) and that the state was seeking four aggravating factors, penalty phase counsel did not hire a mitigation specialist, an investigator, or anyone else to assist with the penalty phase investigation – he was it. ¹² (11 PCR 1909.)

¹² The only help penalty phase counsel received with his investigation was from Banks’ uncle, Dane Banks. (11 PCR 1910.) Had Dane not showed up in counsel’s office unannounced one day, counsel would not have had Dane’s help, either. (11

And even though penalty phase counsel was the only person working on Banks' mitigation, he failed to travel to the area where Banks spent all but two years of his life and spent only two hours interviewing mitigation witnesses. Although counsel spoke to some family members such as Banks' uncle, father, and half-sister, briefly over the telephone, he did not meet these people in person, or attempt to establish a rapport with them. Moreover, counsel neglected to speak with other critical family members, such as Banks' ex-stepfather, Wray Bailey, who was present for most of Banks' childhood, and his uncle, Kurt Banks who was best friends with Banks' maternal uncle and resided with Banks when Banks was a child. Each of these witnesses provided significant mitigation in postconviction that was not discussed at trial.

The ABA Guidelines explain that a mitigation specialist is “an indispensable member of the defense team throughout all capital proceedings.”¹³ ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, at 4.1, commentary, p. 33 (emphasis added).

The Guidelines further explain that, regardless of who is conducting

PCR 1939.) Counsel blamed Uncle Dane for various shortfalls in Banks' mitigation investigation and presentation. (e.g. 11 PCR 1940-41.)

¹³ The United States Supreme Court (USSC) has long referred to the ABA Standards “as guides to determining what is reasonable” in capital representation. Wiggins, 539 U.S. at 524 quoting Strickland, 466 U.S. at 688.

mitigation interviews, ten to twenty minute minutes phone conversations with mitigation witnesses does not constitute sufficient mitigation investigation. ABA Supplementary Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.11 (2008). Rather:

Team members must conduct in-person, face-to-face, one-on-one interviews with the client, the client’s family, and other witnesses who are familiar with the client’s life, history, or family history or who would support a sentence less than death. **Multiple interviews will be necessary to establish trust, elicit sensitive information and conduct a thorough and reliable life-history investigation.**

Id. (emphasis added). This guideline are grounded on common-sense. Certainly, where members of a defense team fail to establish a rapport with potential witnesses, those witnesses will understandably be hesitant or downright unwilling to divulge personal information.

Counsel repeatedly groused in evidentiary hearing that he “wanted more,” “wanted” to present witnesses to discuss Banks’ background, socioeconomic status, etc., but that he “couldn’t find” witnesses and the whole thing was the fault of Dane Banks – Banks’ uncle who took it upon himself to assist counsel contact some witnesses. (e.g. 11 PCR 1940-41, 1986-87, 1993; 12 PCR 1977.) Counsel’s complaints only highlight his incompetence in the penalty phase investigation. It was defense counsel’s job – with or without Uncle Dane or a mitigation specialist – to ensure that all available information was discovered prior to sentencing. Wiggins, 539 U.S. at 514. Penalty phase counsel’s performance rises to a level of

deficiency where he failed to uncover obvious mitigation and was too proud, or too oblivious of his own shortfalls to seek help when he came up short.

A. Mental mitigation that could have been presented at trial had counsel provided the mental health expert with adequate background information

Based on Dr. Dudley's 12 hour evaluation of Banks, his review of collateral documents, including interview summaries with Banks' family members (14 PCR 2501-02), he made a number of mental health diagnoses, including: (1) "fairly severe" trauma-related issues in the form of anxiety disorder with depression; (2) a personality disorder characterized by difficulties and instability in a broad range of areas, including attachment, mood, mood regulation, mood stability, impulsivity and an unstable sense of self; (3) substance abuse disorder; (4) cognitive and intellectual difficulties, which included frontal lobe issues and a history of learning disabilities; (5) Depression. (14 PCR 2504-05.)

Critically, Dr. Dudley also opined that Banks was suffering from an extreme emotional disturbance at the time of the crime, stemming from a combination of his anxiety disorder (which qualifies as a "major psychiatric disorder") and Banks' other mental health issues such as cognitive disability and substance abuse disorder. Dr. Dudley explained that the interactions of Banks' various mental issues had an exponential rather than additive outcome, and "they collectively result[ed] in an extreme emotional disturbance." (15 PCR 2538-40.)

Concerning the “capacity to conform his conduct” mitigator, Dr. Dudley explained:

[A]ll these difficulties [anxiety disorder, depression, personality disorder, cognitive and intellectual difficulties, substance abuse disorder] go right to the heart of being able to make some sort of reasonable, rational decision and impact on decision-making. And particularly under periods of stress and particularly when decisions have to be made quickly. And the -- the impairment in that regard, in my opinion, is such that it impairs his capacity to control his behavior.

(15 PCR 2539-41).¹⁴

B. Mitigation that could have been presented at trial through lay-witnesses

Because of penalty phase counsel’s constitutionally infirm investigation, neither the jury nor the judge knew the following in evaluating the appropriate sentence for Banks:

Banks was born to Mary, a sixteen-year-old girl, and Donald Senior, a 19 year-old-boy in 1972. (13 PCR 2181, 86.) Mary did not want Banks, and characterized him as a “mistake.” She wanted an abortion, but her mother forbid it

¹⁴ Dr. Dudley had significantly more information at his disposal than Drs. Krop or Miller who assisted counsel the time of Banks’ trial. (15 PCR 2573-74.) Dr. Dudley, unlike Dr. Krop, reviewed Banks’ juvenile records (9 PCR 1503-1563), Fla. Department of Corrections records, school records, Dr. Krop’s file, and the mitigation records from Ms. Flynn, including Flynn’s interview notes from Banks’ family members: Mary Patterson, Shar-day Edwards, Wray Bailey, Dane Banks, Kurt Banks, Carol Dunn, Arlene Edwards and others. (14 PCR 2501.) He also spent two days with Mr. Banks for a total of twelve hours. (14 PCR 2502.)

and forced the teenagers to marry. Mary did not let Banks call her “mommy,” and did not spend time with him. (13 PCR 2207.) She was utterly disinterested in rearing a child after raising her four younger siblings due to her mother’s illness. (13 PCR 2135-36.)

Senior was serving in Vietnam when Banks was born. (13 PCR 2180). When he returned, he was a broken man – a “lunatic” and a “junkie.” (13 PCR 2184, 2193.) He was paranoid and quick tempered. He fell into violent rages and repeatedly destroyed everything in the house. (13 PCR 2182.) Mary would leave him, only to get back together with him again. And young Banks witnessed everything. (13 PCR 2184.) After Mary’s mother died, when Banks was about 7 years old, she left Senior for good. (13 PCR 2194.)

The divorce destroyed little Banks. He was angry at his mother for leaving his dad. (13 PCR 2190.) Mary took Banks to counseling for about six months, but she stopped because it did not seem to be working and she did not want to pay for it any longer. (13 PCR 2198.) She never secured mental health services for Banks, thereafter (even when juvenile correction employees informed her that Banks likely had “mental problems” and needed help). (13 PCR 2205.)

When Mary met and married her second husband, Wray Bailey, Wray observed that there was something wrong with 8 or 9 year old Banks. He was having “every problem a kid could have” in school; he was withdrawn. (14 PCR

2371-73.) Young Banks always wanted to spend time with his father, but when he returned from his dad's house, he was "sullen" because of what went on over there. (14 PCR 2372.)

Banks' sister, Shar-day painted a vivid picture of what was occurring at Banks' father's house. Senior talked about his wartime experiences, stating that he had both kneecaps blown off in the war; that a rusty knife he kept in the house once saved his life in battle; he saw his friends die and he had to kill people. Senior was paranoid, would creep around the house, and place objects on the doorknobs so he would know when someone was coming. (13 PCR 2248-50.) Senior was violent with Shar-day – he would throw her up against the walls. (13 PCR 2259.) Senior used cocaine and heroin. (13 PCR 2250.) When, at the age of four, Shar-day caught him sniffing something up his nose, he told her it was "medicine for adults." (13 PCR 2294.) Her mother, Arlene, who also resided in the house, was a heroin addict. (13 PCR 2250.) Shar-day found drug paraphernalia just lying around the home. (13 PCR 2250.) Banks was well aware of the drug use at his dad's house – he told Shar-day that it was occurring long before she was born. (13 PCR 2257.) Shar-day struggled as a teenager and became a "hard teenager" because of her difficult home life. (13 PCR 2258.)

There was an utter lack of positive role models in Banks' life. Mary and Wray both smoked marijuana every day in the house, (14 PCR 2380) Mary

engaged in uncontrollable spending (14 PCR 2379), and Wray had a gambling problem, (14 PCR 2381.) Banks Sr. and his girlfriend fought in the streets and abused drugs. (14 PCR 2376.) His father's brothers, who young Banks looked up to, also abused drugs. Banks' uncle, Kurt, spent time in prison for a drug related robbery. (13 PCR 2153-55.) Banks' uncle, Dane, probably would have ended up in prison, but he lost his leg in a motorcycle accident, altering the course in life. Banks' paternal grandparents drank a lot. (13 PCR 2199.) His maternal grandmother, with whom he was close, died when he was seven, and he never knew his maternal grandfather. (13 PCR 2194.) His maternal uncles also used drugs. Banks mother did not pay any attention to him – when he was gone, no one wondered where he was or bothered to look for him. (13 PCR 2140, 2145.)

