

IN THE SUPREME COURT OF THE STATE OF FLORIDA

**CASE NUMBER: SC14-1796**

**LOWER TRIBUNAL CASE NUMBER: 162009CF002002AXXMA**

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**JUSTIN MCMILLIAN,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

**INITIAL BRIEF OF APPELLANT**

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RECEIVED, 01/30/2015 09:08:40 AM, Clerk, Supreme Court

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## **REQUEST FOR ORAL ARGUMENT**

The resolution of the issues involved in this action will determine whether Mr. McMillian lives or dies. This Court has not hesitated to allow argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. McMillian.

## **PRELIMINARY STATEMENT**

This proceeding involves the appeal of the Circuit Court's denial of Mr. McMillian's Motion to Vacate Judgments of Conviction and Sentence. The Motion was brought pursuant to Fla. R. Crim. Pro. 3.851.

Justin McMillian will be referred to as "Mr. McMillian" or "Defendant." References to the record of the direct appeal of the trial judgment and sentence in this case are designated DIR. ROA followed by the appropriate page number, e.g. (DIR. ROA, p. 123). Citations to the record from the post-conviction evidentiary hearing will be designated as PC, followed by the appropriate page number, e.g. (PC, p.123). References to Exhibits are designated by the record, followed by the exhibit number, followed by the appropriate p. number, e.g. (DIR. ROA, Exh. 1, p. 1).

## STATEMENT OF THE CASE

This is an appeal of the circuit court's denial of Mr. McMillian's Motion to Vacate Judgments and Sentence, brought pursuant to Fla. R. Crim. P. 3.851. Mr. McMillian was charged by Indictment on March 26, 2009 with one count of murder in the first degree for the death of Danielle Stubbs which occurred on January 11, 2009, and one count of possession of a firearm by a convicted felon. Defendant was also charged with attempted murder in the first degree of K.W. Bowen, a law enforcement officer in a separate case, number 162009CF000721AXXXMA. It is unclear from the record when the Public Defender for the Fourth Judicial Circuit was appointed to represent Defendant. An Order determining Defendant's need for court appointed counsel was entered January 15, 2009. Assistant Public Defenders Fred Gazaleh, Quentin Till and Michael Bateh were assigned to handle each of the cases by the Public Defender's Office.

On January 14, 2010, the Public Defender's Office moved to sever the possession of a firearm by a convicted felon count from the Indictment which was granted without objection by the State. On December 21, 2009, the Public Defender's Office moved to consolidate the attempted murder charge contained in case number 162009CF000721AXXXMA with the charge contained in the Indictment for first degree murder. The cases were consolidated without objection

by the State. On June 14, 2010 trial commenced with jury selection. No new Indictment was obtained and a “dummy” Indictment that included the charges of first degree murder and attempted first degree murder was prepared by the State for use at trial.

At trial, the prosecution presented two theories to support its first-degree murder charge: that the murder was premeditated or that the murder was a felony murder based on an underlying burglary and/or sexual assault. The trial ended on June 18, 2010, with a jury verdict of guilty of only premeditated first degree murder and guilty of the lesser included offense of attempted second degree murder of a police officer. The trial court withheld adjudication pending disposition.

On June 30, 2010, penalty phase commenced before the same jury that was empanelled for the guilt phase. The jurors returned a verdict recommending the death penalty by a vote of 10-2 as to the count of capital homicide on that same day. A *Spencer* hearing commenced on August 27, 2010, but neither side presented any additional testimony or evidence. Subsequently, on October 1, 2010, the Court sentenced Mr. McMillian to death for the murder of Danielle Stubbs, and to thirty years with a 20 year minimum mandatory sentence for the attempted second degree murder of a law enforcement officer. The Court ran each sentence consecutive with the other sentence.

The Court found the following two aggravating circumstances to support the death sentence: the defendant had previously been convicted of a prior violent felony (the contemporaneous attempted murder of the law enforcement officer) (great weight); felony probation stemming from Defendant's felony fleeing and eluding offense in Georgia (great weight). The Court found one statutory mitigating circumstance: no significant history of prior criminal activity but only assigned this mitigation "little weight" because of evidence presented throughout both phases of the trial that McMillian had a history of fighting in school, was regularly in trouble with the police for driving with a suspended license and had a felony fleeing and eluding charge.

The trial court also found seven non-statutory mitigating factors, ascribing each only slight or little weight: 1) raised in the church (very slight weight); (2) McMillian loves and is loved by his family and friends (little weight); (3) McMillian has a consistent history of employment (little weight); (4) McMillian's biological mother was not an active participant in his upbringing (slight weight); (5) McMillian has an IQ of 76 (little weight); (6) McMillian behaved appropriately during trial (slight weight); (7) McMillian suffered from some mental or emotional distress at the time of the murder (some weight).

The post-conviction court held an evidentiary hearing from June 23, 2014 – June 25, 2014, and on June 30, 2014, at which Assistant Attorney General Stephen

White, and Assistant State Attorney Bernardo de la Rionda were present. Ann Finnell, Esq. and BeJae Shelton, Esq. appeared as counsel on behalf of Mr. McMillian. Mr. McMillian called Mr. Quentin Till, Esq., Mr. Fred Gazelah, Esq. and Mr. Michael Bateh, Esq. to testify. Mr. McMillian also called nine other witnesses in support of his claim.

### **STATEMENT OF THE FACTS**

Mr. McMillian relies on this Court's direct appeal opinion in *McMillian v. State*, 94 So. 3d 572 (Fla. 2012) for the statement of the facts of the trial. Additionally, Mr. McMillian presents the following additional statement of facts as to the evidence presented at trial and at the evidentiary hearing on each claim for which an evidentiary hearing was granted.

Quentin Till, an Assistant Public Defender testified at the evidentiary hearing. (PC, p. 711) Mr. Till testified he was the attorney primarily responsible for handling the guilt phase of this case. (*Id.* at 731-732). Mr. Till testified that upon learning that his client, Mr. McMillian, was being treated at Shands Hospital, he sent an investigator to speak with Mr. McMillian, but was unsuccessful as Mr. McMillian was in a comatose state. (*Id.* at 719). Mr. Till also deliberately chose not to share some information from Mr. McMillian's medical records with Dr. Krop, the mental health expert hired by the defense, or explore the issue further. (*Id.* at 740-743).

Mr. Till also admitted that when the State played a recording of Mr. McMillian's statement to the jury, Mr. Till never made any objections regarding the interrogating officers' inflammatory comments about Mr. McMillian's family's belief in his guilt. (*Id.* at 758). In fact, Mr. Till stated "I guess to be on the safe side I could have done that, but I didn't do it." (*Id.* at 759).

Mr. Till also testified he sought consolidation of the charges against Mr. McMillian – the first degree murder of victim Danielle Stubs occurring on January 11, 2009, and the attempted murder of Officer K.W. Bowen on January 14, 2009. (*Id.* at 761-762). The motion for consolidation was made on the eve of the trial scheduled for the attempted murder charge after the trial indicated no continuance would be granted. When Mr. Till was questioned as to whether he realized the prejudicial effect of the consolidation of these two charges, Mr. Till provided non-responsive answers and became argumentative. (*Id.* at 766-767). Even Mr. Gazelah, the other attorney on Mr. McMillian's case whose testimony is discussed more fully below, testified that had he known of Mr. Till's motion to consolidate the charge, he would have discouraged Mr. Till from doing so. (*Id.* at 855-56). Mr. Gazelah recognized the prejudicial affect of consolidation, stating, "if the jury felt he was guilty of one, they were more likely to convict him of the other." (*Id.* at 855-56).

Mr. Till admitted that he never objected to an inflammatory picture entered into evidence by the State which depicted a hole punched into a wall by the victim's brother after discovering his sister's body. (*Id.* at 772-773). Mr. Till responded "how was that inflammatory? I mean it wasn't inflammatory to me." (*Id.* at 772-773). Mr. Till testified he failed to object to the inflammatory testimony of the victim's mother's vivid and emotional description of how she discovered her daughter's body, which caused the victim's brother to jump over the gallery wall in the courtroom during trial. (*Id.* at 774-775). Mr. Till admitted, "it is inflammatory." (*Id.* at 774-775).

Mr. Till claimed he spoke with Mr. McMillian and properly counseled him prior to his testimony, but then acknowledged that Mr. McMillian gave testimony which later allowed the State to impeach him without objection from Mr. Till. (*Id.* at 780-781). Further, Mr. Till acknowledged that he solicited testimony from officers at trial regarding the fact that Mr. McMillian was pulled over for driving on a suspended license. (*Id.* at 782). When asked why Mr. Till would use this method despite its prejudicial implications, Mr. Till responded, "I guess it depends on how serious do you look at a misdemeanor capias for driving on a suspended license," but later admitted that it "may have been prejudicial." (*Id.* at 783).

Mr. Till also testified that he failed to object during the State's inflammatory closing argument where the State argued Mr. McMillian was

committing adultery and that the victim was likely praying prior to her death. (*Id.* at 785, 786-87). Mr. Till stated “I’m not even sure where that came from” and acknowledged he could have at least objected on the grounds that the argument assumed “facts not in evidence.” (*Id.* at 785, 786-87). Mr. Till went on to recount other objections he could have made and his state of mind at the time, “ I’m probably thinking there, well, that could be objectionable. Well, it’s too late.” (*Id.* at 786-87).

Mr. Till also testified about the State’s closing argument during the penalty phase. He admitted to not making objections on several matters stating, “I could have jumped up and down thirty times in that closing argument making objections” but did not. (*Id.* at 829).

When questioned about his own efforts to interview potential witnesses, investigate Mr. McMillian’s background and upbringing Mr. Till stated, “I’ll be honest with you, I did very little.” (*Id.* at 794). Mr. Till also testified as to Dr. Krop’s collaboration on this matter for the purpose of presenting a case during the penalty phase of Mr. McMillian’s trial. Mr. Till admitted he never provided Dr. Krop with any information regarding Mr. McMillian’s possible posttraumatic stress disorder (hereinafter “PTSD”) brought on by his exposure to mortar fire while in Iraq and Afghanistan. (*Id.* at 795). Mr. Till argued that he did not present Dr. Krop with any of this information because Mr. McMillian merely worked in

an “air conditioned gym” while in the middle east and therefore, he could not have made a case for PTSD. (*Id.* at 796). However, Mr. Till’s assumption about Mr. McMillian’s lack of PTSD was based on nothing more than conjecture as he readily admitted he never talked to a single person at “Kellog, Brown, and Root, (hereinafter “KBR”)” the company that employed Mr. McMillian in Afghanistan and Iraq. (*Id.* at 1366) However, as discussed more fully below, Mr. McMillian was exposed to mortar fire and daily bombings and attacks from the Taliban and suffered from anxiety and nightmares as a result.

Mr. Gazelah also testified at the evidentiary hearing regarding this matter. Mr. Gazelah was the attorney primarily responsible for handling the penalty phase of Mr. McMillian’s case. (*Id.* at 842). Mr. Gazelah testified his investigation consisted of one or two trips to Georgia and interviewing very few witnesses. (*Id.* at 846-847). He testified that he interviewed Mr. McMillian’s mother and suspected “she had some mental health problems,” but never investigated this issue further as he was unaware that she was placed in special education classes as a child and had been diagnosed with bipolar disorder. (*Id.* at 846-47). Further, Mr. Gazelah testified he did not know Mr. McMillian’s grandmother adopted him as a child. (*Id.* at 848).

Mr. Gazelah also testified regarding his collaboration with Dr. Krop for the penalty phase of the trial. He admitted that Dr. Krop had not been given all the

records he requested so that he could conduct his evaluation and prepare his testimony. (*Id.* at 862). Specifically, Mr. Gazelah recounted that even a month prior to Mr. McMillian's trial, his office still had not provided Dr. Krop all the records Dr. Krop had requested. (*Id.* at 862). Mr. Gazelah recognized that Dr. Krop complained that Mr. Gazelah's interviews of potential mitigation witnesses in the case were "superficial" as Mr. Gazelah's inquiries requested minimal background information. (*Id.* at 866).

Mr. Gazelah admitted that Dr. Krop recommended a neurologist evaluate Mr. McMillian due to temporal and frontal lobe impairment suffered by Mr. McMillian; however, Mr. Gazelah never procured a neurologist for the case. (*Id.* at 880).

Mr. Gazelah testified that Dr. Krop never received psychological records that Dr. Krop requested regarding Mr. McMillian's mental state at the time of the shootout with police on January 14, 2009. (*Id.* at 872). Mr. Gazelah claimed he was surprised that Dr. Krop had never been given this information when he found out about the deficiency only four days before trial. (*Id.* at 873). Further, Mr. Gazelah admitted that even after he found out Dr. Krop had not received this information, he still made no attempt to ensure Dr. Krop received these records prior to the commencement of the penalty phase of Mr. McMillian's trial. (*Id.* at 873).

Mr. Gazelah testified he obtained some records regarding Mr. McMillian's employment with KBR. (*Id.* at 893). However, other than the names listed in the KBR file, Mr. Gazelah admitted that he did not attempt to identify anyone else who worked with Mr. McMillian. (*Id.* at 894). Mr. Gazelah claims that he asked Mr. McMillain whether he was exposed to war time conditions, but also admitted that he has no notes to reflect that this conversation ever took place. (*Id.* at 894-97). Further, Mr. Gazelah admitted he never conducted any independent investigation of the conditions that Mr. McMillian was subjected to during his employ with KBR. (*Id.* at 897).

Additionally, Mr. Gazelah admitted that he was aware of Mr. McMillian's prior criminal acts, but decided against waiving the mitigator of "no significant criminal history" because he believed it was less significant than a homicide and "didn't feel like any of it was significant." (*Id.* at 905). Further, when asked about his failure to object to the State's inflammatory closing argument during the penalty phase, Mr. Gazelah admitted there was no reason for this failure. (*Id.* at 906).

Mr. De La Rionda, the prosecutor in Mr. McMillian's case, testified at the evidentiary hearing. Mr. De La Rionda testified regarding the consolidation of Mr. McMillian's two original cases. (*Id.* at 612). Mr. De La Rionda testified that five days prior to the attempted murder trial, Mr. Till moved to consolidate the

attempted murder charge contained in case number 162009CF000721AXXXMA with the charge contained in the Indictment of first degree murder. (*Id.* at 614). Mr. De La Rionda even commended Mr. Till for being “cost-effective.” (*Id.* at 614).

Dr. Herkov, a board certified clinical psychologist and neuropsychologist, testified at the post-conviction evidentiary hearing. (*Id.* at 945, 948). Dr. Herkov testified he reviewed the records in this case and conducted interviews with Mr. McMillian’s friends and family. (*Id.* at 954). Dr. Herkov opined that Mr. McMillian had a diagnosable mental illness at the time he committed the capital crime; specifically, Mr. McMillian suffered from cognitive disorders, borderline intellectual functioning, PTSD, alcohol abuse, and cannabis intoxication at the time of the offense. (*Id.* at 954).

Specifically, Dr. Herkov testified that Mr. McMillian, who prior to working for KBR did not abuse alcohol or drugs, began drinking overseas to cope with his PTSD symptoms and drank more heavily upon his return to the United States. (*Id.* at 955). Dr. Herkov testified that PTSD is caused by an extreme psychological stressor that overwhelms an individual’s coping abilities; in this case, Mr. McMillian was subjected to almost daily mortar fire, witnesses the death of others, and continuous threats to his personal safety. (*Id.* at 966). Additionally, Dr. Herkov confirmed that it is not unusual for an individual suffering from PTSD to

refrain from speaking about the traumatic incident(s) which cause such stress and anxiety. (*Id.* at 969-970). Dr. Herkov testified there was evidence Mr. McMillian exhibited multiple signs of PTSD, such as flashbacks, nightmares, extreme weight loss, suicidal thoughts, and mood alterations. (*Id.* at 973; 978-982). Dr. Herkov explained that simply because Mr. McMillian wanted to return to work for KBR overseas, did not mean that Mr. McMillian did not suffer from PTSD – this is common among veterans because they are able to make much more money overseas than in the United States with limited education. (*Id.* at 982). Dr. Herkov testified, it was very clear to him that Mr. McMillian was suffering from PTSD. (*Id.* at 969-970).