Banks grew up in crime and drug-ridden areas of New Jersey in subpar conditions. (e.g. 9 PCR 1512.) Mary was on public assistance when she and Wray met. (14 PCR 2369.) She later made only \$157 per week as a shop girl. (9 PCR 1504.) Mary, Wray, Banks, and Mary's siblings all resided in one home to reduce costs. (14 PCR 2378.) At one point, the upstairs apartment where Mary and Banks lived burned and she was forced to move in with the landlady downstairs and Banks had to sleep on the couch. A probation officer noted that Mary and Banks lived in a “deteriorating” neighborhood; that the landlady was slow to make repairs; and that the living conditions were not very good. “[Banks’ admitted it was

not very pleasant living in someone else's apartment and sleeping on the couch. The defendant says that he did not want to live there and this partly explains his staying away for days at a time. The defendant believes that even after he goes away to Jamesburg [juvenile detention]...the situation will be unchanged...there will be no apartment to live in..." (9 PCR 1512.)

Given Banks' poor role models, bad neighborhoods, and lack of supervision, he began getting into trouble at only 11 years old. (9 PCR 1511.) He began taking cars and "joyriding." (13 PCR 2145; 2206-07.) He was first incarcerated at 14 years of age. (9 PCR 1511.) When he got into more trouble following his release from the juvenile facility, his mother suggested that they bring him back to the Youth House. (9 PCR 1515.)

Despite his rocky start and his difficulty adjusting to life outside prison, Banks moved to Florida to try to get his life in order. (13 PCR 2259-61.) Banks had hopes and aspirations. He wanted to get married and have children. He kept a journal filled with positive messages. (13 PCR 2271.)

C. 100 mitigating factors

All told, the postconviction mitigation specialist found 100 mitigators that could have been, and were not presented at Banks' trial. A complete list of those mitigators is located at (10 PCR; 1545-49.)

III. There is a reasonable probability that the outcome of Banks' penalty phase would have been different but-for counsel's deficient investigation

and presentation

A. Mitigation presented in penalty phase

Trial counsel requested only 5 non-statutory mitigating factors in penalty phase and no statutory mitigation.¹⁵ Much of the information presented by Dr. Krop was actually more damaging than helpful – which would not have been the case if Dr. Krop had been sufficiently advised regarding Banks’ upbringing and provided necessary collateral documentation concerning his childhood.

Critically, counsel failed to explain to the jury or judge how any of the weak mitigation presented at trial was relevant to Banks’ adult life and the crime in question, and resultantly much of the mitigation was accorded little weight. See Crook v. State, 908 So. 2d 350, 359 (Fla. 2005) (“the existence of this mitigation, and especially that evidence connecting the mental mitigation to the crime, prevents us from classifying this case as among the most aggravated and least mitigated”); (6 R 999-1000.)

B. The state’s penalty phase theory would have been diminished had an adequate mitigation presentation occurred

The state argued that Banks murdered the victim in a “cool, calm, and

¹⁵ One of which was given no weight (6 R 999) and another, that Banks has ASPD, was tremendously damaging. No one with any experience in capital representation would present ASPD as a mitigating factor because of the negative perception of this personality disorder, especially without presenting a mitigation explanation for how or why the client developed ASPD. (Eler 11 PCR 1735-37); (Chipperfield 14 PCR 2412); (Flynn 14 PCR 2472.)

collected” manner that established the cold, calculated, premeditated (CCP) aggravator. “She was so brutally killed also tells you that the perpetrator must have intended that killing not just out of rage but for payback, for some other reason...” (14 R 926.) Similarly, the prosecutor argued that the Volum crime was “not a onetime mistake. This was not a fit of rage that just happened to appear one day...” “This is who he is. This is his character.” (14 R 931.)

This argument, would have been significantly mitigated had counsel presented evidence in penalty phase that the combination of Banks’ low cognitive abilities, anxiety disorder, depression, frontal lobe impairment, and substance abuse manifested themselves in such a way that Bank was suffering from an extreme emotional disturbance and was unable to conform his conduct to the requirements of the law at the time of the crime. The jury would have learned that Banks did not arrive at a “decision” to murder the victim (or to hurt Mr. Johnson, for that matter) with the same decision-making process or tools that an average person has. Instead, the kaleidoscopic effects of Banks’ mental instability and low intelligence distorted his decision-making in such a way as to cause him to act outside the spectrum of a rational, law-abiding citizen.

Had the jury learned that Banks, an institutionalized individual who tried very hard to survive on the outside and make a life for himself, crumbled under the pressure of the world and succumbed to his numerous mental problems, the jury

may have determined that the instant crime was not the product of a high functioning criminal mastermind, and that Banks was worthy of a life recommendation.

Additionally, counsel's utter failure in penalty phase allowed the prosecutor to argue that the fact Banks' father was "not around" was not important and mock the uninspiring mitigation presentation:

There are hundreds of thousands of millions of human being that grow up without a father or an absent father. He had a father, apparently a man that served his country. Lots of people grow up without their daddy but it doesn't justify or mitigate any of this...

(14 R 933.)

Well, I feel bad for him. Maybe his stepdaddy hit him once. You decide whether that is mitigation...and you compare that to what happened to William Johnson outside that convenience store...

You also heard from the doctor who basically said the guy is a littler bit below average. Doesn't do real well on written tests...May have some frontal lobe deficits...and even if all those things were true he still has free will and he's still able to decide who he wants to kill and who he doesn't want to kill and there was nothing in that testimony from Dr. Krop that told you anything different other than that man made the decision to become a killer period.

(14 R 933-34.) The prosecutor was spot on: the fact that Banks' father was not around was not only "not important," it was absolutely not true. As set forth in postconviction, Banks' father was, indeed, "around" but was a drug and war-addled "lunatic" who had an extremely negative impact on Banks. Had counsel presented the facts that Banks witnessed his father terrorize his mother, abuse

drugs, and creep about the house in paranoia; that after his parents divorced he visited his dad frequently, but would always come back to his mother “sullen” because it was “all hell” at his father’s house, the state would not have been able to present Banks’ upbringing as normal.

Additionally, the prosecutor’s argument concerning Dr. Krop’s findings were also valid – Dr. Krop, nor any other witness explained how or why Banks’ low IQ and frontal lobe deficits affected Banks’ decision making abilities. Had an expert been fully apprised of Banks’ background at the time of trial, s/he could have testified, as Dr. Dudley did, that any “decision” that Banks made in hurting Volum or Johnson was not clearheaded or rational. Instead, it was clouded by his multitudinous mental infirmities that were present at the time of the crimes.

C. Trial counsel’s minimal penalty phase investigation and presentation does not eliminate prejudice

The fact that counsel presented some mitigation in penalty phase and that some information set for in postconviction resembled that set forth in penalty phase does not eviscerate Banks’ claim of prejudice here.

The United States Supreme Court has found “deficiency *and* prejudice in cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase.” Sears v. Upton, 130 S. Ct. 3259, 3266 (2010) (emphasis original) (citing Williams, 529 U.S. at 398 (remorse and cooperation with police); Rompilla v. Beard, 545 U.S. 374, 378 (2005)

(residual doubt); Porter, 130 S. Ct. at 453-54 (diminished capacity based on drunkenness). The Court explained in Sears that “[w]e certainly have never held that counsel’s effort to present *some* mitigation evidence should foreclose and inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant.” Sears, 130 S. Ct. at 326 (emphasis original).

Moreover, even where, as here, the subject matter of the trial and postconviction evidence overlaps to some degree (frontal lobe impairment, low IQ, parent’s divorce, lack of father figure), prejudice may be established under Strickland where trial counsel fails to adequately describe the defendant’s background. Wiggins, 539 U.S. at 535-36 (finding deficiency and prejudice “[g]iven both the nature and extent of the abused petitioner suffered.”) Williams, 529 U.S. at 370, 398 (finding prejudice based on counsel’s omission of “graphic description of[the petitioner’s] childhood” including “documents...that dramatically described mistreatment, abuse, and neglect.”)

As such, federal circuit courts have consistently granted Strickland relief where some evidence was presented at trial but postconviction evidence made it clear that the jury never learned the full picture. See Williams v. Allen, 542 F. 3d 1326, 1329, 1342 (11th Cir. 2008) (even though petitioner’s mother testified at trial that the petitioner was subject to physical abuse as a child, the postconviction investigation revealed a “vastly different picture of [the petitioner’s] background

than that created by [the] abbreviated [trial] testimony...”); Johnson v. Sec’y DOC, 643 F.3d 907, 936 (11th Cir. 2011) (“the description, details, and depth of abuse in Johnson’s background that were brought to light in the evidentiary hearing in the state collateral proceeding far exceeded what the jury was told.”); Stankewitz v. Woodford, 365 F.3d 706, 724 (9th Cir. 2004) (explaining that a defendant is prejudiced when counsel introduces “some of the defendant’s social history” but does so “in a cursory manner that was not particularly useful or compelling.”).

In the present case, trial counsel presented bare bones mitigation that Banks suffered with frontal lobe impairments, low IQ, and that he had anti-social traits, the latter becoming a focus of the penalty phase to imply Banks was just a bad person. His father testified that he was not there for Banks as a child. And that’s where counsel stopped. There was no effort on counsel’s part to dive further into Banks’ background to determine why he exhibited the “anti-social” traits that Dr. Krop observed; no attempt to figure out why Banks was first incarcerated at 14; there was no attempt to find out what Banks’ socioeconomic status was growing up; what his living conditions were like. Counsel literally gave up. This was immensely prejudicial to Banks because his jury knew nothing about him.

IV. Problems with the trial court’s order denying relief

The trial court’s order denying Banks’ postconviction request for sentencing relief is flawed in many respects:

First, the court failed to provide a single citation to the record, failing to comply with Fla. R. Crim. Pro. 3.851(f)(5)(D).

Second, the court made numerous incorrect factual and legal determinations with respect to mitigation witnesses' presented in evidentiary hearing.

Dr. Richard Dudley: The Court concluded that Dr. Dudley was simply a "more favorable mental health expert." However, this court made no analysis as to whether, in consulting with its chosen mental health experts, trial counsel provided the experts with adequate information to conduct a thorough mental health evaluation of Banks. (8 PCR 1167.) As Dr. Dudley testified, he had more information than was provided to Dr. Krop by trial counsel. (15 PCR 2542, 2573-74.) Thus, counsel may not have been deficient in failing to **consult** with a mental health expert, but was deficient in failing to adequately investigate and present the expert with necessary information. Douglas v. State, 141 So. 3d 107 (Fla. 2012).

Additionally, the court failed to apply the correct prejudice analysis, stating only "it is doubtful [Dr. Dudley's] testimony could have affected the sentence determination in light of the fact that the murder was cold, calculated, and premeditated." The court's prejudice determine here was akin to that condemned in Porter, 558 U.S. 30.¹⁶

¹⁶ See also McQuitter v. State, 103 So. 3d 277, 280 (Fla. 4th DCA 2012):

Mitigation specialist, Sara Flynn: All told, Ms. Flynn found over 100 mitigating factors. (10 PCR; 1545-49; 14 PCR 2474.) The trial court acknowledged Ms. Flynn's qualifications and determined that her investigation for mitigation evidence was "exhaustive," but concluded that Mr. Banks' past "as presented by Ms. Flynn was incredibly divergent from the past discovered by Mr. Edwards, though they had relied almost entirely on the same sources of information." (8 PCR 1168.) The trial court also determined that Ms. Flynn's testimony was largely hearsay. (8 PCR 1167.)

Where Ms. Flynn actually travelled to New Jersey (where Mr. Banks lived for all but approximately 3 years of his life) (14 PCR 2433-35), conducted extensive interviews with Banks' family (beginning 14 PCR 2433) and his girlfriend at the time of the crime, and applied her training and experience in

The judge in the written order denied the motion because he could not conclude that testimony from the alibi witnesses "would have changed the outcome or verdict in this case." ... Strickland prejudice, however, does not require the reviewing court to conclude with certainty that the outcome "would have" differed. The question is whether the defendant has established a "substantial likelihood" of a different result such that confidence in the outcome is undermined.

We cannot conclude that the trial court applied the correct standard, and therefore, reverse and remand for further proceedings consistent with this opinion.

(emphasis added.)

analyzing that information, she certainly was not “relying on the same sources of information” as Mr. Edwards who had never even spoken to many of the witnesses that Ms. Flynn and had not even traveled to the location where Banks lived most of his life. Even if counsel did briefly (as counsel’s billing records demonstrate) speak to Shar-Day Edwards and Banks’ father, he was unsuccessful in garnering useful mitigation because did not bother to meet with them personally or establish a rapport and thus, they did not feel comfortable speaking with him about their personal lives. (e.g. 13 PCR 2264; 14 PCR 2431.)

Moreover, even if some of Ms. Flynn’s testimony constituted “hearsay,” it still must be considered in mitigation – the evidentiary rules in capital penalty phase are relaxed so that a finder of fact may consider “any” mitigating evidence put forth by the defendant. See Lockett v. Ohio, 438 U.S. 586, 604 (1978). (“Eighth and Fourteenth Amendments require that the sentence... not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death”); § 921.141(1), Fla. Stat. (discussing relaxed evidentiary standards of a capital sentencing); Francis v. State, 529 So. 2d 670 (Fla. 1988).

Shar-Day Edwards: The trial court declined to consider any of Shar-day’s postconviction testimony because trial counsel and Dr. Krop spoke with her prior

to trial and she did not discuss the things she discussed in postconviction. (8 PCR 1165.) The trial court did not consider that Banks' penalty phase attorney and/or Krop only spoke to Ms. Edwards briefly, over the phone. (13 PCR 2264.) The Court did not consider Ms. Flynn's testimony or the ABA Guidelines that explain it is critical to develop a relationship with an individual in order to perform an adequate mitigation interview (which trial counsel failed to do) and that it may take several encounters with a mitigation witness before s/he feels comfortable enough to open up about their most guarded secrets. ABA Supplementary Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.11 (2008); (14 PCR 2431.)

Wray Bailey: The Court ignored much of the mitigating evidence adduced from Mr. Bailey's testimony, determining that "there is no indication that Mr. Edwards should have been able to find the whereabouts of Mr. Bailey prior to trial, though he tried" and Mr. Bailey "would have been an inappropriate mitigation witness." (8 PCR 1165.) The mere fact that postconviction counsel easily found Mr. Bailey indicates that he was not difficult to find through reasonable investigation—the fact that trial counsel may have "tried" to find Bailey at the time of trial is not an excuse, especially where counsel was using a family member of Banks, not an investigator or mitigation expert, to help locate witnesses. See Cooper v. McNeil, 2008 U.S. Dist. LEXIS 113372, 97-100 (M.D. Fla. 2008) (reversed, in part, on

other grounds) (Finding deficient performance in penalty phase where, “**Other than the difficulties they experienced in reaching potential witnesses, the attorneys offered no explanation for not broadening their mitigation investigation** beyond what they learned from Dr. Merin, Petitioner, and his mother.”).

Moreover, the fact that Mr. Bailey’s testimony may not have been entirely helpful to Banks does not absolve trial counsel of his deficient performance in failing to find and present Mr. Bailey at trial. Sears, 130 S. Ct. at 3264.

Kurt Banks: In dismissing Kurt’s postconviction testimony, the court did not engage in any prejudice inquiry under Strickland or Porter. The Court referenced Counsel’s reliance on Dane Banks to locate family members. (8 PCR 1164.) However, the reliance of counsel on one family member to investigate Banks’ entire social history is indicative of his unreasonable investigation, not an excuse for failing to find witnesses. See Cooper, 2008 U.S. Dist. LEXIS 113372 at 97-100 (reversed, in part, on other grounds). Kurt was in prison at the time of Mr. Banks trial and was thus, easy to locate – his family knew exactly where he was. (12 PCR 2153-54.) All counsel had to do was ask. The Court’s inference that counsel could not have obtained Kurt’s testimony at penalty phase because he was incarcerated is contrary to the evidence. (8 PCR 1164.) Kurt testified that he would have testified telephonically from prison if requested by counsel. (12 PCR 2154.)

Sudie Johnson: The Court’s Order did not address Ms. Johnson’s mitigation in spite of Supreme Court authority mandating that a finder of fact consider “any” mitigating factor. Lockett, 438 U.S. at 604, Wiggins, 539 U.S. 510, et al. Even if this Court should find that Ms. Johnson’s testimony should not be considered because postconviction counsel did not list Ms. Johnson as a witness in the 3.851 motion, the mitigation presented by Ms. Johnson in evidentiary hearing was provided to Dr. Dudley for his evaluation of Banks. Therefore, her testimony demonstrates that Dr. Dudley considered additional information that the mental health experts at trial did not have such as Banks’ recurrent nightmares, as well as his diary, and dreams of having a family and career, which refute Dr. Krop’s ASPD finding.

C. Finally, the court’s prejudice determination was fundamentally flawed. The court below failed to consider the mitigation presented at trial in conjunction with the mitigation presented in postconviction, including two statutory mitigators, and reweigh the mitigation against the aggravators as required. Williams, 529 U.S. at 397-398 (“The State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence -- both that adduced at trial, and the evidence adduced in the habeas proceeding -- in reweighing it against the evidence in aggravation.”) (citing Clemons v. Mississippi, 494 U.S. 738, 751-752 (1990)).

The court also applied the wrong prejudice standard where it repeatedly stated that the mitigation presented in postconviction would not have changed the outcome. See McQuitter v. State, 103 So. 3d 277, 280 (Fla. 4th DCA 2012).

V. Conclusion

In sum, deficient performance has been demonstrated where trial counsel did virtually nothing to prepare for Banks' penalty phase and unsurprisingly failed to discover 100 mitigating factors including significant mental mitigation resulting from Banks' childhood and development and two statutory mental mitigators. Where two jurors recommended life upon hearing almost nothing in penalty phase, and instead heard further damning information about Banks such as being a liar, a sociopath, and a generally despicable person, there is a reasonable probability that the outcome of Banks' penalty phase would have been different had counsel engaged in a constitutionally sound mitigation investigation and presented his findings at trial.

ARGUMENT TWO

THE TRIAL COURT ERRED IN FAILING TO FIND THAT BANKS' TRIAL ATTORNEY WAS DEFICIENT IN FAILING TO FILE A MOTION TO SUPPRESS THE ILLEGAL POLICE SEARCH OF BANKS' RESIDENCE RESULTING IN VIOLATIONS TO HIS FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLA. CONSTITUTION

Ms. Johnson, Banks' girlfriend, supposedly "consented" to two searches of a

home she shared with Banks. Despite Studie Johnson's insistence that police threatened to destroy her home, that she was surrounded by police officers, that she had been questioned for hours by detectives, she felt pressured, and that she had been threatened with arrest, Banks' trial attorney did not file a motion to suppress evidence collected during the searches. If such a motion had been filed, the burden would have been on the state to demonstrate by clear and convincing evidence that valid consent was voluntarily given. Florida v. Royer, 460 U.S. 491 (1983).