Dr. Herkov also testified he found clear evidence of brain dysfunction in Mr. McMillian. (*Id.* at 958). Based on Dr. Herkov's review of Dr. Krop's original evaluation of Mr. McMillian, Mr. McMillian had demonstrable deficits in the frontal/temporal areas of the brain at the time of the capital offense. (*Id.* at 958). Dr. Herkov testified that Mr. McMillian's cognitive issues and deficits may be the result of genetics, as Mr. McMillian's mother also had learning and cognitive issues as a child (attention deficit disorder and hyperactive disorder). (*Id.* at 961). Moreover, Dr. Herkov testified that Mr. McMillian was diagnosed with ADHD as a child and that Mr. McMillian has borderline intellectual functioning with an IQ

of 74, which is merely points above the status of “mental retardation.” (*Id.* at 963-964).

Dr. Herkov testified that Mr. McMillian’s ability to conform his conduct to the requirements of the law was substantially impaired at the time of the capital offense. (*Id.* at 993-994). Finally, Dr. Herkov testified that Mr. McMillian suffered from an extreme mental or emotional disturbance based on the fact that Mr. McMillian had previously attempted suicide. (*Id.* at 997).

David Douglas, an investigator with the Public Defender’s Office at the time of Mr. McMillian’s trial, testified at the post-conviction evidentiary hearing. Mr. Douglas testified he was unaware that Mr. McMillian’s mother had been diagnosed with bipolar disorder or that she was in special education classes as a child. (*Id.* at 667). As part of Mr. Douglas’s investigation, he learned that Mr. McMillian worked in both Iraq and Afghanistan. (*Id.* at 670). Mr. Douglas admitted that he had received training involving PTSD; however, despite his training, Mr. Douglas never researched the camps where Mr. McMillian was stationed to determine whether Mr. McMillian had been exposed to war time conditions. (*Id.* at 672) Further, Mr. Douglas never spoke with any of Mr. McMillian’s family regarding changes in his behavior after he came back from overseas. (*Id.* at 674). Mr. Douglas admitted that he was not aware that Mr.

McMillian lost approximately 100 pounds while working overseas or that Mr. McMillian suffered from night sweats and nightmares. (*Id.* at 674).

Mr. McMillian testified at the evidentiary hearing. Mr. McMillian testified he began working for KBR because he needed money to support his family and KBR paid much more than any other employer would typically pay for someone with Mr. McMillian's background. (*Id.* at 1366-67). Mr. McMillian testified that while he worked in Iraq and Afghanistan on various military bases, the Taliban frequently attacked the bases with an onslaught of rocket fire. (*Id.* at 1372, 1376). Mr. McMillian testified the sometimes constant attacks from the Taliban caused a growing fear and anxiety within him; he stated, "it really broke me, and I needed to leave. I wanted to leave." (*Id.* at 1377-1379). Oftentimes, attacks would occur so quickly and without warning that the individuals on base would not have time to grab their helmets or Kevlar vests and would simply have to run to a bunker as fast as possible. (*Id.* at 1373).

Mr. McMillian testified about the stress he experienced caused by the vulnerability of the military bases. (*Id.* at 1375). Specifically, as part of his employment, Mr. McMillian spent several months living in a tent on a military base with no protection from outside bombings or shrapnel. (*Id.* at 1375). Mr. McMillian explained that attacks from the Taliban could last for hours and sometimes days on end. (*Id.* at 1377). On one occasion, Mr. McMillian testified,

the Taliban invaded the camp where he was stationed and attempted a violent overthrow of the United States military base. (*Id.* at 1380). During this attack, a mortar round exploded within feet of Mr. McMillian's position. (*Id.* at 1380). Further, Mr. McMillian testified to the countless fallen soldiers whose caskets were paraded through the camp at Kandahar and the friends that he lost to enemy fire while overseas. (*Id.* at 1387 -1388). Mr. McMillian went on to explain that he does not freely speak of these traumatic experiences as it is something that causes him severe distress. (*Id.* at 1381).

Mr. McMillian testified that Mr. Till inquired as to where Mr. McMillian was employed; however, he never inquired any further. (*Id.* at 1391). Mr. McMillian stated he provided Mr. Till with the names of individuals that he worked with at KBR, including Perez Staples and Keith Broomer. (*Id.* at 1393).

Several other witnesses testified at the evidentiary hearing, including Nicole Thomas, Nicole McMillian, Edwin McKinnon, Perez Staples, Keith Broomer, and Dorrell Grant. All of these witnesses confirmed there was a noticeable difference in Mr. McMillian's behavior after he came back from Afghanistan and Iraq because Mr. McMillian had become increasingly paranoid, withdrawn, and depressed. (*Id.* at 1181, 1208, 1253, 1284, 1311, 1355). Nicole Thomas, Nicole McMillian, Keith Broomer, and Perez Staples testified they were all available to

testify on Mr. McMillian's behalf during the penalty phase of his trial; however, trial counsel never contacted any of them. (*Id.* at 1183, 1239, 1253, 1355).

### **SUMMARY OF THE ARGUMENTS**

The post-conviction court erroneously denied Claims 2(B), 2(A), 2(C), 2(D), 1A, 1B, 1D, 1E, 1F, and 1H, raised in Mr. McMillian's Motion To Vacate. The evidentiary hearing demonstrated Mr. McMillian's trial counsel failed to provide effective assistance of counsel in accordance with *Strickland v. Washington*, 466 U.S. 668 (1984). There was no substantial competent evidence to support the post-conviction court's findings that counsel was not deficient as to the following claims:

Claim 2(B) argued that trial counsel was ineffective for failing to properly provide background information to Defendant's mental health expert, Dr. Krop, regarding Defendant's exposure to wartime conditions, his symptoms of post-traumatic stress disorder, and his background.

Claim 2(A) argued that trial counsel was ineffective at the penalty phase for failing to properly investigate and interview potential mitigation witnesses who had information about Defendant's mental health, background, and character.

Claim 2(C) argued that trial counsel was ineffective for failing to waive the mitigating circumstance of no significant criminal history under circumstances when it should have been waived.

Claim 2(D) argued that trial counsel was ineffective for failing to object to portions of the State's penalty phase closing argument wherein the prosecutor argued non-statutory aggravating circumstances relating to Defendant's adultery and made inflammatory comments about the victim's death.

Claim 1A argued trial counsel was ineffective at the guilt phase for failing to file a comprehensive pretrial motion to suppress Mr. McMillian's recorded out of court statements made to police at the hospital following his arrest.

Claim 1B argued trial counsel was ineffective at the guilt phase for failing to move to redact portions of the recorded statement made to law enforcement following Mr. McMillian's arrest.

Claim 1D argued that trial counsel was ineffective for moving to consolidate Defendant's capital homicide with the separately charged offense of attempted first degree murder of a law enforcement officer.

Claim 1E argued that trial counsel was ineffective for failing to object to the testimony of Janice Stubbs, the mother of the deceased Danielle Stubbs, and to the testimony of Harold Stubbs, the father of the deceased Danielle Stubbs, and to State's exhibit # 54.

Claim 1F argued that trial counsel was ineffective for failing to object to Detective Wolcott's testimony about the victim's cell phone and other information surrounding the cell phone.

Claim 1H argued that trial counsel was ineffective for failing to object to inflammatory closing argument by the prosecutor during the guilt phase of the trial.

## ARGUMENT

### A. INTRODUCTION

After conducting an evidentiary hearing, the post-conviction court erred in finding that Mr. Mr. McMillian failed to establish deficient performance by trial counsel and prejudice at the guilt and penalty phases of his capital trial in violation of the, Fourth, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and his corresponding rights under the Florida Constitution. Further, Mr. McMillian's convictions are materially unreliable due to trial counsel's deficient performance.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversary testing process. *Id.* at 688. Following *Strickland*, the Florida Supreme Court has held that for ineffective assistance of counsel claims to be successful, two requirements must be satisfied:

First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied.

*Maxwell v. Wainwright*, 490 So.2d 927, 932 (Fla. 1986) (internal citations omitted).

There is a strong presumption that trial counsel's performance was not deficient and the defendant carries the burden to "overcome the presumption that under the circumstances the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689.

In *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000), the Florida Supreme Court held "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under norms of professional conduct."

Additionally, counsel has an obligation to conduct a thorough investigation of a defendant's background. *Porter v. McCollum*, 558 U.S. 30, 39 (2009). Counsel has a duty to make reasonable investigations or to make reasonable decisions that makes investigations unnecessary. *Hurst v. State*, 18 So.3d 975, 1008 (Fla. 2009). The Florida Supreme Court has found counsel's performance deficient where counsel "never attempted to meaningfully investigate" mitigation although substantial mitigation could have been presented. *Asay v. State*, 769 So.2d 974, 985 (Fla. 2000); *Shellito v. State*, 121 So. 3d 445 (Fla. 2013).

## **B. STANDARD OF REVIEW**

Review of a circuit court's resolution of ineffective assistance of counsel claims under *Strickland* is a mixed standard of review because both the performance and the prejudice prong of the *Strickland* test present mixed questions of law and fact. *Sochor v. State*, 883 So.2d 766 (Fla. 2001). The trial court's factual findings that are supported by competent, substantial evidence are given deference, but legal conclusions are reviewed de novo. *Id.* at 771-72.

“Penalty phase prejudice under the *Strickland* standard is measured by whether the error of trial counsel undermines this Court's confidence in the sentence of death when viewed in the context of the penalty phase evidence and the mitigators and aggravators found by the trial court.” *Hurst v. State*, 18 So.3d. 975, 1013 (Fla. 2009). That standard does not “require a defendant to show ‘that counsel's deficient conduct more likely than not altered the outcome’ of his penalty proceeding, but rather that he establish ‘a probability sufficient to undermine confidence in [that] outcome.’” *Porter v. McCollum*, 558 U.S. 30 (2009) (quoting *Strickland*, 446 U.S. at 693-94 (1984)). “To assess that probability, [the Court] consider[s] ‘the totality of the available mitigation evidence . . .’ and ‘reweigh[s] it against the evidence in aggravation.’” *Id.* at 453-54 (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)).

**C. CLAIM 2: MR. MCMILLIAN WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL, DUE PROCESS, AND RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF MR. MCMILLIAN’S FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND HIS CORRESPONDING RIGHTS UNDER THE DECLARATION OF RIGHTS OF THE FLORIDA CONSTITUTION.**

An evidentiary hearing was granted by the post-conviction court as to Claims 2(B), 2(A), 2(C), and 2(D) of Defendant’s Amended Motion to Vacate Judgments of Conviction and Sentence brought pursuant to Fla. R. Crim. Pro. 3.851. All of these claims deal with trial counsel’s ineffective assistance during the penalty phase. After the evidentiary hearing, the post-conviction court denied each claim, finding that trial counsel was effective. However, this ruling has no legal basis and is not supported by competent, substantial evidence.

- a. Claim 2(B) argued that counsel failed to properly provide background information to Defendant’s mental health expert, Dr. Krop, regarding Defendant’s exposure to wartime conditions, his symptoms of post-traumatic stress disorder, and his genetic heritage.**

The Sixth Amendment requires competent mental health assistance to ensure fundamental fairness and reliability in the adversarial process. *Ragsdale v. State*, 798 So.2d 713 (Fla. 2001). Meaningful assistance of counsel in capital cases requires counsel pursue and investigate all reasonably available mitigating evidence, including brain damage, drug abuse and mental illness. *Frazier v.*

*Huffman*, 343 F.3d 780 (6th Cir. 2003). A new sentencing hearing is mandated in cases that entail psychiatric examinations so grossly insufficient that they ignore clear indicators of mental retardation or brain damage. *Id.*

When a defendant shows signs of mental issues during the defense of a case involving the death penalty, it is fundamental that counsel seek an evaluation by a mental health expert. *Jones v. State*, 988 So. 2d 573, 583 (Fla. 2008). Further, counsel renders deficient performance when he fails to ensure an adequate and meaningful mental health/drug abuse examination. *Ponticelli v. State*, 941 So.2d 1073, 1095 (Fla. 2006); *Sochor v. State*, 833 So.2d 766, 722 (Fla. 2004). Counsel's failure to pursue mental health/drug abuse mitigation despite "red flags" amounts to deficient performance. *Arbelaez v. State*, 898 So.2d 25, 34 (Fla. 2005). Prejudice is established when counsel fails to investigate and present evidence of brain damage and mental illness/ or drug influenced behavior. *Ragsdale v. State*, 798 So.2d 713, 718-19 (Fla. 2001); *Rose v. State*, 675 So.2d 567, 571 (Fla. 1996) (citing *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir. 1994)).

Mr. Gazelah testified in support of this claim at the evidentiary hearing. Mr. Gazelah acknowledged that he waited approximately a year after Mr. McMillian's arrest to retain a mental health professional for the penalty stage of the trial. (PC, p. 855-56). Mr. Gazelah testified he retained Dr. Krop to evaluate Mr. McMillian for the purposes of presenting mitigation. (*Id.* at 860-61). According to Mr. Gazelah's

own testimony, Dr. Krop requested medical records, school records, and interviews with Mr. McMillian's family. (*Id.* at 860-61). However, despite Mr. Gazelah's claim that he was the attorney primarily responsible for the penalty phase of the trial, he claimed that he relied on Mr. Till to provide the doctor with this information prior to his evaluation. (*Id.* at 860-61).

Mr. Gazelah acknowledged that at one point, Dr. Krop requested more information and records in order to complete his evaluation, as the interviews and investigation conducted by Mr. Gazelah were lacking. (*Id.* at 865). Additionally, Dr. Krop wanted records regarding Mr. McMillian's childhood and schooling, medical records from when Mr. McMillian was shot, and more detailed interviews from Mr. McMillian's friends and family. (*Id.* at 866, 870, 878). However, despite Dr. Krop's repeated requests, Mr. Gazelah admitted that Dr. Krop did not receive all the necessary information to perform his evaluations and prepare his penalty phase testimony. (*Id.* at 862). As little as a month before trial, Dr. Krop had still not received all the information and records he requested. (*Id.* at 862).

Further, Mr. Gazelah acknowledged that he knew Mr. McMillian was adopted by his grandmother at a young age, but failed to procure any adoption records or court documents relating to the issue for Dr. Krop's review. (*Id.* at 868). Mr. Gazelah also testified Mr. McMillian's mother appeared to be of borderline intelligence; however, he apparently never looked any further into that issue as he

also testified he was unaware that Mr. McMillian's mother was placed in special education classes as a child or that she had been diagnosed with bipolar disorder. (*Id.* at 846-847). When asked why Dr. Krop never received the information he requested from Mr. Gazelah, Mr. Gazelah stated he simply assumed Dr. Krop had received them, although he personally never verified whether Dr. Krop received the records. (*Id.* at 871). Specifically, Mr. Gazelah explained, "I can't explain – I cannot explain why it wasn't given to [Dr. Krop]." (*Id.* at 878).

Mr. Gazelah was also questioned about trial counsel's deliberate withholding of certain information from Dr. Krop – specifically, records indicating that Mr. McMillian wanted police to shoot and kill him during the shootout that resulted in the attempted murder of a law enforcement officer charge. (*Id.* at 872). Mr. Gazelah testified he did not know that Dr. Krop was unaware of this issue and also admitted that he only learned Dr. Krop had not been provided these records four days prior to trial. (*Id.* at 872). Mr. Gazleah went on to testify that because he only learned of this issue four days prior to trial, Dr. Krop likely never received this information prior to the start of trial, if at all. (*Id.* at 873). Despite learning of trial counsel's own omission/failure to provide this information to Dr. Krop, Mr. Gazelah never bothered to confer with Mr. Till on the matter or inquire as to why this information was being withheld from a mental

health expert who was supposed to assist with presenting mitigation to the jury. (*Id.* at 873).

Mr. Gazelah testified that while preparing for the penalty phase of trial, Dr. Krop recommended that trial counsel procure a neurologist to evaluate Mr. McMillian based on the temporal and frontal neurological impairments suffered by Mr. McMillian. (*Id.* at 879-880). However, Mr. Gazelah admitted that neither he nor Mr. Till ever retained a neurologist to evaluate Mr. McMillian as suggested. (*Id.* at 880).

Also, during the evidentiary hearing, Mr. Gazelah was questioned about his failure to provide background information regarding Mr. McMillan's exposure to wartime conditions and symptoms of PTSD to Dr. Krop. Mr. Gazelah claimed he asked Mr. McMillian whether he was exposed to wartime conditions while in Iraq and Afghanistan and that Mr. McMillian indicated he was not; however, Mr. Gazelah admitted that he had no notes reflecting this conversation. (*Id.* at 894-897). Mr. Gazelah admitted he never performed any kind of independent investigation concerning where Mr. McMillian was stationed while in Iraq or Afghanistan and whether those stations were the subject of Taliban attacks and bombings. (*Id.* at 897).