I. Counsel was deficient in failing to file a valid motion to suppress based on Studie Johnson's coerced consent

Banks lived with Studie Johnson when the police searched their residence so Banks had standing to contest the search of his home. (1 SPCR 152.)

A. Studie Johnson's "consent" was invalid under the totality of the circumstances

There was significant evidence available to trial counsel that Johnson's supposed consent was mere submission to authority and thus, involuntarily given.

When asked in deposition whether she willingly consented, she responded:

Well, **they kind of threatened me** because they said that if they didn't get Donald now that they possibly can come back with a warrant they said **and tear up my house, and I told them that I didn't want them to tear up my house**, you know, if I wasn't at home, so I feel like I wanted them to do it while I was there so nothing was done while I wasn't at home.

(1 SPCR 154) (emphasis added). Johnson reiterated those facts in another deposition and stated that the JSO detective told her that if she did not grant

consent they would return with a search warrant and destroy the house and that she felt backed into a “corner.” (1 SPCR 10-11.) Johnson stated that she allowed the police to enter for the singular purpose of apprehending Banks so he could be questioned. (1 SPCR 152-53.)

After an initial search of the Banks/Johnson residence, where the police arrested Banks, and set dogs on Banks resulting in significant bodily injury (10 PCR 1533-44; 14 PCR 2403), they took Johnson to the police station, questioned her at length, requested that she sign a consent form, then returned to her house in the wee hours of the morning. (1 SPCR 154.) The police told Johnson that she could stop them at any time, but they were in three different rooms, and it was impossible to watch them all. Johnson only authorized them to search Banks’ stuff, but they went through her belongings as well. (1 SPCR 155-56.)

At Banks’ 3.851 evidentiary hearing, Johnson clarified that not only did the police threaten to tear up her house and her possessions if she did not consent, they also threatened to charge her as an accomplice to the homicide. (13 PCR 2279.) They told her that if she did not allow them to enter they would hold her for the crime of aiding and abetting Banks. (13 PCR 2279.) The night she signed the consent form there were too many officers to count – they surrounded the house. (13 PCR 2279.) She estimated there were four officers at each corner of the house and two more on the sidewalk, for a total of at least eighteen officers. (13 PCR

2279-80.) As she was driving up to her house, she saw police cars lined up from a block away, and one police car (the canine unit) blocked her driveway. (13 PCR 2280.) Det. Bodine admitted that this second search of Banks' home occurred at around 3:40 in the morning. (12 PCR 2025.) During this second search, Bodine was accompanied by his supervisor, two robbery detectives, his partner, and an evidence technician. (12 PCR 2026.) Bodine also conceded that they were not actively seeking a warrant at the time. (12 PCR 2028.)

Mr. Chipperfield, the attorney who initially handled Banks' case, testified in evidentiary hearing that he thought this issue "was an arguable claim" and would not have been a "frivolous motion." (14 PCR 2406.) Chipperfield thought there was "reason" to file the motion to suppress even though Mr. Johnson purportedly consented, because "her answers to those questions were a little bit inconsistent," and of course, "the sworn statement was also taken by the officers" – the same people Johnson said coerced her. (14 PCR 2413-14.) Chipperfield correctly noted the law governing consent – you must look at the totality of the circumstances to see whether consent was voluntarily provided, including an examination of the number of officers at the scene, any potential coercion the officers are using to obtain consent (like a threat to charge the person as an accomplice) whether repeated requests for consent were made, or whether the consent was limited in scope or withdrawn. (14 PCR 2404-05.)

B. The applicable law

Warrantless searches by the state are per se unreasonable unless the searches fall within an established exception. See Katz v. United States, 389 U.S. 347 (1967). It is uncontested that the searches in question were conducted without a warrant, that no exigent circumstances justified a warrantless search, and that no officer was attempting to secure a warrant at the time when the search was made. (13 PCR 2027-28.)

Therefore, the validity of a search rests only on the legitimacy of Johnson's consent, and the state has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a **mere submission to a claim of lawful authority**. See Royer, 460 U.S. 491 (emphasis added). Whether consent was freely and voluntarily given is a factual question to be determined by the totality of the circumstances. See Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Furthermore, there are limits to the consent an individual provides. See Florida v. Jimeno, 500 U.S. 248, 251 (1991) (“The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of “objective” reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?”).

The above-described totality of circumstances demonstrate that Johnson's

“consent” was not freely and voluntarily given. (Subsection A, supra.)

C. Trial counsel’s misunderstanding of the law

Defense counsel in evidentiary hearing admitted that there were numerous armed and uniformed police officers present at the house when Johnson signed the consent form, and assumed that is what Johnson meant when she said she felt pressure. (11 PCR 1742.) Furthermore, he argued in opening and closing that the police pressured Johnson into consenting to the search by threatening to return to the house and destroy it. (11 PCR 1738-39.) Yet, counsel neglected to file a suppression motion based on two misunderstandings of the law: (1) that the voluntariness analysis was subjective rather than objection (11 PCR 1743), and (2) that the inevitable discovery doctrine would have thwarted suppression of the evidence even if the consent was found to be involuntary. A decision based on a misunderstanding of the law is *per se* deficient under Strickland. See Butler v. State, 84 So. 3d 419, 421 (Fla. 5th DCA 2012)(citing Hardwick v. Crosby, 320 F.3d 1127, 1163 (11th Cir. 2003)(“It is well established, in a number of contexts, that ‘a tactical or strategic decision is unreasonable if it is based on a failure to understand the law.’”)).

First, counsel’s rationale that because Johnson was a “pretty strong little woman,” and the applicable totality of the circumstances test was “subjective” rather than an “objective” test is contrary to the law. Jimeno, 500 U.S. at 251.

Second, as misunderstood by trial counsel and the trial court (11 PCR 1741) the inevitable discovery doctrine does not apply here because the police were not actively seeking a warrant. Rowell v. State, 83 So. 3d 990, 995 (Fla. 4th DCA 2012). As acknowledged by Detective Bodine, it is undisputed in this case that the police were not seeking a warrant prior to entering Banks' residence and searching his property. (13 PCR 2027-28.) The First DCA has "squarely held that the inevitable discovery doctrine did not apply where police 'did not attempt to get a warrant.'" Thomas v. State, 127 So. 3d 658, 666 n.12 (Fla. 1st DCA 2013) (citing King v. State, 79 So. 3d 236, 238 (Fla. 1st DCA 2012)).

II. Banks was prejudiced by his counsel's failure to suppress damaging evidence in his case

Had counsel filed the meritorious suppression motion in question, it would have resulted in the exclusion of the victim's laptop, a pillowcase that came from the victim's home, and clothing worn by a black male captured on video attempting to use the victim's debit card within a couple hours of the murder. Banks v. State, 46 So. 3d 989, 992-96 (Fla. 2010). The state would have been unable to present evidence that a shoeprint at Ms. Volum's home matched a shoe found at Banks' home. (11 R 696.)

Had these items been suppressed, Banks' trial would have looked incredibly different – Sudie Johnson's statements that Banks gave her the victim's laptop, that he pulled it out of a pillowcase, and that there were bloody clothes in the

pillowcase, would have been uncorroborated. Furthermore, damaging information that Banks was in possession of the victim's belongings after her death would have been unavailable for the jury's consideration.

Given the state's significant reliance on the items found in Banks' home to demonstrate that Banks was guilty in closing argument (11 R 696, 697-98, 699) and this Court's consideration of this evidence in ascertaining the sufficiency of the evidence, it is apparent that a reasonable probability exists that the outcome would have been different if none of this evidence had been available to the state. Banks, 46 So. 3d at 1000.

ARGUMENT THREE

THE TRIAL COURT ERRED IN DENYING BANKS' CLAIM THAT COUNSEL WAS INEFFECTIVE IN FAILING TO PRECLUDE DNA EVIDENCE PREJUDICING BANKS AND RESULTING IN VIOLATIONS TO HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS OF THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLA. CONSTITUTION

Where the state neglected to present population statistics regarding the DNA evidence in the case, and counsel failed to object under Brim, counsel rendered ineffective assistance.¹⁷

¹⁷ On direct appeal, Banks argued that the trial court improperly allowed this expert testimony because no population statistics were provide to the jury, in direct conflict with Brim v. State, 695 So. 2d 268 (Fla. 1997). However, this Court determined that trial counsel failed to preserve this issue for appeal. Banks then raised counsel's failure to preserve this error in postconviction, and the trial court

I. Trial counsel was deficient in failing to properly object

Trial counsel filed a motion in limine to prohibit the testimony of the state's DNA expert arguing, among other things, that the prosecution failed to list a witness qualified to testify about population statistics, which are required to establish significance to the biological results and to render the DNA evidence admissible under Florida jurisprudence. (4 R 625-28.) The trial judge deferred ruling on the motion until a proffer was made during the trial.

However, the trial attorney failed to follow up with the motion in limine. Although trial counsel lodged a trial objection to the population statistics on the basis of “predicate,” and the State agreed not to present those statistics, counsel failed to make the **additional** argument—which had been raised in the motion in limine—that without pop stats, the DNA evidence is inadmissible under Brim. Brim v. State, 695 So. 2d 268, 270 (Fla. 1997) (if the state chooses to introduce DNA evidence at trial: (1) the state must show that two DNA samples match based on principles of molecular biology and chemistry; and (2) the submit statistical data to show the relevance of the match.)

Trial counsel candidly admitted at the postconviction hearing that he wished he preserved the Brim objection. (11 PCR 1754, 56-57.) Despite trial counsel's

denied the claim, finding that the attorney's decision was based on sound strategy rather than an oversight.

admission that his omission was not strategic, the trial court reasoned that counsel's omission *was* "strategic" for two reasons. First, the trial court found that the trial attorney's objection would have proved futile and the population statistics would have been presented. This finding is contrary to the evidence. The trial attorney, in filing his pretrial motion in limine, clearly believed that he had a valid argument that the state expert from the FDLE was unqualified to testify to the population statistics. (In fact, the state expert testified at the evidentiary hearing that at the time of the trial he had not even completed all of the statistical calculations. (14 PCR 2343-44.) The trial court deferred ruling on that issue until the trial, and had the attorney raised that argument and been successful, the DNA testimony would never have been heard by the jury. Assuming that the motion in limine was filed in good faith, then the trial attorney had no strategic motive not to raise that issue again at trial, given the overwhelming positive benefit of excluding the devastating DNA evidence.

Second, the trial court reasoned counsel failed to object under Brim because the DNA evidence was not damaging to Banks' case. At the evidentiary hearing, the trial attorney testified that he was not concerned with the blood at the scene being matched to Banks' DNA, because that was consistent with the story that Banks had told his attorney about what had happened. (11 PCR 1753, 57.) Contrary to the trial court's conclusion, the fact that a drop of blood at the victim's

apartment contained a mixture of Banks and the victim's blood was among the most damaging evidence against him – and the prosecution knew it, focusing on this fact in their closing argument. (11 R 695.)

II. Prejudice

Where trial counsel for Banks and the trial court stated that the DNA was not all that damaging in Banks' case, they forget that if the DNA evidence been excluded, the jury would not have learned that Banks' genetic material – blood or semen – was found in the victim's home.¹⁸ Banks would not have had to testify to explain the presence of his DNA in the victim's home. The only evidence against Banks would have been Ms. Johnson's testimony, a tape showing someone who might have been Banks using the victim's ATM card, and the evidence recovered from Banks' home (which, as explained in the preceding claim, should have been excluded).

Where the DNA was admitted, it was extremely damaging to Banks' case,

¹⁸ Notably, this is not a case where statistics were put on and the defendant is contesting the statistical training and experience of the expert requiring remand for evidentiary hearing on this narrow issue. See e.g. Casias v. State, 94 So. 3d 611 (Fla. 2d DCA 2011). Here the state failed to give statistical data regarding the DNA “matches,” rendering the DNA evidence meaningless. Brim, 842 So. 2d at 269-70 (“to say that two patterns match, without providing any scientifically valid estimate (or at least, an upper bound) of the frequency with which such matches might occur by chance, is meaningless. Certainly, a judge's or juror's untutored impression of how unusual a DNA profile is could be very wrong.”) (internal citations omitted)

because the mix of the victim's DNA and Banks' DNA tended to show that they bled at the same time in the same place, all but rebutting Banks' testimony (that he would not have needed to give had counsel properly excluded the DNA) that he cut himself on a broken crack pipe sometime earlier that day. Indeed, the prosecution relied heavily on this fact in their closing argument, even beginning with a very lengthy discussion of the DNA in support of their argument Banks was the perpetrator:

[L]et's start with the DNA. Not just touch DNA, not just something from passing one another. Biological DNA. His semen all over her naked body. Her vaginal swabs, her anal swabs, on her thigh. Complete match to him.

Now, this lid found very close to where her body was found had his blood. In fact, his blood was everywhere in her house. This lid gave chemical indications for the presence of blood as well as being an exact match to his DNA, mixed with DNA consistent with hers. Nobody else's. His and hers.

Why is this piece of evidence so important? Because it proves to you he just didn't have sex with her and leave before she was hurt because his blood and her blood are mixed together. He was there while she was bleeding and he was bleeding. That lid speaks volumes about this Defendant's guilt.

(11 R 694-95) (emphasis added.) The prosecution continued its discussion of the DNA evidence in their rebuttal closing argument:

But the unknown, as Mr. Eler likes to put it, DNA in this case, it's striking how obvious it is that it's Linda Volum's DNA and Linda Volum's blood; One of these [an item at the scene] was a perfect profile of Donald Banks and Donald Banks only; And you remember that mixture of Donald Banks's blood in Donald Banks' footprints,

these are his footprints, the mixture of his blood with his footprint has all of her alleles; Wow, the towel on two separate locations in front, the cuttings have both victim and defendant blood. Strikingly Similar.

(11 R 744-45). There is a reasonable probability that failing to exclude DNA evidence that established Banks was bleeding at the victim's apartment, engaging in sexual acts with the victim, and that his blood was mixed with her blood, undermines confidence in the outcome of this trial.

ARGUMENT FOUR

THE TRIAL COURT ERRED IN DENYING BANKS' CLAIM THAT HIS ATTORNEY WAS INEFFECTIVE IN ELICITING TESTIMONY ON CROSS-EXAMINATION OF SUDIE JOHNSON THAT SHE SAW A VIDEO OF BANKS STABBING SOMEONE IN AN UNRELATED CRIME RESULTING IN VIOLATIONS OF BANKS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLA. CONSTITUTION

Evidence of an unrelated armed robbery that occurred within days of the instant crimes, and surveillance video of that unrelated crime – depicting an assailant (allegedly Banks) stabbing a man outside a convenience store – was unquestionably inadmissible during the guilt phase of Banks' trial. And yet, in attempting to impeach Sudie Johnson defense counsel erroneously elicited evidence of the unrelated incident:

Defense: And isn't it true, Ma'am, that to this day you don't believe that Donald Banks did this?

Johnson: (Inaudible)

Defense: I'm sorry. I didn't hear you.

Johnson: He was capable. I believe he was capable.

Defense: But for a whole year into it, while you were communicating with him in the jail, you felt he wasn't?

Johnson: No.

Defense: Did you change your mind?

Johnson: Yes.

Defense: Change your mind because you found out that he and Ms. Volum had sex?

Johnson: No, that wasn't the reason. The reason was from the previous—I supported Mr. Banks all the way up until **I seen the tape of him stabbing Mr. William Johnson from the first...**

(8 PCR 1147) (emphasis added.) Defense counsel immediately moved for a mistrial and the following dialogue took place:

State: Your Honor, he walked right into that when he kept asking and kept asking and kept asking.

Court: You sure did. Boy, did you ask for that answer.

...

Defense: I don't think it was an invited comment, Judge.

Court: Well, I know that you don't. I think that it was.

Defense: [Requested curative instruction]

Court: All right, I will give that, but I think you probably better move along to another subject because you've clearly opened the door to this...

(8 PCR 1147.) A curative instruction was given, and then the next morning the trial judge questioned each of the jurors individually as to whether s/he thought that s/he could disregard Ms. Johnson's statement.¹⁹

Florida courts have applied Strickland in ascertaining whether a defense attorney's performance in cross-examining a witness amounted to a deficient performance resulting in prejudice to a defendant's case. See e.g. Parker v. State, 89 So. 3d 844, 861 (Fla. 2011); Barwick v. State, 88 So. 3d 85, 95 (Fla. 2011).

III. Trial counsel admittedly was deficient in his cross-examination because he knew from a prior deposition Ms. Johnson would provide this damning response

In denying Banks' postconviction claim in this regard, the lower court ruled that counsel's questioning of Johnson was "a matter of reasonable trial strategy":

The defense sought to portray Johnson as a scorned woman who was seeking revenge upon the defendant by testifying. Defendant's counsel was successful in at least implying such a motive through his cross-examination.

(8 PCR 1147.) However, the ineffective act was not counsel's **goal** of presenting Johnson as a scorned lover, but his **reckless questioning**, and the prejudicial **result**

¹⁹ Banks challenged trial judge's decision not to grant a mistrial on direct appeal, but this Court found that the trial court did not abuse its discretion. Although state argued that defense counsel was at fault in inviting Johnson's testimony (Answer on Direct Appeal SC08-1741, 40-42), this Court did not directly comment on trial counsel's performance in this regard.

of his carelessness.

Trial counsel admitted during the post-conviction evidentiary hearing that he knew prior to questioning Johnson that she saw the video in question. (11 PCR 1159, 1162.) Shockingly, counsel engaged in a nearly identical line of questioning in a prior deposition and Johnson gave an identical response, proving unequivocally that counsel knew exactly how Johnson would react when asked these questions:

Defense: Okay. I think you said earlier in the deposition that you refused to believe that he was capable of this, or something like that.

Johnson: Right.

Defense: Do you still feel that way?

Johnson: Not after watching—not after seeing the first case that he was convicted on.

Defense: So, you actually saw a video and an attack on an individual?

Johnson: And I had testify [sic] on the identity of Mr. Banks.

Defense: But prior to that you felt in your heart that—

Johnson: No. Not at all. Didn't even think he was capable.

(1 SPCR 15.) Given this deposition testimony, Ms. Johnson's response to counsel's questioning at trial, was not some random, unforeseeable consequence; rather, trial counsel already knew exactly what Ms. Johnson would say – and

thereby, knew what questions not to ask to elicit such a prejudicial response.