When questioned about why Mr. Gazelah never shared these issues with Dr. Krop, Mr. Gazelah admitted he never brought the issue of PTSD to Dr. Krop's

attention because he was unaware of the possibility Mr. McMillian suffered from PTSD. (*Id.* at 901). Apparently, Mr. Gazelah did not investigate or pursue the issue at all as he was unaware that Mr. McMillian lost approximately one hundred pounds after working in Iraq and Afghanistan or that Mr. McMillian's family described him as anxious, withdrawn, and depressed after coming back from overseas. (*Id.* at 897). Further, Mr. Gazelah admitted he never interviewed any individuals who worked with Mr. McMillian overseas who would have firsthand knowledge regarding the everyday circumstances and exposure to wartime conditions experienced by Mr. McMillian. (*Id.* at 850).

Mr. Till also testified at the evidentiary hearing in support of this claim. When asked why he and Mr. Gazelah failed to provide background information to Dr. Krop regarding the possibility of PTSD experienced by Mr. McMillian and Mr. McMillian's exposure to wartime conditions, Mr. Till stated that he believed the use of PTSD had been "abused" in previous unrelated trials and, therefore, he decided not to pursue the issue. (*Id.* at 795). When asked whether he was aware that Mr. McMillian worked in Iraq and Afghanistan, he replied he was aware that Mr. McMillian worked in an "air-conditioned gym." (*Id.* at 796). Based on his belief that Mr. McMillian worked in an "air-conditioned gym," Mr. Till explained that it would have been difficult to make a case for PTSD. (*Id.* at 798). Additionally, Mr. Till claimed he asked Mr. McMillian what it was like to work

for KBR, but Mr. McMillian gave no information about mortar attacks. (*Id.* at 1453).

In fact, when Mr. Till was asked whether he knew what bases Mr. McMillian was assigned to in Iraq and Afghanistan, Mr. Till replied, “he was in a gym.” (*Id.* at 799). When asked where the gym was located, Mr. Till admitted that he never asked and simply “imagined” that the gym was at a base of some sort. (*Id.* at 799). Mr. Till went on to justify his decision not to pursue Mr. McMillian’s wartime experience arguing, “I would love to see photographs of [Mr. McMillian] in his helmet and his Kevlar vest.” (*Id.* at 796). Mr. Till admitted that he never interviewed individuals who worked with Mr. McMillian overseas who would have firsthand knowledge regarding Mr. McMillian’s everyday circumstances and exposure to wartime conditions. (*Id.* at 797). Mr. Till attempted to explain trial counsel’s decisions arguing, “he didn’t say he had PTSD. I mean maybe he did.” (*Id.* at 797).

Dr. Herkov, a psychologist licensed in the State of Florida and neuropsychologist hired by post-conviction counsel, testified at the evidentiary hearing in support of this claim. (*Id.* at 945, 948). Dr. Herkov regularly studies, assesses, and treats psychiatric disorders, depression, schizophrenia, and PTSD. (*Id.* at 947). Dr. Herkov’s evaluations were based on his review of the records in this case, the trial transcripts, and interviews with friends and family of Mr.

McMillian. (*Id.* at 954). Dr. Herkov opined that Mr. McMillian had a diagnosable mental illness at the time of the offense. (*Id.* at 954). Specifically, Dr. Herkov testified Mr. McMillian met criteria for cognitive disorders, borderline intellectual functioning, PTSD, alcohol abuse, and cannabis intoxication. (*Id.* at 954). Dr. Herkov explained that the cognitive disorder suffered by Mr. McMillian means that Mr. McMillian had some sort of pathology affecting his thinking and/or behavior. (*Id.* at 958). Dr. Herkov also testified that Mr. McMillian began abusing alcohol only while overseas and then began to drink more heavily after he returned home. (*Id.* at 956). Further, Dr. Herkov stated that Mr. McMillian began using marijuana after his return from Iraq/Afghanistan and had actually used marijuana on the date of the offense. (*Id.* at 957).

Dr. Herkov testified that as part of his evaluation, he interviewed almost all of Mr. McMillian's family and also reviewed Dr. Krop's evaluations of Mr. McMillian. (*Id.* at 957, 958). Further, Dr. Herkov testified that he would diagnose Mr. McMillian with PTSD, which is a trauma related disorder and a psychological reaction that occurs when a person is exposed to extreme stress. (*Id.* at 965). Based on Dr. Herkov's investigation, he learned that Mr. McMillian's station in Afghanistan was attacked by rocket fire and regular bombings by the Taliban causing extreme fear and anxiety in Mr. McMillian. (*Id.* at 966). Dr. Herkov confirmed that rather than simply relying on Mr. McMillian's account of the event,

he actually had an investigator verify that the camps where Mr. McMillian worked overseas were frequently attacked during Mr. McMillian's employ. (*Id.* at 967). Further, Dr. Herkov interviewed friends and family of Mr. McMillian and learned that Mr. McMillian exhibited multiple signs and symptoms of PTSD; however, as discussed more fully below, these friends and family members were never contacted by the trial defense team for the purposes of procuring any background information or testifying during the penalty phase. (*Id.* at 977).

Dr. Herkov's interview with Nicole McMillian confirmed that Mr. McMillian experienced fear and anxiety as a result of the Taliban attacks after returning home. (*Id.* at 973-976). Additionally, his interview with Perez Staples, who observed Mr. McMillian in both Afghanistan and Iraq, confirmed that Mr. McMillian suffered from flashbacks and nightmares. (*Id.* at 973-976). Dr. Herkov learned through friends and family that Mr. McMillian lost a significant amount of weight after he began working for KBR and that when Mr. McMillian returned home from overseas he exhibited changes in his mood and cognition. (*Id.* at 978, 981). Specifically, Dr. Herkov found that Mr. McMillian became more reserved, more irritable, lacked motivation, engaged in self-destructive behavior, and had suicidal thoughts. (*Id.* at 980-981, 983, 984).

Moreover, Dr. Herkov testified that Mr. McMillian tried to treat symptoms by self-medicating with alcohol and drugs, which is not uncommon among people

who suffer from PTSD. (*Id.* at 994). Consequently, Dr. Herkov testified, drug and substance abuse exacerbates PTSD, which decreases a person's judgment even further. (*Id.* at 994). Dr. Herkov explained that in terms of Mr. McMillian's mental status, the drugs and alcohol consumed by Mr. McMillian would have affected his already damaged cognitive functions and further reduce his impulse control and other abilities at the time of the crime. (*Id.* at 994). Dr. Herkov confirmed that his diagnosis of PTSD in Mr. McMillian was to a reasonable degree of psychological certainty. (*Id.* at 995).

Dr. Herkov also testified that Dr. Krop found evidence of deficits in the frontal and temporal areas of Mr. McMillian's brain and also deficits in the executive functions, impulsivity, memory, and learning. (*Id.* at 958-59). Dr. Herkov explained that some of the cognitive issues suffered by Mr. McMillian may have been genetic as Mr. McMillian's mother also suffered from learning and cognitive issues as a child. (*Id.* at 961). Mr. McMillian's school records show that Mr. McMillian clearly had cognitive issues starting early on in his childhood. (*Id.* at 961). Specifically, Dr. Herkov testified Mr. McMillian was diagnosed with ADHD as a child and also had borderline intellectual functioning. (*Id.* at 963). Dr. Herkov explained that Mr. McMillian's IQ is 74, which is merely a few points above being classified as "mentally retarded". (*Id.* at 964).

As part of his review of the KBR employment records, Dr. Herkov learned that prior to the offense, Mr. McMillian received an emergency message while overseas which stated that his wife had been beaten and his children had been taken hostage. (*Id.* at 988). As a result, Mr. McMillian was granted emergency leave to return home. (*Id.* at 988). However, upon returning, Mr. McMillian found another man living in his home with his wife. (*Id.* at 988). Dr. Herkov testified that this event caused Mr. McMillian significant psychological stress. (*Id.* at 989). Dr. Herkov opined that this event, along with Mr. McMillian's other mental issues, likely could have impacted Mr. McMillian's behavior on the date of the offense. (*Id.* at 992).

Based on all of the foregoing, Dr. Herkov opined that Mr. McMillian's ability to conform his conduct to the requirements of the law were substantially impaired at the time of the capital offense. (*Id.* at 993-994). Additionally, Dr. Herkov testified that Mr. McMillian was under extreme mental or emotional disturbance at the time of the capital offense. (*Id.* at 1174). Dr. Herkov testified regarding his review of Dr. Krop's evaluation and stated that it appeared Mr. McMillian's trial counsel did not provide Dr. Krop with all the relevant information because Dr. Krop's notes did not contain many important details. (*Id.* at 997). Specifically, Dr. Krop's notes did not reflect that Mr. McMillian had been stationed in Afghanistan/Iraq or that he worked in a combat zone. (*Id.* at 997).

Rather, the notes indicate that Mr. McMillian was simply a personal trainer. (*Id.* at 997). Further, Dr. Herkov testified that Dr. Krop's notes did not reflect that Mr. McMillian was raised by his grandparents from a young age. (*Id.* at 997).

Mr. McMillian also testified at the evidentiary hearing in support of this claim. Mr. McMillian testified that Mr. Till simply asked him where he worked and Mr. McMillian informed him that he worked for KBR; however, Mr. Till never inquired into the issue further. (*Id.* at 1391). Had Mr. Till or Mr. Gazelah inquired into the issue further, they would have discovered that Mr. McMillian was in fact exposed to wartime conditions as Mr. McMillian testified that he worked in both Iraq and Afghanistan and often experienced an onslaught of attacks from the Taliban. (*Id.* at 1369, 1383, 1377).

Mr. McMillian testified that oftentimes he would be working when they would hear an incoming rocket, which meant everyone on base had to find cover within a matter of seconds. (*Id.* at 1370). Mr. McMillian explained that even if they were able to seek shelter in a bunker, the bunker was incapable of protecting the inhabitants from a direct hit. (*Id.* at 1370-1371). Mr. McMillian also explained that shrapnel would fly everywhere during these attacks so they wore Kevlar vests and helmets if they had time to grab them. (*Id.* at 1370-1371). Further, Mr. McMillian testified that these attacks sometimes happened several times a day, multiple times per week and the attacks could last for several hours. (*Id.* at

1372,1377). On at least one occasion, the Taliban invaded their camp and came close to taking over. (*Id.* at 1380). On another occasion, a mortar round exploded within approximately six feet of where Mr. McMillian was sleeping. (*Id.* at 1380). Mr. McMillian testified that these conditions caused such anxiety and fear that “it really broke me, and I needed to leave. I wanted to leave.” (*Id.* at 1379).

While overseas, Mr. McMillian saw civilians injured from shrapnel blasts and often watched the “fallen soldier” procession which carried caskets of soldiers through the camp. (*Id.* at 1386-1387). Mr. McMillian testified he also suffered the loss of a good friend while working for KBR. (*Id.* at 1388). Mr. McMillian explained that he befriended a marine named “Newhouse” who helped Mr. McMillian acclimate to living on the base and helped him work through his problems. (*Id.* at 1387-1388). Unfortunately, one day Newhouse was killed while on patrol. (*Id.* at 1388). As a result, Mr. McMillian refrained from forming a bond with anyone else because he feared they would suffer the same fate. (*Id.* at 1388).

Mr. McMillian testified that all of these experiences made him increasingly anxious. (*Id.* at 1389). He began suffering from nightmares and night sweats, and became increasingly frightened by loud noises and large crowds. (*Id.* at 1389). Mr. McMillian explained that he never volunteered this information because Mr. Till never asked, and the issue was not something that Mr. McMillian talked about regularly. (*Id.* at 1381, 1391). However, Mr. McMillian testified he did provide his

attorneys with enough information to investigate this matter by providing them with the names of individuals who worked with him overseas, such as Perez Staples, and the names of other people who could provide insight into his background and mental health, such as Keith Broomer. (*Id.* at 1393).

David Douglas, the investigator and mitigation specialist, also testified at the evidentiary hearing in support of this claim. Mr. Douglas confirmed that when he interviewed Mr. McMillian, he learned that Mr. McMillian had been in Iraq/Afghanistan for five years. (*Id.* at 653, 702-703). Mr. Douglas also learned that Mr. McMillian had suicidal thoughts and had suffered from stress-related blackouts. (*Id.* at 651). Lastly, Mr. Douglas confirmed that he typed up all of this information into a report and provided it to trial counsel. (*Id.* at 660).

Mr. Douglas testified that he had training in recognizing PTSD from various seminars he had attended. (*Id.* at 667,673). However, despite this training, Mr. Douglas' interview of Mr. McMillian appeared to be cursory as he confirmed he never bothered to research whether the bases where Mr. McMillian worked overseas were ever attacked. (*Id.* at 672). Further, Mr. Douglas testified he never asked for any of the names of other employees who worked with Mr. McMillian overseas or attempted to interview any of them. (*Id.* at 672). Mr. Douglas confirmed that he never attempted to obtain any kind of employment records form KBR regarding Mr. McMillian's employment (*Id.* at 673). Mr. Douglas admitted

he never asked any of Mr. McMillian's friends or family whether Mr. McMillian's behavior changed after he returned from overseas. (*Id.* at 674). Finally, Mr. Douglas confirmed that the defense team never considered that a mental health expert should evaluate Mr. McMillian to determine if he suffered from PTSD. (*Id.* at 674).

Perez Staples, Mr. McMillian's cousin who also worked with Mr. McMillian overseas, testified at the evidentiary hearing. (*Id.* at 1196). Mr. Staples testified that he had firsthand knowledge regarding what it was like to work in Afghanistan and Iraq as he and Mr. McMillian were located in the same base camp together. (*Id.* at 1196). Mr. Staples confirmed that both he and Mr. McMillian were subjected to wartime conditions and often had to spend hours waiting for the bombings to subside. (*Id.* at 1197-1198). Mr. Staples also testified regarding Mr. McMillian's struggles to cope with his experience overseas, stating Mr. McMillian became anxious and wanted to go home. (*Id.* at 1207). Further, Mr. Staples testified that after Mr. McMillian came back to the United States, he began drinking heavily and was much more paranoid and anxious. (*Id.* at 1207-1208). However, despite Mr. Staples firsthand knowledge of these issues, no one from the defense team ever reached out to Mr. Staples to procure his testimony for Mr. McMillian's trial or to obtain information of any kind. (*Id.* at 1239).

Several other witnesses testified at the evidentiary hearing, including Nicole Thomas, Nicole McMillian, Edwin McKinnon, Keith Broomer, and Dorrell Grant. All of these witnesses confirmed there was a noticeable difference in Mr. McMillian's behavior after he came back from Afghanistan and Iraq because Mr. McMillian had become increasingly paranoid, withdrawn, and depressed. (*Id.* at 1181, 1208, 1253, 1284, 1311, 1355). Nicole Thomas, Nicole McMillian, and Keith Broomer, testified they were all available to testify on Mr. McMillian's behalf during the penalty phase of his trial; however, trial counsel never contacted any of them. (*Id.* at 1183, 1239, 1253, 1355).

As to Claim 2(B), the post-conviction court held Mr. McMillian failed to meet his burden in demonstrating that counsel's performance fell below an objective standard of reasonableness. This ruling is contrary to the evidence presented at the evidentiary hearing and is not supported by law.

The post conviction court argued in its ruling that simply because a mental health expert's testimony at an evidentiary hearing differs from the testimony of the mental health expert at trial, does not automatically mean that prejudice has been shown which warrants relief. Further, the post-conviction court argued that defense counsel is entitled to rely on evaluations conducted by qualified mental health experts. However, this argument ignores the fact that trial counsel rendered deficient performance in failing to ensure a meaningful mental health evaluation

by performing only a bare-bones investigation and then providing only a portion of that cursory information to Dr. Krop. Furthermore, the fact that Mr. McMillian was in Iraq and Afghanistan for approximately five years during a time of war should have been a clear “red flag” to trial counsel. Trial counsel’s decision to ignore this issue amounted to deficient performance.