Unquestionably, where **counsel already knew exactly how Johnson would respond** to a nearly identical set of questions, counsel's decision to embark in this devastating line of questioning before the jury was a deficient act; everyone – the judge and prosecutor at trial, and trial counsel in evidentiary hearing – acknowledge that he “walked right into” that one. (9 R 378-80; 11 PCR 1763.) According to trial counsel, I “probably shouldn't have asked it the way I did.” (11 PCR 1763)

IV. Prejudice

The trial court's finding as to prejudice stands on even weaker legal footing:

Instead, Johnson testified that she came to believe Defendant committed the instant murder because she had seen a surveillance videotape of Defendant stabbing another person outside a convenience store.... There is no reasonable probability that the trial would have been different without the cross-examination, because Defendant was not prejudiced by this remark.

(8 PCR 1147.) The trial court based its decision that Johnson's statement was not prejudicial based on this Court's affirmance on direct appeal given the curative instruction and poll of the jury. (8 PCR 1147); Banks, 46 So. 3d at 997.

Undeniably, the court failed to mention in the order denying 3.851 that it, not once, but **twice**, asked the jury to disregard the prejudicial comments. Certainly, the trial court recognized the monumental problem of a jury hearing about another violent crime at trial if it asked them to disregard it twice. Even trial

counsel admitted in postconviction the statement by Ms. Johnson was prejudicial to his case. (11 PCR 1763).

Indeed, Banks' jury deliberated about whether he committed the stabbing in the instant case with the knowledge that he stabbed another person during the same timeframe. Our judicial system cannot tolerate a conviction and sentence of death to stand on the *hope* that twelve people accomplished the impossible intellectual feat of ignoring this devastating information (that was enhanced where the trial court repeatedly reminded the jury of the comment) in determining whether an "abiding conviction of guilt" rested in their souls at the time they rendered their verdicts. Banks' conviction cannot stand where his own attorney, through a preventable error, invited testimony that poisoned this jury's impartiality, despite the jury's well-intentioned responses to the trial court's polling questions. See e.g. Coverdale v. State, 940 So. 2d 558, 560 (Fla. 2d DCA 2006) ("[t]he improper admission of evidence concerning a defendant's prior criminal history is frequently too prejudicial for the jury to disregard, regardless of any curative instruction given by the trial court.") (internal citations omitted).

ARGUMENT FIVE

THE TRIAL COURT ERRED IN REJECTING BANKS' CLAIM THAT COUNSEL WAS INEFFECTIVE IN FAILING TO IMPEACH STATE WITNESSES SUDIE JOHNSON AND DETECTIVE BODINE RESULTING IN VIOLATIONS OF BANKS' RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLA. CONSTITUTION.

I. Applicable law

Florida courts have found that defense counsel can be deficient and prejudice can be shown under Strickland v. Washington, 466 U.S. at 688, 694 (1984) for failing to impeach witnesses that have exculpatory or impeachment value. See Kegler v. State, 712 So. 2d 1167 (Fla. 2d DCA 1998) (Finding appellant met both prongs of Strickland v. Washington and reversing appellant's first-degree murder and armed robbery conviction because defense counsel failed to impeach a state witness).

II. Counsel was deficient in failing to impeach critical state witnesses

A. Sudie Johnson

Sudie Johnson was the state's star witness in Banks' case; she testified that Banks confessed. DNA and Johnson's testimony was the only direct evidence against Mr. Banks – otherwise, all the state had was circumstantial evidence. Where Banks openly admitted to that he spent time in the victim's apartment, cut himself there, had sex with the victim, and the victim and Mr. Banks were

observed together earlier the day in question, the evidence would have been insufficient to convict Banks without Johnson's testimony. As such, it was imperative for defense counsel to do everything possible to discredit Ms. Johnson's testimony where "weakening [Johnson's] testimony was the only plausible hope [Banks] had for acquittal." Blackburn, 828 F.2d at 1183.

In particular, instead of opening the door to Banks' prior violent crime (see preceding argument), counsel should have impeached her with information: that she was a convicted felon; that she was threatened with imprisonment if she did not implicate Banks; and that she was angry with Banks at the time of her sworn statement.

Specifically, Ms. Johnson testified in evidentiary hearing that when police questioned her on March 24, 2005 following Banks arrest, she felt like she was being interrogated and felt like she was a suspect.²⁰ She was questioned from 9 p.m. to the following morning. She was tired, hungry, and cold and was not offered any food. The officers told her facts of the crime during the interview. (13 PCR 2290-92.)

In a letter from Johnson to Banks dated March 26, 2005, one day after her

²⁰ Banks was arrested on March 24, 2005 for his involvement in another crime. (1 R 2.) Ms. Johnson was questioned following Mr. Banks' arrest and gave a sworn statement to police officers regarding the instant case on March 25, 2005. (10 PCR 1556.)

sworn statement, she told Banks that the officers were “nagging and prying like she did something wrong. They tried to insinuate I was connected, that if I knew people, I was so scared they said they could lock me up...” Eler was aware of this letter prior to trial and could have used it in his examination of Johnson. (11 PCR 1808.)

In another letter, written on March 25, 2005, the very day Ms. Johnson gave her sworn statement, she wrote: “why was you tricking with that white [bitch] in my house and in my bed, you nasty bitch, you could have given me AIDS.” She also wrote, “I know I told you I hate you, but now I was extremely angry with you and hate that I was so harsh...” Eler conceded that this could have been used to impeach Ms. Johnson, but stated that he did not use the letter because it contained negative information (information that was before the jury anyway). (11 PCR 1809-10.) Eler also claimed he did not use the letter because he assumed that Banks was trying to get Ms. Johnson to perjure herself. However, Eler admitted that this was merely speculation. (11 PCR 1810-11.)

Moreover, counsel failed to even impeach Ms. Johnson with her prior felony conviction, a fact observed by the trial court in its order denying 3.851 relief. (8 PCR 1160.)

The trial court, in denying relief, claims that much of the information described above could not have been used to impeach Ms. Johnson because it was

“inadmissible hearsay.” (8 PCR 1160.) This is an incorrect statement of the law. Initially, if trial counsel had questioned Ms. Johnson about the conditions of her questioning by law enforcement, he would have gotten the same answers that postconviction counsel did in evidentiary hearing: That Ms. Johnson felt like she was a suspect, she was interrogated, she was questioned over a period of several hours from 9 p.m. to early the next morning, and she was cold, hungry, and tired. If Johnson had given trial counsel untruthful answers, counsel could have been impeached with her prior inconsistent statements contained letters and depositions. Fla. Stat. § 90.608(1), 90.614(2); see also Gamble v. State, 492 So. 2d 1132, 1133 (Fla. 5th DCA 1986) (“A witness’ credibility may be impeached by introducing statements of the witness which are inconsistent with his present testimony.”) The prior statements could also have been used to refresh Ms. Johnson’s memory. Fla. Stat. 90.613.

Moreover, the above information regarding Ms. Johnson’s motivation for testifying should have been offered to demonstrate Johnson’s bias and motivation for testifying. Fla. Stat. § 90.608(2); see also Thornes v. State, 485 So. 2d 1357, 1359 (Fla. 1st DCA 1986) (“this fact shows Miller's bias and tendency to testify more favorably to the prosecutor, who then had the power to reinstate the criminal prosecution against her. A party may attack the credibility of a witness by showing that the witness is biased. § 90.608(1)(b), Fla. Stat. (1983). The right of a

defendant to cross-examine a prosecution witness about actual or threatened criminal investigation against that witness to show bias or self-interest is well-established. Harrell v. State, 108 So. 3d 1146, 1148 (Fla. 5th DCA 2013).

B. Detective Bodine

Det. Bodine was involved in collecting evidence at the victim's house. (12 PCR 2030.) He testified in evidentiary hearing that in the course of his investigation, he determined that Tony Romasheer had a physical relationship with the victim. (12 PCR 2030.) Scott Greenfield was the victim's friend and loaned her money, some of which was outstanding. (12 PCR 2031.) There was evidence of drug abuse found in the victim's home and Det. Bodine was aware that she was using cocaine and other drugs during the time leading up to her murder. (12 PCR 2035.)

Although these individuals were mentioned in defense counsel's cross-examination of Det. Bodine, counsel failed to develop the **context** of the questioning by explaining who the individuals were, what their relationships were to Ms. Volum, and why Det. Bodine sought to investigate them in the first place. Further, counsel failed to elicit from Det. Bodine whether the victim had a drug problem.

The trial court, in denying relief in this claim, found that the information regarding Det. Bodine's investigation constitutes inadmissible hearsay. (8 R

1161.) However, where the information is not being supplied for the truth of the matter asserted, but to demonstrate why various people were investigated, the information identified above, is not hearsay. Peterka v. State, 640 So. 2d 59, 68 (Fla. 1994). As explained by this Court in Paterka:

The record in the instant case shows that Deputy Harkins testified that a teletype from Nebraska revealed that Peterka was an escaped fugitive and was considered “armed and dangerous.” Defense counsel objected to the testimony as hearsay and irrelevant. The trial court overruled the objection because it found that the testimony was offered to explain the officer’s actions in subsequently arresting Peterka. . . . The record supports the trial court's rulings that the testimony was not hearsay because it was not offered to prove the truth of the matter asserted and that the testimony was relevant. Moreover, the record shows that the trial court gave the jury a limiting instruction that **the teletype testimony was being admitted not to prove the truth of the matter asserted, but to explain the actions of law enforcement officers.**

Id. (emphasis added). In the instant case, as in Paterka, the information concerning Det. Bodine’s investigation of various leads in Ms. Volum’s murder described above is not offered for the truth—it makes no difference whether Ms. Volum actually owed Mr. Greenfield money, or whether Mr. Barnett was physically violent with Ms. Volum. Rather, Det. Bodine’s testimony explains his actions in targeting these individuals and demonstrates that Banks was not the only person of interest in the case, which would have been extremely helpful to Banks’ defense.