The post-conviction court also argued that the defendant’s lack of cooperation during the pendency of the case should be considered, citing *Cherry v. State*, 781 So. 2d 1040, 1052 (Fla. 2000) (concluding that although counsel appeared to have given insufficient information to the mental health expert, there was no deficiency because the lack of information was due to the defendant’s own lack of cooperation).

However, the post-conviction court did recognize that it is critical to inquire into counsel’s conversations with the defendant to make a proper assessment of counsel’s investigative decisions. As such, the testimony presented at the evidentiary hearing demonstrated that Mr. McMillian’s trial counsel did little more than inquire as to whom Mr. McMillian worked for and what position he held. Had trial counsel inquired into the matter more thoroughly, trial counsel would have been aware of the wartime conditions and Taliban attacks that Mr. McMillian was exposed to for the five year period he spent overseas. The post-conviction court cites the fact that Mr. McMillian never directly told his attorneys

that he had PTSD as a failure of Mr. McMillian to supply the proper information to his attorneys. However, Mr. McMillian is not a medical professional and was not aware that he was suffering from PTSD as he had never before been diagnosed; therefore, it would have been impossible for him to inform his attorneys of this issue. Additionally, the diagnosis of PTSD means that the person affected does not want to discuss the traumatic experience because it causes additional emotional trauma.

The post-conviction court found that Claim 2(B) in Mr. McMillian's Motion to Vacate Judgments of Conviction and Sentence was refuted by the testimony provided at the evidentiary hearing. The post-conviction court gave weight to the testimony of Mr. Gazelah, who stated that he provided medical records to Dr. Krop. Furthermore, the post-conviction court argued, based on Dr. Krop's testimony at the penalty phase of trial, it was clear that he did receive the requested medical records. However, the post-conviction court's assumption is misguided as the evidentiary hearing demonstrated that even as close as a month prior to trial, Mr. Gazelah and Mr. Till still had not provided all of the information that Dr. Krop requested in order to complete his evaluation. Further, Mr. Gazelah admitted that only four days prior to trial he learned that Dr. Krop had never received any information regarding the fact that Mr. McMillian attempted to commit "suicide by cop." Just as in *Ponticelli*, trial counsel's failure to ensure all

relevant information was given to Dr. Krop deprived Mr. McMillian of a meaningful mental health examination and was, therefore, deficient performance. Further, the post-conviction court also failed to acknowledge that Mr. Gazelah never bothered to speak with Mr. Till about this failure or ensure that this information was brought out at the penalty phase of trial in support of mitigation.

Additionally, the post-conviction court found that Mr. Till's decision to withhold certain medical records concerning Mr. McMillian's attempt to commit "suicide by cop" from Dr. Krop was a reasonable trial strategy.

The post-conviction court found the claim that trial counsel failed to provide sufficient information to Dr. Krop so that he could properly evaluate Mr. McMillian for PTSD was refuted by testimony at evidentiary hearing. The post-conviction court cited the fact that Mr. Till, a Marine Corps veteran, and Mr. Douglas, an investigator who received training in recognizing PTSD, never saw any indication of PTSD. However, this argument ignores the fact that trial counsel never asked Mr. McMillian, or his friends and family, the questions necessary to determine whether he showed signs or symptoms of PTSD. Had trial counsel performed more than a cursory investigation and interview process of Mr. McMillian's friends and family, trial counsel would have been aware that Mr. McMillian exhibited signs and symptoms of PTSD – even without input from Mr. McMillian.

The post-conviction court also found that Mr. McMillian failed to demonstrate prejudice simply because the State's evidence at trial overwhelmingly demonstrated that Mr. McMillian committed the murder of Danielle Stubs. However, even if true, this fact does not relieve trial counsel of the obligation to present all reasonably available mitigation in a death penalty case.

Accordingly, the post-conviction court's finding that trial counsel's errors neither constituted ineffective assistance nor prejudice to Mr. McMillian's case is contrary to the evidence presented at the evidentiary hearing and not supported by law.

**b. Claim 2(A) argued that counsel failed to properly investigate and interview potential mitigation witnesses who had information about Defendant's mental health, background, and character.**

In *Wiggins v. Smith*, 539 U.S. 510 (2003), the United States Supreme Court held "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Id.* at 2538. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness. . . ." *Id.* at 2535.

Counsel's highest duty is the duty to investigate and prepare. Where counsel does not fulfill that duty, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, or on the failure to properly investigate or prepare. *See Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991); *Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1991); *Kimmelman v. Morrison*, 477 U.S. 365 (1986). A reasonable strategic decision is based on informed judgment. “[T]he principal concern . . . is not whether counsel should have presented a mitigation case. Rather, [the] focus [should be] on whether the investigation supporting counsel’s decision not to introduce mitigating evidence . . . was itself reasonable.” *Wiggins*, 539 U.S. at 2536. In making this assessment, the Court “must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. “ *Id.* at 2538.

In *Rompilla v. Beard*, 545 U.S. 374 (2005), the United States Supreme Court held that counsel rendered deficient performance and cited counsel’s failure to review Rompilla’s prior conviction, failure to obtain school records, failure to obtain records of Rompilla’s prior incarcerations, and failure to gather evidence of a history of substance abuse. *Id.* at 2463. *See also Haliym v. Mitchell*, 492 F.3d 680, 2007 WL 2011268 (6<sup>th</sup> Cir. July 13, 2007) (trial counsel rendered deficient

performance where they “failed to discover important mitigating information that was reasonably available and suggested by information already within their possession”). The United States Supreme Court recently reiterated that according to “prevailing professional norms” counsel has an ‘obligation to conduct a thorough investigation of the defendant’s background.’” *Porter v. McCollum*, 130 S.Ct. 447 (2009) (citing *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). In *Porter*, the Court held that a state court unreasonably applies *Strickland’s* prejudice standard when it fails to give weight to mitigating evidence of a capital defendant’s abusive childhood, brain damage, and post-traumatic stress disorder. *Id.*

Further, a defendant can properly demonstrate ineffective assistance of counsel when counsel fails to call a mitigation witness if the defendant can show that witness would have been able to testify at trial. *Nelson v. State*, 875 So. 2d 579, 584 (Fla. 2004). A defendant will not be able to meet this burden if the defendant failed to respond to his counsel’s requests to provide the names of possible witnesses who might assist with mitigation. *Carroll v. State*, 815 So. 2d 601, 615 (Fla. 2002).

Mr. Gazelah testified at the evidentiary hearing regarding his investigation and interviews of mitigation witnesses. (PC, p.842). Mr. Gazelah testified that he conducted an interview of Mr. McMillian’s biological mother, Caroline Cook, and

stated that she appeared to have a borderline intelligence level. (*Id.* at 846-847). However, despite this recognition, Mr. Gazelah apparently never investigated the matter further as he was unaware that Ms. Cook was placed in special education classes as a child or that she had been diagnosed with bipolar disorder. (*Id.* at 846-847). Mr. Gazelah admitted he never spoke with Mr. McMillian's paternal grandmother or the grandmother's husband. (*Id.* at 848-849). As a result of this failure, Mr. Gazelah was unaware that Mr. McMillian's paternal grandmother had actually adopted Mr. McMillian as a child because his mother was incapable of raising him and the father was not home very often. (*Id.* at 849). Further, Mr. Gazelah admitted that he never attempted to interview potential mitigation witnesses such as Nicole Thomas, Nicole McMillian, or Perez Staples. (*Id.* at 850).

Mr. Till also testified at the evidentiary hearing. When asked about the defense team's investigation and interviews of potential mitigation witnesses and Mr. McMillian's adoption records, Mr. Till responded, "I'll be honest with you, I did very little – all I knew is they were going to Georgia and obtaining witnesses." (*Id.* at 794). Additionally, Mr. Till acknowledged he never spoke with potential mitigation witness such as Perez Staples, Nicole Thomas, and Nicole McMillian, who could have provided information regarding Mr. McMillian's mental health, background, and character. (*Id.* at 797). Mr. Till also admitted that he never spoke

with a single individual who worked with Mr. McMillian while he was employed by KBR. (*Id.* at 798).

These witnesses testified at the evidentiary hearing, including Nicole Thomas, Nicole McMillian, Edwin McKinnon, Perez Staples, Keith Broomer, and Dorrell Grant. All of these witnesses confirmed there was a noticeable difference in Mr. McMillian's behavior after he came back from Afghanistan and Iraq. (*Id.* at 1181, 1208, 1253, 1284, 1311, 1355). Specifically, these witnesses confirmed that Mr. McMillian did, in fact, exhibit the signs and symptoms of PTSD, such as depression, increased abuse of alcohol and drugs, paranoia, and difficulty sleeping. (*Id.* at 1181, 1207-1208, 1253, 1282-1288). Nicole Thomas, Nicole McMillian, Keith Broomer, and Perez Staples testified they were all available to testify on Mr. McMillian's behalf during the penalty phase of his trial; however, trial counsel never contacted any of them. (*Id.* at 1183, 1239, 1253, 1355).

Mr. McMillian testified at the evidentiary hearing in support of this claim. Mr. McMillian testified he provided Mr. Till with names of possible mitigation witnesses, such as Keith Broomer and Perez Staples, however, as previously discussed, Mr. Till never contacted these individuals. (*Id.* at 1393). Mr. McMillian testified Mr. Till asked him who he worked for and Mr. McMillian informed him that he had worked for KBR; however, Mr. Till never asked anymore questions about the matter. (*Id.* at 1392).

As to Claim 2(A), the post-conviction court specifically held Mr. McMillian failed to meet his burden in demonstrating that counsel's performance fell below an objective standard of reasonableness based on the fact that Mr. Till and Mr. Gazelah claimed Mr. McMillian did not provide them with the information necessary to investigate and interview some of the possible mitigation witnesses. The post-conviction court noted that despite Mr. McMillian's testimony that he did in fact provide this information to his attorneys, Mr. Till and Mr. Gazelah were more credible. This ruling is contrary to the evidence presented at the evidentiary hearing and is not supported by law.

Additionally, the post-conviction found the testimony of Keith Broomer unpersuasive because he testified he would have been able to attend the penalty phase of trial had Mr. McMillian's attorneys reached out to him, but also later stated that he did not attend the trial because he could not get time off from work. This ignored the fact that Mr. Broomer's employer would have had to allow Mr. Broomer to attend had counsel issued a subpoena.

Secondly, the post-conviction court simply dismissed the evidentiary hearing testimony of both Edwin McKinnon and Dorell Grant arguing that neither of the witnesses testified to any symptoms of PTSD at the time of Mr. McMillian's trial. This reasoning ignores the crux of Mr. McMillian's argument – had trial counsel performed an adequate investigation and properly interviewed

the potential mitigation witnesses, these witnesses would have been able to provide testimony about the changes to Mr. McMillian's personality. The witnesses cannot be faulted for failing to provide answers to questions which were never asked.

The post-conviction court found that trial counsel conducted a thorough investigation of Mr. McMillian's background despite Mr. Till and Mr. Gazelah acknowledging they never attempted to find and interview some of these witnesses. The post-conviction court gave weight to the claims of both Mr. Till and Mr. Gazelah that they never received adequate information about these possible mitigation witnesses from Mr. McMillian. However, it is clear that trial counsel had at least some knowledge of the potential for mitigation witnesses as Mr. Till readily admitted he never spoke with a single individual who worked with Mr. McMillian while he was employed by KBR. Basic investigation would have led trial counsel to these witnesses who could have testified as to Mr. McMillian's mental health, background, and character.

Mr. Till and Mr. Gazelah's decision to completely ignore the possibility that a fellow co-worker at KBR might be able to provide the jury with insight into Mr. McMillian's mental health, background, and character fell far short of a strategic decision to pursue other mitigation. The same can be said for the other witnesses who were never contacted and whose names Mr. McMillian testified he did in fact

provide to his attorneys. As demonstrated above, trial counsel conducted less than a complete investigation of potential mitigation witnesses and therefore, could not have made a reasonable professional decision to ignore the potential witnesses in compliance with the standard stated in *Wiggins*.

The evidentiary hearing demonstrated that (1) trial counsel's failure to investigate and present mitigation was deficient performance and (2) the prejudice is Mr. McMillian's death sentence. The evidentiary hearing made clear that had the jury been aware of the unique nature of Mr. McMillian's personality, his background, his borderline intellectual functioning, his mental health especially the post-traumatic stress disorder, the effects of this disorder and the full circumstances surrounding the crime, there is a reasonable probability that Mr. McMillian would have received a life sentence.

Accordingly, the post-conviction court's finding that trial counsel's errors did not constitute ineffective assistance or prejudice to Mr. McMillian's case is contrary to the evidence presented at the evidentiary hearing and not supported by law.

- c. Claim 2(C) argued that counsel failed to failed to waive the mitigating circumstance of no significant criminal history under circumstances when it should have been waived.**

According to Florida Statute § 921.141, the death penalty will be imposed when there are sufficient aggravating circumstances which are not negated by a

sufficient number of mitigating circumstances. Accordingly, a defendant in a death penalty case may present a variety of mitigating circumstances, including the mitigator of “no significant criminal history.” *Id.* In *Grim v. State*, 971 So.2d 85, 100 (Fla. 2007), the Court ruled that a defendant in a death penalty case may waive mitigating evidence and choose what mitigating evidence is introduced by counsel during the penalty phase of trial.

A tactical or strategic decision during the pendency of a death penalty case is unreasonable if it is based on a failure to understand the law. *Horton v. Zant*, 941 F.2d 1449, 1462 (11<sup>th</sup> Cir. 1991). Counsel’s decisions must be reasonable in light of all the circumstances. *Id.* at 1461. However, a “strategic decision” cannot be deemed reasonable when trial counsel fails to consider the options and make a reasonable choice between those options. *Id.* at 1462.

Here, Mr. McMillian’s trial counsel attempted to present the mitigator of “no significant criminal history.” However, Mr. McMillian had a history of minor difficulties in school, a fighting charge, and he was on felony probation for fleeing and attempting to elude police under conditions where he was greatly exceeding the speed limit.

The prosecutor argued the following:

You heard about his schooling, how he got into trouble in school, whether he was expelled or not, but he had fights and other incidents at school. You heard about other—a battery and you obviously heard about the felony fleeing...when he testified in the trial he talked

about the fact that he had a gun and that he had some drugs and that's why he was fleeing the police.

The defense is going to arguing, oh, that wasn't a big deal. It was just a felony fleeing. He was just going 120 miles an hour. . . . He was on probation. That means the Judge gave him a break. . . . And what does he do? What are the conditions of his probation? To stay out of trouble, not to carry a firearm. And what does he do? He gets in trouble...this time kills a young lady, and the Judge gave him a break, gave him five yeas probation even though he had a prior battery before that in which he had been given a break again, 12 months probation that time. . . . So first you decide the aggravating circumstances.

Yeah, in Georgia they gave him a break. Okay, it wasn't a violent crime. He didn't run over a kid. I mean he came close but didn't run over him. He was just going 120 miles an hour in a small town...He was just trying to get away from the police. He had a gun in his car. Yeah, he had some drugs, but you know, that's not a big deal...the judge gave him a break. (DIR. ROA, p. 2268-2280)

The jury was then presented with a very lengthy narrative recounting each of these prior bad acts with great detail. (DIR. ROA, p. 2288-2290).

Mr. Gazelah testified at the evidentiary hat he planned to rely on the mitigating circumstance of no significant criminal history. (PC, p. 888). However, Mr. Gazelah admitted that during the guilt phase of trial, Mr. Till solicited testimony regarding the fact that Mr. McMillian had driven on a suspended license. (*Id*).

Despite his plan to rely on the above-mentioned mitigator, Mr. Gazelah admitted he never discussed trying to avoid testimony about Mr. McMillian's criminal history during guilt phase testimony with Mr. Till. (*Id*). Mr. Gazelah

admitted Mr. Till's solicitation of previous crimes from Mr. McMillian on the witness stand negatively impacted his plan to rely on the above-mentioned mitigator. (*Id.* at 889). Mr. Gazelah testified he considered waiving the mitigator, but ultimately decided against it because the previous crimes were "less significant" than a homicide. (*Id.* at 890, 905). Mr. Gazelah attempted to explain by adding that eluding a police officer was not the worst prior criminal act that a client of his had committed. (*Id.* at 905).