III. Prejudice

As explained above, where Sudie Johnson's testimony was the most damaging evidence in Banks' case, counsel was obligated to do everything it could to undermine her credibility. This could have been accomplished with obvious impeachment such as Johnson's felony conviction. Certainly, Johnson's motivation for giving a sworn statement against Banks – her anger at Banks for “tricking” with a “white bitch” and her fear of arrest as an accomplice – would have caused the jury to question her credibility as a witnesses against Banks. Had Johnson been adequately impeached in cross-examination there is a reasonable probability that the jury would have discounted her veracity and the outcome of his trial would have been different.

Similarly, if the jury had learned that Volum associated with several other individuals who were questioned by law enforcement regarding the homicide, that Banks was not the only lead in the case, and that the other leads were abandoned without sufficient investigation, there is a reasonable probability of a different outcome at trial.

ARGUMENT SIX

THE TRIAL COURT ERRED IN DENYING BANKS' CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE AND CALL KENYANNA SMITH IN BANKS' GUILT PHASE RESULTING IN A VIOLATION OF BANKS' FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE US CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLA. CONSTITUTION

I. Applicable law

Counsel can be ineffective in failing to call witnesses at trial. Yarbrough v. State, 871 So. 2d 1026, 1028 (Fla. 1st DCA 2004); Mendoza v. State, 81 So. 3d 579, 581 (Fla. 3d DCA 2012) (“the failure to reasonably investigate and locate witnesses can often serve as a colorable claim of ineffective assistance of counsel.”) (citing Wiggins v. Smith, 539 U.S. 510, 521 (2003) (observing that “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary”))

II. Deficiency- counsel failed to present a critical witness who corroborated Banks' version of events and provided evidence Banks and the victim were friends

Kenyanna Smith testified at Banks' evidentiary hearing that she was a clerk at the Winn-Dixie on Arlington Road and Atlantic in 2005. (12 PCR 2112.) In her capacity as a Winn-Dixie clerk, she waited on Mr. Banks and a companion – an older white woman, Ms. Volum. (12 PCR 2113-14, 2117) Ms. Volum bought beer. She attempted to secure cash-back, but was unsuccessful. She was not

distressed when she was denied cash-back. There did not appear to be any animosity between Banks and Volum. The pair entered the store together and left together. (12 PCR 2114-15.) Ms. Smith would have testified in Banks' trial had she been asked. (12 PCR 2116.)

Trial counsel remembered that a Winn-Dixie employee saw Banks and Ms. Volum together the day of the crime and reported that they bought beer and cigars together. (11 PCR 1781.) He recalls reading this in a police report cannot recall whether he spoke with her or took her deposition. (11 PCR 1782.) He agreed that her testimony could have been useful to demonstrate that Banks and the victim were acquaintances, that they may have engaged in consensual sex, and may have corroborated that Ms. Volum allowed Banks use her ATM card. (11 PCR 1782-1785.)

Where counsel knew that his client, Mr. Banks was going to testify and that his veracity would be seriously questioned due to his status as the defendant in the case and his criminal history, counsel was obligated to put on evidence corroborating Banks' description of the day's events. Instead, counsel left the jury to ascertain Banks' believability without a shred of support.

III. Prejudice

Where Banks and Volum spent most of the day in question alone together, counsel should have questioned Ms. Smith, one of the few people to see Banks and

Volum that day, to support his client's testimony. This available witness corroborated Banks' description of events on the day in question, verified Banks' account that he and Ms. Volum drove to Winn-Dixie together, bought party supplies, and did not appear to have an acrimonious relationship. Ms. Smith emphasized that Ms. Volum was not stressed or nervous in Banks' presence even after she could not secure cash back.

Because this witness was not called, the prosecution insinuated Banks probably raped Ms. Volum, was not friends with her, and committed a premeditated killing. As such, there is a reasonable probability that the outcome would have been different had Smith testified. See Cf. Russo v. State, 418 So. 2d 483, 484 (Fla. 2d DCA 1982) ("Because Tillis' story was so crucial to the state's case, omission of any evidence relating directly to his credibility was harmful and prejudicial to the defense."); Dukes v. State, 442 So. 2d 316, 317 (Fla. 2d DCA 1983) (error on direct appeal not harmless where trial court excluded defense witness whose testimony, although cumulative of defendant's, would have supported the defendant's credibility).

ARGUMENT SEVEN

THE TRIAL COURT ERRED IN DENYING BANKS' CLAIM THAT COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO IMPROPER PROSECUTORIAL COMMENTS THAT AMOUNTED TO FUNDAMENTAL ERROR IN VIOLATION OF BANKS' FOURTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLA. CONSTITUTION

I. Applicable Law

Where an appellant's claims of prosecutorial misconduct were not preserved with objections at trial, Strickland is the appropriate standard for ascertaining error. Brooks v. Kemp, 762 F.2d 1383, 1402 (11th Cir. 1985). Reversible error exists where improper conduct of a prosecutor "so infects the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986).

II. Improper prosecutorial tactics in guilt phase

A. Comments inferring that Banks' was guilty of an uncharged crime of sexual battery of the victim

A prosecutor may not make unsubstantiated statements concerning other crimes a defendant **may** have committed. Ford v. State, 50 So. 3d 799, 800 (Fla. 2d DCA 2011)(Implicating a defendant in other crimes not charged "is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged"); Huff v. State, 437 So. 2d 1087, 1089 (Fla. 1983). Defense counsel can be

ineffective in failing to object to such statements, and such statements are not harmless if they have the reasonable possibility that they contributed to the conviction. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986); Strickland, 466 U.S. 668.

Banks was never charged with the crime of sexual battery of the victim. (1 R 17-19.) Absolutely no evidence was introduced that Banks raped the victim. In fact, the only evidence presented at trial regarding sex, other than a DNA match to Banks' semen, came from Banks who testified that he had consensual sex with the victim on numerous occasions, including the day of the crimes. (11 R 631.)

Nonetheless, the state repeatedly argued that Banks sexually battered the victim. During opening statements, the prosecution inferred that although they could not prove it, the victim's "bleeding, dead corpse" indicated that the victim was sexually battered. (9 R 233.) And then, even more egregiously, in closing arguments, the prosecutor argued:

State: And the fact that she's completely naked and his sperm is all over her shows that there was recent sex involved in her death and, mind you, **the only way we can prove it's consensual or not is that nine-time convicted felon's word it was consensual. That's the only way. There was evidence it wasn't consensual in that she's dead lying naked on the foot of her bed.** But that's not what we're here to determine whether it was consensual or not. That's not what the defendant's charged with. The victim was found naked, therefore it's more likely to be killed.

(11 R 734-735) (emphasis added). Where, as here, the state repeatedly accused

Banks of sexually battering the victim, a crime that was not charged in the indictment and was not supported by the evidence, counsel was deficient in failing to object to the same.

B. Improper cross-examination of Mr. Banks

A state may not ask a witness in cross-examination to comment on the veracity of another witness's testimony. In Coulliette v. State, the prosecutor asked the defendant several times on cross-examination whether the state's witnesses, who contradicted the defendant's testimony, were lying or telling the truth and the First DCA found these questions improper. 949 So. 2d 1078 (Fla. 1st DCA 2007). See also Knowles v. State, 632 So. 2d 62, 65 (Fla. 1993) (holding it was improper for prosecutor to ask defendant if he thought the state's witnesses were lying); Mosley v. State, 569 So. 2d 832, 832 (Fla. 2d DCA 1990). As the FSC explained in Knowles, asking a witness if a prior witness who testified differently is lying is improper for a number of reasons:

First, allowing one witness to offer a personal view on the credibility of a fellow witness is an invasion of the province of the jury to determine a witness's credibility. Second, although the fact that two witnesses disagree does not necessarily establish that one is lying, such questioning may lead the jury to conclude that the witness being questioned is actually lying. Finally, unless there is evidence that the witness is privy to the thought processes of the other witness, the witness is not competent to testify concerning the other's state of mind.

632 So. 2d at 65-66, citing Boatwright, 452 So. 2d at 668.

Federal courts have also long prohibited the prosecution from forcing a defendant to comment on the veracity of a state witness. United States v. Moreland, 622 F.3d 1147, 1160 (9th Cir. 2010); United States v. Richter, 826 F.2d 206, 209 (2d Cir. 1987) (“prosecutors have been admonished time and again to avoid statements to the effect that, if the defendant is innocent, government agents must be lying.”); Garber v. United States, 145 F.2d 966, 972 (6th Cir. 1944) (“**No defendant should be compelled to call those who bear witness against him liars or perjurers**, upon peril of implied acceptance of the truth of their testimony unless thus vigorously denied. Odious comparisons do not best serve court decorum, nor is truth more inherent in robust than in temperate language.”)(emphasis added).

And yet, during the guilt phase of Banks’ trial, the state improperly bolstered its case by questioning Banks as to his truthfulness and the veracity of another witness:

STATE: Mr. Banks, isn’t it true that you have the greatest interest in the outcome of this case versus all the other witnesses that have testified?

BANKS: I do not understand.