Mr. Till also testified at the evidentiary hearing in support of this claim. Mr. Till acknowledged that he did in fact solicit testimony regarding Mr. McMillian's previous crimes, including the fact that Mr. McMillian had been driving on a suspended license at the time of the arrest. (*Id.* at 782). Further, Mr. Till acknowledged he was aware that the plan for the penalty phase was to present Mr. McMillian as a defendant with no significant criminal history. (*Id.* at 783). When asked why Mr. Till would purposely solicit such testimony when he knew Mr. Gazelah planned on arguing the statutory mitigator of no significant criminal history, Mr. Till responded, "I guess it depends on how serious do you look at a misdemeanor *capias* for driving on a suspended license." (*Id.* at 783). Mr. Till then admitted that it "may have been prejudicial." (*Id.* at 783).

The post-conviction court found that Mr. McMillian failed to demonstrate that trial counsel was defective in failing to waive the above-mentioned mitigator.

The post-conviction court argued that a mitigating circumstance is any aspect of the defendant's character that may serve as a basis for imposing a sentence less than death and that an attorney might prejudice his client's case by not presenting such evidence. The post-conviction court argued that trial counsel's actions must be judged from the perspective of defense counsel at the time of trial rather than in hindsight. Further, the post-conviction court stated that trial counsel cannot be deemed ineffective when counsel makes reasonable strategic decisions.

Here, trial counsel's decision to present the above-mentioned mitigator was not reasonable; trial counsel should have been aware the State would present negative information to negate this mitigator. This included extensive of Dr. Krop concerning Mr. McMillian's history of fights while in school. Even without the advantage of hindsight, trial counsel should have known that the likelihood of establishing this mitigating factor was extremely unlikely given the fact Mr. Till purposely solicited testimony regarding Mr. McMillian's previous misdemeanors and the fact that Mr. McMillian was on probation at the time of the offense. Further, because of the evidence introduced by the State to negate mitigation, the jury heard evidence of criminality that they would otherwise not have heard.

Under Florida law, Mr. McMillian had the right to waive this mitigating circumstance and trial counsel rendered ineffective assistance by moving ahead with the mitigator despite the fact it opened the door to prejudicial evidence from

the State. Furthermore, trial counsel's failure to understand the law means that neither attorney's decision could be a reasonable strategic decision. As demonstrated at the evidentiary hearing, Mr. Till knew Mr. Gazelah intended to present the mitigator of no significant criminal history, but presented evidence of Mr. McMillian's previous crime anyway. Mr. Gazelah claimed the previous criminal history was "less significant than a homicide."

Accordingly, the post-conviction court's finding that trial counsel's errors did not constitute ineffective assistance nor prejudice to Mr. McMillian's case is contrary to the evidence presented at the evidentiary hearing and not supported by law.

- d. Claim 2(D) argued that counsel failed to object to portions of the State's penalty phase closing argument wherein the prosecutor argued non-statutory aggravating circumstances relating to Defendant's adultery and made inflammatory comments about the victim's death.**

Section 921.141 of the Florida Statutes specifically delineates the aggravating circumstances that may be considered and limits the aggravating circumstances to those listed in the Statute.

The Florida Supreme Court has consistently held that "where the State presents evidence that constitutes inadmissible non-statutory aggravation, the error is not harmless." *Poole v. State*, 997 So. 2d 382 (Fla. 2008); *see also Perry v. State*, 801 So. 2d 78, 89 (Fla. 2001); *Kormondy v. State*, 703 So. 2d 454, 463 (Fla.

1997) (concluding that the admission of impermissible evidence of non-statutory aggravation was not harmless error and stating that the jury is “charged with formulating a recommendation as to whether [the defendant] should live or die [and] turning a blind eye to the flagrant use of non-statutory aggravation jeopardizes the very constitutionality of our death penalty statute”); *Gerald v. State*, 601 So. 2d 1157, 1162-1163 (Fla. 1992).

The law is clear that the State cannot argue a non-statutory aggravating circumstance to the jury. Nor is it proper to characterize a Defendant in derogatory terms in an effort to inflame the passions of the jury. *Brooks v. State*, 762 So.2d 879, 900 (Fla. 2000). In *Brooks*, the prosecutor used the terms “executed” and “executioner” multiple times. The Court held the prosecutor impermissibly inflamed the passions and prejudices of the jury with elements of fear and emotion. The Court went on to say these types of comments have been condemned by the Court over the last fifty years, citing *Garron v. State*, 528 So.2d 353, 359 (Fla. 1988), *King v. State*, 623 So.2d 486, 488 (Fla. 1993), and *Bertolotti v. State*, 476 So.2d 130, 133 (Fla. 1985).

All of these cases were in effect at the time of Mr. McMillian’s trial. Indeed as early as 1951, the Florida Supreme Court held that “the trial of one charged with a crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament.” *Adams v. State*, 192 So.2d 762,

763 (Fla. 1966) (quoting *Stewart v. State*, 51 So.2d 494 (Fla. 1951)). Further, a tactical or strategic decision not to object is unreasonable if it is based on a failure to understand the law. *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991).

At trial, the prosecutor argued the following regarding Mr. McMillian's adultery: "you heard today from his wife who seems like a very nice lady. Now, he's fooling around on her but I guess she doesn't have –it's not a big deal to her, and I'm not here to—or ask you to judge in terms of whether that is right or wrong." (DIR. ROA, p. 2272). The prosecutor then stated "he loved his wife while he's fooling around on her on the side but I guess that's alright." (DIR. ROA, p. 2272). The prosecutor then added, "he is not just fooling around with the victim in this case. He's fooling around with other women." (DIR. ROA, p. 2272). "Then they bring in an attempt to get sympathy from you photographs of his children, how he loved his children so much, how he cared for them so much but yet he's having this relationship with all these other people." (DIR. ROA, p. 2272).

The prosecutor then advised the jury as to his own imagined theory of what happened on the date of the offense, "he walks right up to her and shoots her in the head while she is still clutching that comforter . . . she was trying to live." (DIR. ROA, p. 2275). The prosecutor continued, "we are here about the horrific death of a 26-year-old young woman who died, I submit, because she wanted to live." (DIR. ROA, p. 2269).

Mr. Gazelah testified in support of this claim at the evidentiary hearing. Mr. Gazelah admitted that as the attorney primarily responsible for the penalty phase, he would have been the attorney primarily responsible for objecting during the penalty phase closing argument. (PC, p. 905). He acknowledged that the prosecutor made a number of inflammatory references during his penalty phase closing argument. (*Id.* at 906). When asked why he failed to object to the prosecutor's numerous comments about Mr. McMillian cheating on his wife and committing adultery, he said there was no reason he could articulate. (*Id.* at 906). He did acknowledge a jury may not approve of Mr. McMillian's adultery, but then argued it probably would not have caused a juror to vote for death over a life sentence. (*Id.* at 906). Further, Mr. Gazelah testified he did not find the prosecutor's comments about the victim clutching to her comforter in an effort to cling to her life to be inflammatory. (*Id.* at 906).

The post-conviction court denied Claim 2(D) and found that Mr. McMillian failed to demonstrate trial counsel was ineffective for failing to object to the State's penalty phase argument. The post-conviction court argued that an attorney has wide latitude when arguing to a jury, but also stated, "it is well-settled that the prosecutor must limit his or her comments to the evidence on the record or that which may be reasonable inferred from the evidence." The post-conviction court argued that the prosecutor's comments were not inflammatory or meant to illicit

an emotional response in the jury and that defense counsel was not ineffective in failing to make an objection. The post-conviction court argued that Mr. McMillian admitted to dating other women while he was married to his wife and, therefore, this issue could be reasonably inferred from the evidence. Further, the post-conviction court argued that the comments about the victim clinging to her comforter for her life were proper based on the fact that the victim was shot while in her bed. Because of this, the post-conviction court found that the prosecutor's comments were reasonable and, therefore, trial counsel had no need to object.

However, the post-conviction court's reasoning ignores the fact that Section 921.141 of the Florida Statutes specifically limits aggravating circumstances to those listed in the statute. Here, the prosecutor argued the non-statutory aggravating circumstance of adultery, despite the fact that adultery is not listed by the statute. As stated in *Poole*, the mere fact that these arguments were allowed, without objection, is not harmless error. Allowing the prosecutor to taint the minds of the jurors with adultery demonstrates that but for defense counsel's deficiency, Mr. McMillian probably would have received a life sentence.

Further, the post conviction court's ruling ignores the rule set forth by this Court in *Brooks*. Namely, it is improper for the prosecutor to characterize a defendant in a derogatory manner in an effort to inflame the passions of the jury. The post-conviction court in the instant case argued that the comments about

adultery were not inflammatory or derogatory. However, the post-conviction court's suggestion that a juror instructed to use his or her common sense will look favorably on a defendant who has committed adultery is baseless and misguided. The prosecutor's numerous and vivid descriptions of Mr. McMillian's adultery could not possibly have elicited a positive emotion from any juror. Even Mr. Gazelah recognized that jurors may have looked disapprovingly at Mr. McMillian after hearing such comments. As such, trial counsel should have known the jury could not have come to a fair and impartial decision, but rather would base its decision on the emotional response brought about by the prosecutor.

Additionally, the prosecutor's comments about the victim clutching to her comforter for her life impermissibly inflamed the passions of the jury. This argument was not based on actual evidence but rather a loose and creative interpretation of the evidence. The prosecutor's concocted depiction of the victim's final moments did nothing more than conjure prejudicial emotions from the jurors.

Had trial counsel understood that these arguments made by the prosecutor were improper, trial counsel would have been aware of the necessity of objecting to the inflammatory remarks. The decision not to object could not have been a strategic decision on the part of trial counsel as the decision was based on a failure to understand the law. This much was demonstrated by the testimony presented at

the evidentiary hearing. As such, the post-conviction court's finding that trial counsel's errors did not constitute ineffective assistance nor prejudice to Mr. McMillian's case is contrary to the evidence presented at the evidentiary hearing and not supported by law.

**D. CLAIM 1: MR. MCMILLIAN WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL, DUE PROCESS, AND RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF MR. MCMILLIAN'S FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND HIS CORRESPONDING RIGHTS UNDER THE DECLARATION OF RIGHTS OF THE FLORIDA CONSTITUTION.**

- a. CLAIM 1A: The post-conviction court's finding that trial counsel was not ineffective in failing to file a comprehensive pretrial motion to suppress Mr. McMillian's statements made to police is not supported by competent, substantial evidence.**

Claim 1A argued that trial counsel failed to adequately investigate, and comprehensively litigate a motion to suppress Defendant's recorded statement made to law enforcement at the hospital following his arrest. The statements were made in violation of Defendant's right to be free from unreasonable searches and seizures, and his rights to counsel under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article 1 Sections 9, 12, and 16 of the Constitution of the State of Florida. After the evidentiary hearing, the post-conviction court denied this claim, finding that trial counsel was effective.

However, this ruling has no legal basis and is not supported by competent, substantial evidence.

- i. **CLAIM 1(A)(b)** Counsel failed to investigate the circumstances giving rise to notification of the police of Mr. McMillian's improved medical condition and the fact that the police were allowed access to Defendant before he had an opportunity to confer with counsel.

Prior to Mr. McMillian's hospital interrogation by police, Mr. McMillian suffered multiple gunshot wounds on January 14, 2009. One of the gunshot wounds was to the head. He was taken to Shands Hospital, Jacksonville, where he was in a coma or on a ventilator until around the day of his questioning, January 29, 2009. He had episodes of low oxygen during his stay in the intensive care unit. He was not discharged to the jail until February 10, 2009.

While in the hospital, the Public Defender's office attempted to locate and interview Mr. McMillian, but was told that Mr. McMillian was unconscious. On January 29, 2009, the first day that Mr. McMillian regained consciousness, Detectives Wolcott and McClain were notified he had regained consciousness and were allowed into Mr. McMillian's hospital room for the purposes of conducting an interview. The digital audio recording of the entire interview was admitted into evidence at trial.

As late as January 23, 2009, Defendant was in severe respiratory distress with a temperature of 103. He was given medication for pain and anxiety. (PC, p.

736). Also notated in his chart were several instances of a lack of oxygen to the tissues of his body. All of these issues would have had a bearing on the totality of the circumstances surrounding the voluntariness of Mr. McMillian's statement. This was especially important because Defendant made subsequent inconsistent statements. Expert testimony would have been helpful to explain those statements.

Applicable case law provides that the Sixth Amendment entitles a criminal defendant to the aid of counsel, not only at trial, but also prior to trial at critical periods of the proceedings. *Taylor v. State*, 726 So.2d 841 (Fla. 1<sup>st</sup> DCA 1999). Furthermore, according to the United States Supreme Court, a criminal defendant's right to counsel is denied when the government elicits incriminating statements from the defendant when he does not have the advantage of having a lawyer present after having been indicted. *Id.* at 844. *See also Fellers v. United States*, 540 U.S. 519, 520 (2004) (holding that the defendant's sixth amendment right to counsel had been violated when police solicited incriminating information from the defendant after the defendant had been indicted and was outside the presence of counsel). Further, Florida case law also states:

The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. As noted above, this guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation.

*Maine v. Moulton*, 474 U.S. 159, 176 (1985).

Further, trial counsel should challenge the admissibility of a suspect's statements when the statement is not made knowingly, voluntarily, and intelligently. *Schneckloth v. Bustamonte*. 412 U.S. 218, 235-40 (1973); *Thompson v. State*. 548 So.2d 198, 204 (Fla. 1989). A statement may be suppressed as involuntary when the circumstances surrounding the statement indicate the mental state of the defendant is so impaired that the defendant could not possibly understand his or her rights. *Deconingh v. State*, 433 So.2d 501, 502 (Fla. 1983). In *Blackburn v. Alabama*, 361 U.S. 199, 206-207 (1960), the United State Supreme Court declared "this Court enforces the strongly felt attitude of our society that important human values are sacrificed when an agency of the government . . . wrings a confession out of an accused against his will." Further, the Florida Supreme Court has recognized that "if for any reason a suspect is physically or mentally incapacitated to exercise a free will or to fully appreciate the significance of his admissions, his self-condemning statements should not be employed against him." *Deconingh*, 433 So. 2d at 503 (quoting *Reddish v. State*, 167 So. 2d 858, 863 (Fla. 1964)).

A tactical decision, for example the decision not to challenge certain evidence, is unreasonable if it is based on a failure to understand the law. *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991). "Where counsel is so ill prepared

that he fails to understand his client's factual claims . . . counsel fails to provide service within the range of competency expected of members of the criminal defense bar." *Young v. Zant*, 677 F. 2d 792, 798 (11th Cir. 1982).

Mr. McMillian presented several witnesses at the evidentiary hearing in support of this claim. First, the investigator, Mr. Douglas, testified Mr. McMillian told him that he had previously suffered from stress related blackouts and he could not remember committing the offense. (PC, p.651, 654). Mr. Douglas also testified he learned Mr. McMillian had been in Iraq/Afghanistan for approximately five years. (*Id.* at 653). Mr. Douglas learned that at the time of Mr. McMillian's statement to police, he was on morphine and felt he did not have any choice but to speak with the police and answer their questions. (*Id.* at 657). Mr. McMillian told Mr. Douglas he signed a waiver prior to speaking with the police, but did not understand the explanation of his rights due to his groggy state and, most importantly, he did not know that he had the right to speak with counsel before answering any of the officer's questions. (*Id.* at 657).

Mr. Douglas also learned that during the interrogation, Mr. McMillian insisted he couldn't remember the incident, but the officers continued to question him persistently. (*Id.* at 658). Further, Mr. Douglas testified that when he went back to speak with Mr. McMillian a second time, Mr. McMillian did not remember who he was and appeared to be very groggy and confused. (*Id.* at 652).

Mr. Till also testified at the evidentiary hearing in support of this Claim. Mr. Till was questioned regarding the fact that Mr. McMillian was denied the opportunity to confer with court-appointed counsel prior to speaking with police. When asked whether he ever filed any type of emergency motion with the court which would require Shands to notify him upon his client regaining consciousness, Mr. Till acknowledged he never brought up the issue and responded, “that’s a good idea, and I didn’t do it.” (*Id.* at 722-723).

Mr. Till testified he was aware Mr. McMillian had been shot in the head and had to be placed into a medically induced coma as a result. (*Id.* at 735). Mr. Till also acknowledged that he was aware that Mr. McMillian had been prescribed various narcotics and antibiotics as part of his treatment at Shands Hospital. (*Id.* at 736). Mr. Till testified that he received Mr. Douglas’ investigative report and was aware Mr. McMillian was experiencing confusion and memory problems at the time of his statement to police. (*Id.* at 753). Mr. Till testified he was aware that the police questioned Mr. McMillian shortly after Mr. McMillian awoke from his comatose state. (*Id.* at 724). Additionally, Mr. Till was aware that Mr. McMillian stated he blacked out and couldn’t not remember the offense. (*Id.* at 737-738).

Mr. Till stated that he did file a motion to suppress Mr. McMillian’s statement to police; however, Mr. Till acknowledged the Motion failed to state any grounds upon which to suppress Mr. McMillian’s statement. Additionally, Mr.

Till acknowledged he never spoke with Dr. Krop about whether the gunshot wound affected Mr. McMillian's memory and Mr. Till never called Dr. Krop, or any expert, in support of his Motion to Suppress. (*Id.* at 743). Despite his acknowledgement, Mr. Till never called any witness to testify about why Mr. McMillian's treatment could have affected his statement to the police. (*Id.* at 749-750).

The post-conviction court found Mr. McMillian failed to meet his burden of demonstrating that trial counsel was ineffective. Mr. Till never challenged the fact that Mr. McMillian did not have the opportunity to confer with his court-appointed counsel prior to speaking with police officers in violation of Mr. McMillian's sixth amendment rights. As demonstrated by the afore-mentioned case law, Mr. Till should have at least made an argument that the Sixth Amendment right to counsel had already attached at least to the attempted murder of a law enforcement officer charge and the detective's deliberate actions of soliciting incriminating statements from Mr. McMillian violated that right.

Additionally, the post-conviction court found persuasive the fact that Mr. Till did seek suppression of the statement based on "involuntariness" and that Detectives testified Mr. McMillian understood his rights along with their questions. Accordingly, the post-conviction court found merit in Mr. Till's belief that calling a doctor, nurse, or medical expert to testify about Mr. McMillian's

medical condition and circumstances would have been irrelevant.

However, the post-conviction court's argument is misguided as it ignores the fact that trial counsel failed to adequately investigate the issue and make a stronger case for suppression by supporting its Motion to Suppress with the proper evidence. The evidentiary hearing demonstrated that trial counsel should have challenged the admissibility of the statement, as it was clear that at the time police questioned him, Mr. McMillian was unable to leave the hospital and was in a state of confusion upon awaking from his comatose state. These issues could not be resolved simply with the testimony of police officers, who have no medical background, stating they believed Mr. McMillian understood his rights and voluntarily waived those rights. Rather, the testimony of a doctor would have made clear to the Court and to the jury that Mr. McMillian was in a confused state as confirmed by the investigator employed by the Public Defender's Office, Mr. Douglas.

Further, trial counsel should have been aware of the Florida case law stated *supra* which would have supported the Motion to Suppress. Trial counsel's decision not to investigate this issue more fully could not have been a reasonable tactical decision as it was based on trial counsel's failure to understand the law.

Accordingly, the post-conviction court's finding that trial counsel's errors did not constitute ineffective assistance nor prejudice to Mr. McMillian's case is

contrary to the evidence presented at the evidentiary hearing and not supported by law.

- ii. **CLAIM 1(A)(c)**The January 29, 2009 questioning included questioning about the January 14, 2009 attempted murder of a law enforcement officer charge that Defendant had been absentee booked on and for which he had been appointed counsel. Counsel failed under Article 1 Section 16, Florida Constitution to move to suppress that portion of the statement. Trial counsel also failed to raise the issue that the subsequent inculpatory statements made by Defendant about the capital homicide were the fruit of the improper questioning. Counsel failed to raise this issue as part of the totality of the circumstances indicating a violation of the 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution.

The Sixth Amendment right to counsel attaches at the earliest of the following points: formal charge, preliminary hearing, indictment, information, or arraignment. *Kirby v. Illinois*, 406 U.S. 682 (1972). In *Owen v. State*, 596 So.2d 985 (Fla. 1982), the Florida Supreme Court noted that the federal court's interpretation of "arraignment" means the initial or first appearance before a committing magistrate. Florida requires that an accused be brought before a magistrate within 24 hours of arrest and advised of his right to counsel. *See* Rule 3.130 Fla. R. Crim. P..

Similarly, Article 1, Section 16(a) of the Florida Constitution provides in pertinent part: "In all criminal prosecutions the accused shall, upon demand . . . have the right . . . to be heard in person, by counsel or both." The prime right

embodied under this clause is the right to choose one's manner of representation against criminal charges, and this right encompasses two corresponding rights: the right to conduct one's own defense and the right to assistance of counsel. *Traylor v. State*, 596 So.2d 957, 968 (Fla. 1992). The right to counsel under Article 1, Section 16, of the Florida Constitution attaches at the earliest of the following points: when the accused is formally charged with a crime via the filing of an indictment or information; as soon as feasible after custodial restraint; or at first appearance. *Phillips v State*, 612 So.2d 557, 559(Fla. 1992). The Florida Supreme Court has adopted a bright-line rule that once the right to counsel has attached and been invoked, any waiver in the absence of counsel during police initiated questioning is invalid. *Owen v. State*, 596 So.2d 985, 989 (Fla. 1992).

At the time this case proceeded to trial, continuing to today's date, the law in the State of Florida is this bright line test. The argument should have been made that because police violated Florida law in questioning Defendant about the attempted second degree murder charge in violation of his right to counsel, Defendant's entire statement should have been suppressed as "fruit of the poisonous tree. *See State v. Frierson*, 926 So.2d 1139 (Fla. 2006); *Wong Sun v. United States*, 371 U.S. 471, (1963).

Included in the January 29, 2009 interview was questioning about the attempted murder of a law enforcement officer. Under *Owens*, all statements

made by Mr. McMillian to police about the attempted murder of a law-enforcement officer should have been suppressed because his right to counsel attached. Trial counsel failed to argue this issue.

Mr. McMillian had been absentee booked on this charge and counsel had been appointed on January 15, 2009. On that same date, the Public Defender's Officer filed a "Defendant's Claim of Rights" asserting that Mr. McMillian did not wish to be contacted about the case other than through counsel. Mr. McMillian did not initiate any contact with the police. Nevertheless, he was interviewed at the hospital about the attempted murder of a law enforcement charge. The following colloquy was played to the jury at trial without a proper pretrial or trial objection:

**Detective Wolcott:** I'm going to be honest with you Justin, you're in a tough situation right now. I mean you did something really stupid. You know what I mean?

**The Defendant:** Yeah.

**Detective Wolcott:** What were you thinking when the cars were behind you, police cars?

**The Defendant:** Honestly I didn't see no police marked car. All the cars behind me—(Inaudible.)—and like—(Inaudible.)—a truck just like the one that was behind me tried to pull the same thing that the truck did when they tried to take my—(inaudible.)—on the Northside.

**Detective Wolcott:** Uh-huh.

**The Defendant:** So I thought it was them.

**Detective Wolcott:** Was that reported to the police, that incident?

**Detective McClain:** The car that was behind you was a canine officer, a marked car with blue lights on.

**The Defendant:** No. It was a black Explorer.

**Detective McClain:** The truck—the car that pulled you over with the sirens and the lights was a marked police car.

**The Defendant:** It looked like an Explorer. That's why I shot. I shot at a black Explorer, like a gray Explorer.

**Detective McClain:** What made you pull over then? Why would you pull over for a black Explorer?

**The Defendant:** I was going into a neighborhood.

**Detective McClain:** You've got to remember there were two other people in the car with you.

**The Defendant:** Yeah.

**Detective McClain:** All right. There's a reason why you stopped. If a black Explorer got behind me I wouldn't pull over and stop. I'd keep right on riding.

**The Defendant:** Yeah.

**Detective McClain:** The car that was behind you 20 feet away from you was a police car.

**The Defendant:** I ain't seen no police car. I promise you I never seen a police car.

**Detective Wolcott:** Is it normal to just hop out and start shooting?

**The Defendant:** I mean, no, not for me and not at the police because I know they can shoot and kill. See what I'm saying? I ain't ready to die right now.

**Detective McClain:** Well, your cousins knew it was the police. That's why they got out and got on the ground—(Inaudible.) They say they heard the siren, saw the cop, pulled over and stopped. The police say get out and they got out and got flat and that's when all the shooting—

**The Defendant:** I just jumped out and started shooting.

**Detective McClain:** (Inaudible.)

**The Defendant:** I got out and started shooting at the truck.

**Detective Wolcott:** What are you, are you right handed?

**The Defendant:** Right-handed.

**Detective Wolcott:** That gun that you had, was that yours?

**The Defendant:** Yeah.

**Detective Wolcott:** Okay. What kind of gun is that?

**The Defendant:** It's a .45 Desert Eagle.

**Detective Wolcott:** Where did you pick that up?

**The Detective:** In Georgia.

**Detective Wolcott:** In Georgia? Did you buy it somewhere?

**The Defendant:** I bought it off the street.

**Detective Wolcott:** Off the street? Do you remember who from?

**The Defendant:** Not really.

**Detective Wolcott:** What did you pay for it?

**The Defendant:** \$250.

**Detective Wolcott:** Herein lies the problem, okay, we took that gun, okay, we took those bullets and took them shell casings, okay?

**The Defendant:** Uh-huh.

**Detective Wolcott:** And sent them to a lab, okay? And Danielle's house we took the live round, the shell casings, and the projectile that was removed from her head and sent them to the same lab.

**The Defendant:** Yeah.

**Detective Wolcott:** What do you think the results were? It was a match.

**The Defendant:** It was?

**Detective Wolcott:** Yeah.

(DIR. ROA, pp. 1158-1162)

Thereafter, following additional questioning, Defendant McMillian made statements implicating himself in the shooting death of Danielle Stubbs. Afterwards, Detectives continued to question Defendant about the police shooting:

**Detective Wolcott:** What would you like for me to tell Danielle's mom and dad?

**The Defendant:** (Inaudible.)—I did—(Inaudible.)—planning on taking my own—(Inaudible.)

**Detective Wolcott:** You're planning what?

**The Defendant:** Planning on—(Inaudible.)

**Detective Wolcott:** On taking your own life? Is that why you jumped out when the police were behind you? Need to be honest.

**Detective McClain:** You wanted the police to kill you? Justin, is that why you started shooting at five federal officers in a marked car? Did you want them to kill you?

**Detective Wolcott:** Why did you do that?

**The Defendant:** I don't know. (Inaudible.)—I ain't seen the Monte Carlo. (inaudible.)—JSO I probably would have tried to run.

**Detective McClain:** So you're saying you—(Inaudible.) So be honest, you still want to say that you thought it was a jack?

**The Defendant:** No.

**Detective McClain:** Justin, the problem with that is the boys in the

car say hey knew it was the police behind ya'll and that's your own cousin. You don't need to drag him into this okay? Ya'll ain't—I know she cried like a baby when she came down there to get it. She love you. A lot of people care a lot about you.

**The Defendant:** (Inaudible.)

**Detective McClain:** Huh?

**Detective McClain:** Yeah, he home. We let him go. Nobody is trying to portray you as a monster, you know, but she was pissed that you put his life in danger like that and his friend and she's pissed. Were you trying to get them to kill you? You knew that they were police officers. Didn't you?

**The Defendant:** At first I didn't but once I seen that it was JSO—

**Detective McClain:** Okay. I understand. So you made up your mind then you were going to shoot it out with them? How many times did you get hit?

**The Defendant:** Six

**Detective Wolcott:** How many times did you shoot?

**The Defendant:** I think seven.

(DIR. ROA, pp. 1189-1191.)

Although Mr. Till filed a Motion to Suppress Confessions and/or Admissions, the motion failed to cite any provision of the United States Constitution, the Florida Constitution, or cite any relevant case law in support of this Motion. (DIR. ROA, pp. 520-0521.) Rather, the groundless Motion simply declares that Mr. McMillian's "constitutional rights were violated" without further support. (*Id.*)

Mr. Till testified he was aware Mr. McMillian had been arrested for the attempted murder of an officer, not for the murder of Danielle Stubs. (*Id.* at 725). Further, Mr. Till testified that although he attempted to challenge the admissibility of Mr. McMillian's statement, he never challenged the admissibility on the basis

that Mr. McMillian's right to counsel had been violated. (*Id.* at 737-738). When asked why, Mr. Till stated, "I don't know." (*Id.* at 756-757).

The post-conviction court found Mr. McMillian failed to meet his burden in demonstrating that trial counsel's performance was ineffective. Notably, the post-conviction court relied on the fact that the both detectives who interrogated Mr. McMillian testified the main focus of their questioning had to do with murder of Danielle Stubs, and only a limited amount of the questions dealt with the improper questions relating to the attempted murder charge. While the post-conviction court noted trial counsel did not raise the argument that the subsequent questions relating to the murder of Danielle Stubs should have been suppressed as the fruit of the initial illegal questioning, the post-conviction court argued that trial counsel was not to be judged in hindsight.

However, the post-conviction court's finding ignores the fact that trial counsel outright neglected to make any argument regarding Mr. McMillian's Sixth Amendment right to counsel and challenge his statements relating to the attempted murder charge on that basis. Had trial counsel understood the applicable case law and performed a proper investigation and presentation of argument regarding *Owens*, Mr. McMillian's incriminating statements about the attempted murder likely would have been suppressed. Further, had trial counsel bothered to make the argument regarding police questioning of the attempted murder, trial counsel also

would have been able to challenge the statements relating to the murder of Danielle Stubs as the fruit of the poisonous tree.

The post-conviction court's argument that only a limited number of the detectives' improper questions related the attempted murder charge, ignores the fact that Mr. McMillian had a fundamental right to counsel and that right was not honored by the investigating officers. Despite the fact that trial counsel may have a better view of Mr. McMillian's case in hindsight, as the post-conviction court suggests, this does not relieve trial counsel of the obligation to provide competent representation.

As such, the evidentiary hearing demonstrated that trial counsel's failures amounted to ineffective assistance of counsel. Accordingly, the post-conviction court's finding that trial counsel's errors did not constitute ineffective assistance nor prejudice to Mr. McMillian's case is contrary to the evidence presented at the evidentiary hearing and not supported by law.

- b. Claim 1B. Counsel failed to move to redact statements made by the police to Defendant during his recorded statement made to law enforcement following his arrest. The statements made to Defendant by Detectives Wolcott and McClain contained victim impact information, hearsay related by others which was not otherwise admissible, and the personal belief of the detectives in Defendant's guilt or the implausibility of his version of the events.**

In Florida, all relevant evidence is admissible, unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues,

misleading the jury, or needless presentation of cumulative evidence. *Miller v. State*, 42 So.3d 204, 224 (Fla. 2010); *see also* Sections 90.402-403, Fla. Stat. (2008).

In *Martinez v. State*, 761 So.2d 1074 (Fla. 2000), the Florida Supreme Court held the admission of an investigating officer's opinion as to the defendant's guilt was inadmissible. The Court explained that any probative value of such an opinion was clearly outweighed by the danger of unfair prejudice. *Id.* at 1079. The Court went on to explain that the danger of unfair prejudice is especially heightened when the opinions expressed to the jury are made by an officer as the jury may simply assume the officer's opinion of guilt is supported by evidence which was not presented to the jury, but known to the officer, and supports the charge against the accused. *Id.*

The Court further acknowledged that a jury generally will regard an officer as a disinterested, objective party and will, therefore, view the officer as highly credible. *Id.* As such, this Court recognized the danger that an officer's opinions will improperly influence the jury is particularly grave. *Id.* Ultimately, it is for the jury to decide the issue of the defendant's guilt, innocence, and credibility; therefore, opinion testimony as to these issues is improper. *Id.* *See also Pausch v. State*, 596 So. 2d 1216, 1219 (Fla. 2d DCA 1992) (finding it unreasonable to expect the jury to extract the admissible evidence while disregarding the

prejudicial suggestions of guilt created by the detectives' inadmissible statements); *Jackson v. State*, 107 So. 3d 328 (Fla. 2012) (finding that the admission of a tape recorded interrogation where an officer repeatedly repeated his belief in the defendant's guilt basically "permitted the State to improperly illicit police opinion testimony and invade the province of the jury").