STATE: Isn’t it true that you have the greatest interest in how this case is decided by this jury?

BANKS: Um-hum.

STATE: Do you want this jury to convict you of this crime?

BANKS: Nobody wouldn't want that if you sitting - - if you're accused.

STATE: So you have an interest, wouldn't you say, since you are the accused, you have an interest in how this case is decided by this jury.

BANKS: I believe so. I'm telling the truth, yeah.

STATE: You do have an interest in how this case is decided, correct?

BANKS: Okay.

STATE: And you have the greatest interest, in fact, because you are the one on trial, correct?

STATE: Yes.

(11 R 653-654.) The state continued with this improper questioning:

STATE: Would you lie to this jury if you thought it would get you out of trouble?

BANKS: Why should I?

STATE: I'm not tricking you.

BANKS: I'm not, you understand what I'm saying, I'm not trying to argue with you.

STATE: Would you lie to this jury if you thought it would get you out of trouble. That's my question. Would you lie to them if you thought it would bet you out of trouble?

BANKS: No, I don't need to lie to them.

STATE: So you would not lie to this jury if you thought it would get you out of trouble?

(11 R 655-657.)

STATE: And so Sudie Johnson lied when she said she saw you come home in the early morning hours driving that car? That was not true?

BANKS: No, I walked home.

STATE: And she lied when she said that you were carrying a green pillowcase with bloody clothes in it?

BANKS: Yeah.

STATE: And she lied when she said that you gave her a computer that early morning hours?

BANKS: Yes.

STATE: And she lied when she said this was a murder payback?

BANKS: I need for you to explain to me what that is.

(11 R 671-77.) Counsel did not object to these statements despite case law condemning such tactics, however, counsel admitted in evidentiary hearing that the state should not have called Banks a liar in cross-examination. (11 PCR 1814.)

C. Banks is a “nine-time convicted felon”

The state repeatedly informed the jury that Banks’ was a liar because he is a convicted felon:

STATE: [T]he only way we can prove whether it’s consensual or not is that nine-time convicted felon’s word it was consensual.

(11 R 734.)

STATE: But whether or not the night of her death someone is using, it's not her, is using her ATM card, that's not important because that was consensual because you can believe that nine-time convicted felon.

(11 R 736-37.)

STATE: We know two people are involved and there he is. He told you a story and he's a nine-time convicted felon.

(11 R 751.) These repeated references to Banks' felony record invited the jury to convict Banks because he is a criminal and deserves to be in prison. The comments also invited the jury to suppose that Banks **probably** committed the murder because he had committed nine felonies in the past.

While the state may comment on a defendant's prior conviction for impeachment purposes, a prosecutor may not use the defendant's prior convictions to encourage the jury to convict a defendant based on the defendant's apparent propensity to commit crime. Pacifico v. State, 642 So. 2d 1178, 1183 (Fla. 1st DCA 1994). Furthermore, the state is not allowed to invade the province of the jury to determine Banks' credibility. Knowles, 632 So. 2d at 65. Trial counsel agreed that the state's repeated references to Banks' criminal history placed could be considered improper. (11 PCR 1796.)

III. Improper prosecutorial comments in penalty phase

A. "I'm not asking you to take the easy way out and feel sympathy..."

The prosecutor in Banks' penalty phase closing argument informed the jury

its duty to society would not be served until it recommended death and that anything less would be “the easy way out”:

STATE: You have created justice by your verdicts but that justice is not complete. It is only partial justice. This is not a comfortable, everyday exercise that we’re doing here today.

(11 R 922.) The prosecutor later stated:

STATE: I’m not asking you to take the easy way out and feel sympathy or emotion.

(11 R 935.)

STATE: [M]easure this man by his inability to tell you the truth over and over again similar to a person that we call a sociopath as Dr. Krop testified to.

(11 R 940.)

Trial counsel conceded in evidentiary hearing that the prosecutor’s comment that the jury should not “take the easy way out” “bothered him a little bit” and that the “partial justice” argument was “borderline.” (11 PCR 1798.) Counsel was “bothered” by this comment because such an appeal to the jury’s sense of duty and responsibility to protect society was condemned by the Florida Supreme Court in Urbin and Brooks. In Urbin, where the state attorney used some of the exact language employed by the state in Banks, the FSC stated:

The prosecutor argued that “my concern is that some of you may be tempted to take the easy way out, to not weigh the aggravating circumstances and the mitigating circumstances and not want to fully carry out your responsibility and just vote for life.” The prosecutor

continued, “I’m going to ask you not be swayed by pity or sympathy. I’m going to ask you what pity, what sympathy, what mercy did the defendant show Jason Hicks. I’m going to ask you to follow the law. I’m going to ask you to do your duty.”

Urbin v. State, 714 So. 2d 411, 421 (Fla. 1998). The court in Urbin found that this tactic employed by the prosecutor was an “impermissible attempt by the prosecution to instruct the jury as to its duties and functions.” Id.

Contrary to the state’s assertions, the jury did not have a duty to recommend death for Banks. The state of Florida has determined that life in prison is an acceptable, sufficient punishment in a first-degree murder case. Even in cases where the state has established multiple aggravating factors and there is little or no mitigation, a jury is never required to recommend death. The statements by the prosecutor that a vote for life would indicate personal or moral weakness and would let down the community or endanger its citizens by failing to protect it from a “sociopath” were profoundly improper. Defense counsel was deficient in failing to lodge objections to these comments.

IV. Prejudice – The state’s repeated improper comments and tactics amounted to fundamental error

The repeated improper prosecutorial gamesmanship utilized in Banks’ trial “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Darden, 477 U.S. at 181(citing Donnelly v. DeChristoforo, 416 U.S. 637 (1974)). The cumulative effect of these errors denied Mr. Banks his

fundamental rights under the Constitution of the United States and the Florida Constitution. DiGuilio, 491 So.2d 1129. In Defreitas v. State, 701 So.2d 593, 600 (4th DCA 1997) the court stated:

Measuring the prosecuting attorney's conduct in the instant case by the aforementioned well settled standard, we are persuaded that appellant has been denied one of his most precious constitutional rights, the right to a fair criminal trial, by the cumulative effect of one prosecutorial impropriety after another one. Furthermore, we are equally persuaded that the cumulative effect of the numerous acts of prosecutorial misconduct herein were so prejudicial as to vitiate appellants entire trial. In addition, we are likewise persuaded beyond question that the cumulative effect of the numerous acts were of such a character that neither rebuke nor retraction could have or would have destroyed their sinister influence. The prosecutorial misconduct, taken in its entirety and viewed in its proper context, is of such a prejudicial magnitude that it enjoys no safe harbor anywhere in the criminal jurisprudence of this state. Accordingly, we find fundamental error.

Id. (emphasis added.)

The cumulative effect of the prosecutor's comments or actions must be considered when determining whether a defendant was denied a fair trial. See Kelly v. State, 761 So.2d 409 (Fla. 2nd DCA 2000) (holding that the *cumulative effect* of the prosecutor's improper comments and questions deprived Kelly of a fair trial) (emphasis added).

As in Defreitas, the improper comments in Banks' case amounted to fundamental error. Due to the prosecutor's improper tactics and counsel's failure to object, Banks was denied effective assistance of counsel under the Sixth and

Fourteenth Amendments, due process under the Fifth and Fourteenth Amendments, and his death sentence is cruel and unusual in violation of the Eighth Amendment.

ARGUMENT EIGHT

MR. BANKS' TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE VIEWED AS HARMLESS WHEN CONSIDERED AS A WHOLE. THE COMBINATION OF ERRORS DEPRIVED MR. BANKS OF HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

The Supreme Court in Woodson determined that because death is such a unique penalty and is irrevocable, greater caution and safeguards have to be utilized to ensure the constitutional validity of this ultimate sentence. Woodson v. North Carolina, 428 U.S. 280 (1976) (holding that it is vital importance to the defendant and to the community that any decision regarding the guilt and subsequent death imposition be, and appear to be, based on reason rather than caprice and emotion). Because of the uniqueness and severity of the death penalty, the United States and Florida Supreme Courts have held that when errors viewed as a whole, even if they would not require a reversal if viewed individually, can amount to cumulative error that requires a reversal in convictions. See Berger v. U.S., 295 U.S. 78, 88-89 (1935) (“[W]e have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative

effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded. “); Jones v. State, 569 So. 2d 1234 (Fla. 1990)(remanding for new penalty phase due to “cumulative errors”); Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990); Martinez v. State, 761 So. 2d 1074, 1082-83 (Fla. 2000);

The various errors in Banks’ trial individually and cumulatively resulted in a violation of his right to a fair trial under the United States and Florida Constitutions and are sufficient to require reversal of his guilt and penalty phase. As such, he requests his convictions and sentence be reversed and remanded, and a new trial granted.

CONCLUSION

WHEREFORE, based on the foregoing, Mr. Banks respectfully requests this Honorable Court reverse and remand the trial court’s denial of his 3.851 Motion for Postconviction relief for a new trial and/or penalty phase.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing has been delivered via email to the Office of the Attorney General at capapp@myfloridalegal.com and carine.emplit@myfloridalegal.com on this 17th day of February, 2015.

/s/ Rick Sichta _____
A T T O R N E Y

CERTIFICATE OF COMPLIANCE AND AS TO FONT

I **HEREBY CERTIFY** that this brief is submitted by Appellant, using Times New Roman, 14-point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure Rule 9.210(a)(2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

/s/ Rick Sichta _____
A T T O R N E Y