In Mr. McMillian's case, during the January 29, 2009 recorded interview which was played to the jury, Detectives Wolcott and McClain repeatedly made inflammatory comments about the facts of the case and their belief in Mr. McMillian's guilt:

**Detective McClain:** . . . You know those people –I don't know if they will ever have closure. When you lose somebody close to you like that, I don't know if it's ever happened to you, but those families are hurting right now and they are looking to us for answers. That's why we're here to talk to you to get answers. Just like Detective Wolcott said we understand from Danielle's mother that she was in the process of breaking up with you after you helped her move in. Now that would piss me off if I helped some girl move in and then after she got all settled in she tell me hit the road—whoever—who wouldn't be pissed off? That would hurt anybody's feelings, so Mother already told us Danielle was in the process of sending you back home because she felt like your response—you had more responsibility for your kids in Georgia than you did to her and she didn't wasn't to be a part of that. Now if she told you to leave and that set you off and you saw her with somebody else, because apparently she probably might have been seeing somebody else that you found out about. Did you go off? Did she tell you to leave? Something had to set you off. We look at your record. You ain't a bad guy. I mean your aunt said she wish you stayed in Iraq because you was doing so good over there. . . . We ain't angry but we empathize with those families because those families want answers and I think they deserve that. You know, you can't be selfish and think about yourself. You have to do what's right.

(DIR. ROA, pp. 1165-1167).

**Detective Wolcott:** Do you know? Push this button. You stated you blanked out. You—(Inaudible.)—when it comes to them or anyone else. Okay. You’re a healthy man, military. (inaudible.)—stay healthy and stay fit, okay? A couple of drinks ain’t going to make you black out, okay? I know you probably don’t want to remember, okay? But you know what, saying you don’t remember doesn’t cut it...Do you believe me when I say that her family deserves better answers?

**The Defendant:** Uh-huh.

**Detective Wolcott:** Okay. Because they do, okay? Ya’ll were boyfriend and girlfriend for a long time. Ya’ll’s families go back a long way, okay? Your own dad is asking for answers, okay? Common sense tells you that you just didn’t blank out, okay? You don’t have a medical condition that would cause you to blank out, okay? You hadn’t been taking anything that would cause you to blank out, okay? Why is all we’re asking. Why?

(DIR. ROA, pp. 1176-1178).

Mr. Till admitted at the hearing that the recorded portion of Mr. McMillian’s interview with police was played for the jury without redaction. (PC, p.758). Mr. Till admitted he never made any motion to have the recorded interview redacted so that the inflammatory comments were not heard by the jury. (*Id.* at 758). When asked why he never attempted to redact the recording so as not to prejudice Mr. McMillian’s case, Mr. Till responded, “I guess to be on the safe side I could have done that, but I didn’t do it.” (*Id.* at 759).

The post-conviction court found that Mr. McMillian failed to meet his burden of demonstrating that his trial counsel’s performance fell below the *Strickland* standard in regards to this claim. The post-conviction court cited

*Eugene v. State*, 53 So. 3d 1104 (Fla. 4th DCA 2011), and argued a jury may hear a detective's statements about a crime when those statements provoke a relevant response from the defendant. The post-conviction court went on to argue that a rational jury could understand the detective's statements were merely techniques used by officers to secure confessions.

However, the post-conviction court's argument ignores the fact that the comments of the officers gave the jury the impression the officers believed Mr. McMillian to be guilty. Contrary to the post-conviction court's argument, the officers comments failed to elicit any relevant responses from Mr. McMillian, but rather amounted to a narrative of the detectives' opinions and theories in the case. As such, any probative value that they jury may have received from listening to the police interview was outweighed by the unfair prejudice that the evidence elicited and should have been inadmissible under Florida law. Further, as stated in *Martinez*, the unfair prejudice in the instant case was especially heightened as these comments came from police officers – men that the jury likely believed had access to evidence and information not presented to the jury that would support the charges against Mr. McMillian.

Had trial counsel understood the application of Florida law to such comments, trial counsel would have understood the necessity of making an objection to this inflammatory and prejudicial evidence. Even Mr. Till

acknowledged at the evidentiary hearing that the recording could have been redacted to prevent prejudice to Mr. McMillian's case.

As such, the evidentiary hearing demonstrated that trial counsel's failure to move to redact portions of the recorded statement amounted to ineffective assistance of counsel. Accordingly, the post-conviction court's finding that trial counsel's errors did not constitute ineffective assistance nor prejudice to Mr. McMillian's case is contrary to the evidence presented at the evidentiary hearing and not supported by law.

- c. **Claim 1D. Counsel moved to consolidate Defendant's capital homicide with a separate offense of attempted first degree murder of a law enforcement officer. The consolidation of these offenses with one another was contrary to the prevailing case law and resulted in a denial of due process in violation of Defendant's right to due process and a fair trial under the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, Sections 9 and 16, Constitution of the State of Florida. This "strategy" was never discussed with Defendant McMillian.**

For joinder of two offenses to be appropriate, the crimes in question must be linked in some significant way. *Paul v. State*, 385 So.2d 1371 (Fla. 1980); *Crossley v. State*, 596 So. 2d 447 (Fla. 1992). This Court has previously recognized:

[T]he rules do not warrant joinder or consolidation of criminal charges based on similar but separate episodes, separated in time, which are 'connected' only by similar circumstances and the accused's alleged guilt in both or all instances. Courts may consider the temporal and geographical association, the nature of the crimes, and the manner in

which they were committed. However, interests in practicality, efficiency, expense, convenience, and judicial economy, *do not* outweigh the defendant's right to a fair determination of guilt or innocence.

*Ellis v. State*, 622 So. 2d 991, 999 (Fla. 1993) (quoting *Wright v. State*, 586 So.2d 1024, 1030 (Fla. 1991)) (emphasis added).

Further, even when joinder is proper, a defendant is still entitled to separate trials if separation would achieve a fair determination of the defendant's guilt or innocence. *Ellis v. State*, 622 So. 2d 991 (Fla. 1993). In *Crossley v. State*, 569 So.2d 447, 449-450 (Fla. 1992), this Court recognized that “the danger in improper consolidation lies in the fact that evidence relating to each of the crimes may have the effect of bolstering proof of the other . . . evidence that the defendant may have committed another crime can have the effect of tipping the scales” and encourage the jury to convict on one charge simply because there is evidence in support of the other.

Despite this danger, defense counsel decided to try these two unrelated cases together and moved for the consolidation himself. Mr. Till apparently placed his own interests in efficiency above the interests of his client, Mr. McMillan. Mr. Till explained his feelings to the jury stating, “this case is also different from most trials in that we are really trying two different cases in the courtroom this week. This saves money. This saves time, and I have no problem with that.” (DIR. ROA, p. 471). Apparently, Mr. Till recognized that consolidating the two cases was

inappropriate as he even went on to state to the jury, “we are trying these two cases together completely unrelated occurring on different days and both crimes are very serious, very serious in nature, both very serious felonies.” (DIR. ROA, p. 473).

At the evidentiary hearing, Mr. Till was questioned regarding his motion to consolidate the homicide charge with the attempted murder of a police officer. When questioned why he would employ such a tactic, Mr. Till became hostile and provided non-responsive answers arguing, “you ever hear of a jury pardon where the jury might say, well, he might be guilty of one but maybe not the other?” (*Id.* at 767). When asked whether his motivation for consolidation was fueled by his own unpreparedness to move forward with the scheduled trial on the attempted murder charge, Mr. Till denied the allegation stating “that never crossed my mind.” (*Id.* at 768). When confronted with the fact that he had initially unsuccessfully moved to continue the trial on the attempted murder charge and only chose to move to consolidate the cases upon denial, Mr. Till explained, “I don’t get permission from anybody.” (*Id.* at 768).

Mr. Till acknowledged that his motion to consolidate the charges stated the attempted murder charge arose from the Jacksonville Sheriff’s Office arrest of Mr. McMillian for the murder of Danielle Stubs. (*Id.* at 761-762). However, Mr. Till admitted that this statement was incorrect and Mr. McMillian was not actually

arrested for the murder of Danielle stubs until much later on February 2, 2009. (*Id.* at 761-762). Mr. Till claimed he discussed consolidation of the charges with his client prior to filing the motion; however, there is nothing in the record in the form of a colloquy that would confirm Mr. Till's account of the event. (*Id.* at 765, 770-771). Mr. Till admitted he never checked with his superiors at the Public Defender's Office prior to filing his motion to consolidate. (*Id.* at 768).

Mr. Gazelah testified at the hearing that Mr. Till did not involve him at all in the decision to consolidate the two cases and he was unaware that Mr. Till intended to do so. (*Id.* at 855-856). Further, Mr. Gazelah testified he would have discouraged Mr. Till from filing the motion because "if the jury felt he was guilty of one, they were more likely to convict him of the other." (*Id.* at 855-856). Mr. Gazelah also stated the consolidation affected Mr. McMillian's case in that the jury would have heard much less information about other criminal conduct if the charges had been kept separate. (*Id.* at 857).

The post-conviction court held Mr. McMillian failed to meet his burden of demonstrating that trial counsel was ineffective for consolidating the two charges. The post-conviction court argued that trial counsel should not be judged from a court with the advantage of hindsight. Further, the post-conviction court cited the incorrect fact that trial counsel moved to consolidate the charges based on the fact that the attempted murder of a police officer arose out of the sheriff's office

attempt to arrest Mr. McMillian for the murder of Danielle Stubs. The post-conviction court also noted that the same firearm was used in both cases as a factor in support of the motion to consolidate.

The post-conviction court cited Rule 3.151(a), Fla. R. Crim. P., which states, “[two] or more offenses are related if they are triable in the same court and are based on the same act or transaction or on [two] or more connected acts or transactions.” However, the post-conviction court failed to recognize that joinder in this case was completely inappropriate because this case did not meet the stated criterion. First, the attempted murder of the police officer did not arise out of the same occurrence or transaction. Mr. Till admitted at the evidentiary hearing that the alleged attempted murder of the officer did not occur while police were attempting to apprehend Mr. McMillian for the murder of Danielle Stubs; rather, the alleged attempted murder of the officer occurred while police were attempting to arrest Mr. McMillian on an unrelated misdemeanor *capias*.

Second, the mere fact that the same gun was involved in each offense does not mean the charges arose out of the same incident or transaction. In accordance with the reasoning set forth in *Crossley*, these two offenses were separate episodes, separated by time, and the only ‘connection’ was Mr. McMillian’s alleged guilt in both cases. Therefore, even without the benefit of hindsight, Mr. Till should have been aware of the law governing consolidation and should have realized that

consolidation was grossly inappropriate.

Despite Mr. Till's statements to the jury that consolidation of the charges furthered the interests of efficiency and convenience, Mr. Till should not have allowed these interests to outweigh Mr. McMillian's right to a fair determination of guilt or innocence as recognized in *Crossley*. Furthermore, even if the charges had been related or connected, Mr. McMillian was still entitled to have separate trials so that he could achieve a fair determination of his guilt or innocence.

Mr. Till's motion to consolidate these two charges placed Mr. McMillian's right to a fair trial in jeopardy. The attempted murder of the police officer was a major feature of the capital trial and only detracted from the issues in the capital trial. As such, the jury heard a multitude of evidence regarding the attempted murder charge, which ultimately bolstered proof of the capital murder charge. Even Mr. Gazelah recognized the danger of consolidating the two charges and testified that he would have advised against filing the motion as it was likely to negatively impact the jury's decision in this case.

Accordingly, the evidentiary hearing demonstrated that trial counsel's failure to recognize the harm of consolidation and the failure of trial counsel to obtain Mr. McMillian's consent to consolidate these two charges amounted to ineffective assistance of counsel. As such, the post-conviction court's finding that trial counsel's errors did not constitute ineffective assistance nor prejudice to Mr.

McMillian's case is contrary to the evidence presented at the evidentiary hearing and not supported by law.

- d. Claim 1E. Counsel failed to object to the testimony of Janice Stubbs, the mother of the deceased Danielle Stubbs, and to the testimony of Harold Stubbs, the father of the deceased Danielle Stubbs, and to State's exhibit # 54.**

In Florida, all relevant evidence is admissible, unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. *Miller v. State*, 42 So.3d 204, 224 (Fla. 2010); *see also* Sections 90.402-403, Fla. Stat. (2008).

Further, there is a well-established rule in Florida that a member of the deceased victim's family may not testify for the purpose of identifying the victim where nonrelated, credible witnesses are available to make such identification. *See Lewis v. State*, 377 So.2d 640 (Fla. 1979); *Ashmore v. State*, 214 So.2d 67 (Fla. 1<sup>st</sup> DCA 1968). The basis for this rule is to assure the defendant as dispassionate a trial as possible and to prevent interjection of matters not germane to the issue of guilt. The use of a victim's family member to identify the victim "serves only to prejudice the jury against the defendant by injecting issues into the trial which do not fall within the scope of the charges on which the defendant is being tried." *Ashmore*, 214 So. 2d at 69.

In the instant case, Janice Stubbs, the mother of the victim was called by the

prosecution to testify as she was one of the first to discover her daughter's body. During questioning, the Assistant State Attorney asked the following question and received the following answer:

**Q.** Okay. Tell us as best you can what you saw upstairs.

**The Witness:** My daughter was laying there. She was looking so beautiful. Her face was so pretty. She was in a pool of blood. The blood was so thick like from her head to her toes she just drained of blood. She had no clothes on except for a little top—little tank top, and I laid on the floor with her. I rubbed her face, her lower back close to her buttocks and I just rubbed her and rubbed her face---no, no, no.

**The Court:** Ladies and Gentlemen, please retire to the jury room.

**The Witness:** No, no, no, please.

**The Court:** Please retire to the jury room. Mr. Jameson, please take the jury into the jury room.

(DIR. ROA, p. 508-509)

The Court excused the jury not because of the testimony of the witness but because of a contemporaneous outburst from the gallery. Trial counsel moved for a mistrial based upon the outburst but did not object to the emotional testimony of Mrs. Stubbs. Upon the jury returning, the prosecutor then showed Mrs. Stubbs State's Exhibit 54, a photograph of a hole punched in the victim's bedroom wall by her brother upon his learning of her death and seeing her body. (DIR. ROA, p. 520).

Harold Stubbs, the father of the victim was also called to testify. His testimony was cumulative to the mother's testimony. Yet, there was also no objection to his testimony.

**Q:** Okay. At some point did your son Hunter, when he screamed up there, did he cause this damage to this wall right here in the bedroom?

**A:** Yes, sir.

**Q:** And he punched that wall—

**A:** Yes, sir.

**Q:** --after he found your daughter?

**A:** Yes, sir.

(DIR. ROA, p. 544)

As officers of the court, prosecutors have an obligation not to inject “elements of emotion and fear into the jury's deliberations. *Urbini v. State*, 714 So.2d 411, 419 (Fla. 1998) (quoting *King v. State* 623 So.2d 486, 488 (Fla. 1993)). As has been repeatedly stated: “[a]lthough prosecutors have an awesome responsibility and the facts of the crime often inspire righteous indignation, they are also officers of the court who have duties to both “refrain from improper methods calculated to produce a wrongful conviction” and “to use every legitimate means to bring about a just one.” *Salazar v. State*, 991 So.2d 364, 383 (Fla. 2008).

Mr. Till testified the State called the victim’s mother who provided a vivid and graphic description of her discovery of her daughter’s body. (PC, p.774-775). Mr. Till admitted he never objected to the testimony as inflammatory despite his recognition that the testimony “is inflammatory.” (*Id.* at 774-775). Mr. Till confirmed the mother’s testimony prompted the victim’s brother to jump over the gallery and cause a scene in the middle of trial. (*Id.* at 774-775). Mr. Till

confirmed he was aware of the Florida rule that a family member should not testify regarding the identification of a body when another person is available to do so and also admitted he failed to raise the issue in this case. (*Id.* at 776).

Additionally, Mr. Till testified the State did in fact enter a photo of a hole in a wall that was caused by the victim's brother after he learned of his sister's death. (*Id.* at 770-71). When asked why he failed to object to the photo despite its inflammatory nature, Mr. Till responded, "how was that inflammatory? I mean, it wasn't inflammatory to me." (*Id.* at 772-773). Mr. Till testified he never considered filing a motion *in limine* to keep the picture from being entered into evidence. (*Id.* at 772-773).

Mr. Gazelah also testified at the evidentiary hearing in support of this claim. When asked whether he recognized the victim's mother's testimony as inflammatory, he responded "[o]h, I was concerned about a lot of the testimony being inflammatory" and acknowledged her testimony caused the brother jump over the gallery wall and cause a scene in front of the jury during trial. (*Id.* at 885). Mr. Gazelah also testified he was concerned that mother's testimony would lead to an outburst even before trial, yet neither he nor Mr. Till discussed filing a motion to limit the victim's family's testimony. (*Id.* at 885).

The post-conviction court found Mr. McMillian failed to meet his burden of establishing ineffective assistance of counsel on this claim. The post-conviction

court did recognize the rule that a family member may not testify for the purpose of identification of the deceased where a nonrelative witness can provide the same information. However, the post-conviction court went on to argue that if the family member's testimony is necessary for another issue, it may be introduced at trial. The post-conviction court stated the victim's mother testified not only to her identification of the victim, but also to the events leading up to the victim's death. Because the mother also provided testimony about the events leading up to the murder, the post-conviction court argued, the mother had relevant information not available from any other witness and, therefore, the mother's testimony was not improper. Thus, the post-conviction court argued, trial counsel was not ineffective for failing to object to the mother's testimony.

The post-conviction court's argument ignores the fact that the testimony was highly prejudicial. The probative value of the testimony provided by the mother was substantially outweighed by the danger of unfair prejudice in this case. Not only did the jury hear about the events leading up to the murder, but the jury also heard a vivid emotional description of how the mother found her daughter's lifeless body. Further, the jury then watched the victim's brother cause an outburst in the courtroom as a result of the testimony. Mr. Till even admitted at the evidentiary hearing that the testimony was certainly inflammatory and he failed to object at trial. Mr. Gazelah's testimony confirmed that trial counsel was, or should

have been, aware the testimony would prejudice Mr. McMillian's case; however, neither attorney felt it necessary to interpose an objection. The evidentiary hearing made clear that trial counsel should have appreciated and understood the danger of unfair prejudice to Mr. McMillian's case as a result of this testimony and, therefore, should have objected.

Additionally, the post-conviction argued that while some of the testimony from the victim's father was cumulative, the father provided additional testimony describing the condition of the crime scene. Thus, according to the post-conviction court, trial counsel was not deficient for failing to object to the testimony. However, despite this argument, the father's testimony was cumulative of the mother, who had already provided an account of the condition of the crime scene. Furthermore, the father's testimony regarding the fact that there was a hole in the wall caused by the victim's brother's outrage upon discovering his sister's body was highly prejudicial to Mr. McMillian's case. Although the post-conviction court likely saw this evidence as probative in that it may provide the jury with some insight into to condition of the crime scene, any probative value was substantially outweighed by the danger of unfair prejudice. Had trial counsel been properly prepared and aware of the applicable law in this case, trial counsel could have made a meritorious objection.

The testimony of the mother and father served no purpose other than to

inflame the passions of the jury and create a passionate trial depriving Defendant McMillian of his right to due process and a fair trial. As such, the post-conviction court's finding that trial counsel's errors did not constitute ineffective assistance nor prejudice to Mr. McMillian's case is contrary to the evidence presented at the evidentiary hearing and not supported by law.

- e. **Claim 1F. Detective Wolcott testified to cell phone information. Counsel failed to object to such testimony. Some of the information violates the confrontation clause thus denying Defendant his right of confrontation guaranteed by Amendments 5, 6, and 14, Constitution of the United States and Article 1, Section 9, 12, and 16, Constitution of the State of Florida. He was also asked to give opinions regarding the phone records without having been qualified as an expert.**

Detective Wolcott was allowed to testify without objection to the victim's cell phone number, the contents of her cell phone log, the phone records for the victim's phone, whether there were calls to and from the victim's phone from the Gate station, and to the Gate station from the victim's phone, the duration of the calls, and whether it was common or out of the ordinary for phone records to show different information. (DIR. ROA, pp 1123-1128). Failure to object to this hearsay and opinion testimony during the guilt phase precluded appellate review of this issue and fell below an objective standard of reasonableness.

According to Section 90.702 of the Florida Statutes (2009), expert testimony is defined as "scientific, technical, or other specialized knowledge" that will "assist the trier of fact in understanding the evidence or in determining a fact

in issue.” In *McMullen v. State*, 714 So.2d 368, 371 (Fla. 1998), this Court acknowledged that expert testimony is needed when the facts testified to require special knowledge or experience in order for the jury to render a decision. Furthermore, expert testimony has been necessary in previous cases involving cell phones. See *Cooper v. State*, 45 So. 3d 490 (Fla. 4th DCA 2010). In *Cooper*, an expert testified not only to the contents of the cell phone records, but also as to technical knowledge regarding how the cell phone company’s technology interfaced with the cell phone stations where the call records were electronically maintained. *Id.* at 493. The expert also explained how phone calls traveled through the network to connect with the stations. *Id.*

When asked why he did not seek to have the witness tendered as an expert, Mr. Till argued that when a witness testifies as to facts, the witness does not need to be qualified as an expert. (PC, p.776). However, Mr. Till also acknowledged that the officer testified as to the conveyance of information from a phone company in the form of a phone record and whether phone records often show different information than would be expected. (*Id.* at 777).

The post-conviction court found Mr. McMillian failed to meet his burden in demonstrating that trial counsel was ineffective for failing to object to the testimony of the Detective regarding the cell phone records at issue. The post-conviction court argued that basic cell phone records have been admitted into

evidence without the necessity of an expert's testimony. The post-conviction court cited cases including *Perez v. State*, 980 So. 2d 1126 (Fla. 3d DCA 2008) and *Gordon v. State*, 863 So. 2d 1215 (Fla. 2003). However, these cases are inapplicable as both cases involved a lay witnesses testimony about the contents of the cell phone records at issue, rather than testimony about how data is transmitted or how cell phones work.

However, in Mr. McMillian's case, the detective provided testimony to the jury as to how cell phone records are created and how data is transmitted onto the records. Specifically, the detective testified as to whether it was common or out of the ordinary for cell phone records in general to show different information than what would typically be expected. Meaning, the detective's testimony instructed the jury as to whether the cell phone records were reliable or not. As such, the detective was providing "scientific, technical or other specialized knowledge" to assist the trier of fact in rendering its decision. Further, the detective in this case testified as to how the cell phone company's data transmits to its records, like the expert in *Cooper*. This information was beyond the knowledge of the jury as the average juror does not know how a cell phone company transmits information from its network to its records. Therefore, trial counsel should have objected on the basis the detective was never qualified as a cell phone/tower expert.

Failure to object to this opinion testimony fell below an objective standard

of reasonableness. The testimony was quite harmful to Defendant and helped establish premeditation. As such, the post-conviction court's finding that trial counsel's errors did not constitute ineffective assistance nor prejudice to Mr. McMillian's case is contrary to the evidence presented at the evidentiary hearing and not supported by law.

- f. Claim 1H. Counsel failed to object to inflammatory guilt phase closing argument by the prosecutor. Failure to object to the State's inflammatory closing argument resulted in a denial of Defendant's due process right to a fair trial guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, Section 9, 12 and 16, Constitution of the State of Florida.**

At trial, the prosecutor made the following comments during his closing argument:

Sunday January 11 of 2009 is a day that Mr. and Mrs. Stubbs will never forget. For the rest of their lives, they will have forever a memory of their daughter as they found her. That night they discovered their daughter's body in her bedroom, and those memories are forever ingrained in their minds. . . .

After not having heard from that precious 26-year-old young woman, they were frantic. . . .

This photograph is one of the last photographs that will ever be taken of a 26-year-old young female who wasn't a perfect child but was trying as best she could to make it in this world that we all live in. . . .

He's got to come up with an explanation as to why he did this. And, of course it would never be jealousy. I mean, he's got all the women he needs in the world. He's got a wife that he's separated from, but he's got all these other women that he meets or whatever. But that's not against the law and I'm not asking you to pass judgment. . . .

Well, unless you believe that last version he told you—when I say he told you, he told detectives that. We played that for you and we played that at the very end. Why? **Because we knew it wasn't the truth** but we wanted for you to have an example of how his stories have evolved. . . .

Unfortunately, Danielle Stubbs can't come into this courtroom and tell you what really happened, so we've got to rely on his lies, lies, lies, lies and then some version of the truth and the physical evidence. . . .

She's already down on the ground cowering, I mean, ducking for cover. She's trying to use this comforter as her only protection. And this man just shoots her in the head. . . .

This precious young woman wanted to live and this man extinguished her life. . . .

This is a neat lady who cares about her house. She had just moved into her new residence, and this was her pride and joy. Unfortunately this would be her place where she would be murdered. . . .

Is she under the comforter and he just shot her? And she gets shot and she tries to she gets the whole thing and she brings it over and she's—you know, she's cowering? **I don't know if she was praying because we can't tell you what was going on in her mind. Hopefully she was.** But she was cowering and this man just walks right up to her and shoots her in the head. . . .

Look at this. She is still holding onto part of the comforter. **She's, like, grabbing it as her only means of, like, wanting to live.** This is a 26-year-old girl that was an innocent victim. . . .

You know, on January 11<sup>th</sup> of 2009, Danielle Stubbs no longer—or should I say her body was all that we had left. She still exists in, I'm sure, great memories by her parents, but what they will remember based on – finding the body unfortunately is what they will always remember. And the reason that's important is that's how they found her. . . .

(DIR. ROA, p. 1708-1758) (emphasis added).

Florida law was clear at the time these comments were made that closing argument must not be used to inflame the minds and passions of jurors so that their verdict reflects an emotional response to the crime or the defendant. *See also Bertolotti v. State*, 476 So.2d 130 (Fla. 1985); *King v. State*, 623 So.2d 486, 488 Fla. 1993) (finding that if a prosecutor's "comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument"). In *King*, this Court determined that the defendant should be given a new sentencing hearing based on the prosecutor's arguments during closing, which stated that the juror would be cooperating with evil if they were to recommend any sentence less than death. *King*, 623 So. 2d at 488. In *Bertolotti*, this Court found the prosecutor's appeal to the emotions and fears of the jurors improper when the prosecutor urged the jury to consider the message its verdict would send to the community. *Bertolotti*, 476 So. 2d at 133.

Trial counsel is also prohibited from interjecting personal opinion regarding the guilt of the accused into the closing argument. *See Martinez v. State*, 761 So.2d 1074 (Fla. 2000). Lastly, a tactical or strategic decision not to object is unreasonable if it is based on a failure to understand the law. *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991).

When asked why Mr. Till did not object to the prosecutor's comments about Mr. McMillian's adultery, Mr. Till argued that making numerous objections is not always the best approach. (PC, p.785). In regards to the prosecutor's argument that Mr. McMillian was sleeping with other women, Mr. Till recognized that it was objectionable and stated, "I'm not even sure where that came from, so it's also facts not in evidence." (*Id.* at 785).

When asked why he failed to object to the prosecutor's comments that Mr. McMillian's statements to the police were lies, Mr. Till attempted to explain his thought process at the time, "I'm probably thinking there, well, that could be objectionable. Well, it's too late." (*Id.* at 786-787). Mr. Till then acknowledged, "that's improper no matter what's been said." (*Id.* at 787) Further, in regards to the prosecutor's suggestion that the victim was praying prior to her death, Mr. Till agreed that it was an improper argument by the prosecutor, stating "that shouldn't have been in there" and the argument was based on facts not in evidence. (*Id.* at 787).

When asked about his failure to object to the prosecutor's comment that the victim was holding onto the comforter for her life, Mr. Till agreed that this was an "imaginary scenario" with no evidence to support it. (*Id.* at 788). Mr. Till simply stated "unfortunately, it happens." (*Id.* at 788). When asked why he failed to

object, Mr. Till stated, “Mr. De La Rionda talks fast” and that by the time an objection occurred to him, it was too late. (*Id.* at 788).

The post-conviction court found that Mr. McMillian failed to meet his burden in demonstrating that trial counsel was ineffective for failing to object to the State’s inflammatory closing argument. Specifically, the post-conviction court argued that attorneys may draw logical inferences from the evidence and advance legitimate arguments based on this inferences in their closing statements. However, even the post-conviction court recognized that the closing arguments must be based on facts in evidence. The post-conviction court also recognized that attorneys should not obscure the jury’s view by interjecting their own personal opinions into their arguments.

In its order, the post-conviction court argued that in order to for a defendant to show ineffective assistance on a claim such as this, the defendant must show:

Firstly, that the comments were improper or objectionable and that there was not tactical reason for failing to object. Secondly, a defendant must demonstrate that the comments deprived the defendant of a fair and impartial trial, materially contributed to the conviction, were so harmful or fundamentally tainted as to require a new trial, or were so inflammatory that they might have influenced the jury to reach a more severe verdict that that it would have otherwise.

Ultimately, the post-conviction court found that the State’s arguments were proper and, therefore, did not warrant an objection from trial counsel. Further, the

post-conviction court argued that this failure to object could be considered “sound trial strategy.”

However, the post-conviction court’s finding ignores the applicable case law. Like *King*, it is clear that the State’s closing argument was intended to and did inject elements of emotion and fear into the jury’s deliberation and, therefore, ventured outside the scope of proper argument. Here, the evidentiary hearing demonstrated that even trial counsel believed these arguments were improper and that the State’s arguments appealed to the jurors emotions and fears. Mr. Till admitted that the State’s arguments were improper and based on imaginary scenarios and facts not in evidence. As such, there can be no doubt that trial counsel should have made an objection to the inflammatory arguments.

Despite the post-conviction court’s belief that it is a better tactic to let the State proceed with prejudicial arguments rather than make an objection to highly inflammatory remarks, applicable case law supports the proposition that not only was an objection warranted, but also necessary to protect Mr. McMillian’s right to a fair trial. According to the rule set forth in *Horton*, Mr. Till’s decision to completely neglect any objection could not have been sound trial strategy as this decision was clearly based on Mr. Till’s failure to understand the above-mentioned case law and the failure to understand the prejudicial impact to his client’s case.

The evidentiary hearing demonstrated that trial counsel's failure to object to this opinion testimony fell below an objective standard of reasonableness. As such, the post-conviction court's finding that trial counsel's errors did not constitute ineffective assistance nor prejudice to Mr. McMillian's case is contrary to the evidence presented at the evidentiary hearing and not supported by law.

- g. CLAIM FOR WHICH AN EVIDENTIARY HEARING WAS NOT GRANTED:**  
**Claim 1C alleging Counsel failed to object to the State's use of a "dummy" Indictment which was allowed to be viewed by the jury during deliberations. The Court lacked jurisdiction to try the charge of attempted first-degree murder of a law enforcement officer under an amended "dummy" indictment.**

The post-conviction court denied an evidentiary hearing on the above claim. Had Mr. McMillian been afforded the opportunity to present evidence as to the above claim, Mr. McMillian would have presented evidence of the following: Defense counsel moved to consolidate the charge of first degree murder, contained in an Indictment with the charge of attempted first degree murder, contained in a separate Information filed in a separate case number. That motion was granted by the trial court. Subsequently the State never obtained a successive Indictment joining the two charges. Instead the State prepared a document entitled Indictment for first degree murder and attempted murder in the first degree. (DIR. ROA, Exh. 3, p. 687). Immediately before "Second Count" are the handwritten words "Information for." Thus the document appears to be a hybrid of an

Indictment and an Information, however the case number is solely 2009-CF-2002, the case number for the capital homicide.

In *Smith v. State*, 424 So.2d 726 (Fla. 1983), the Court ruled that an Indictment cannot be amended, even by a grand jury to add different, similar or new offenses. The proper course is to obtain a new Indictment. Furthermore, an Indictment cannot be amended by stipulation of the parties. *Akins v. State*, 691 So.2d 587 (Fla. 1st DCA 1997).

Pursuant to the logic in *Akins*, the trial court in this case lacked jurisdiction over the charge of attempted first degree murder and Defendant's conviction and sentence for that charge must be vacated. As a result the use of this conviction as an aggravating factor in support of the death penalty was improper. Failure to properly object to this procedure during the guilt phase fell below an objective standard of reasonableness and as a result of this unprofessional error there is a reasonable probability that the result of the guilt phase and penalty phase of the trial would have been different.

### CONCLUSION

Mr. Justin McMillian prays this Honorable Court reverse and remand the trial court's denial of his Motion to Vacate Judgments of Conviction and Sentence entered on August 26, 2014, thereby entitling Mr. McMillian to a new trial and/or penalty phase proceeding.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has, been provided to the Mr. Bernardo de la Rionda, Esq., Office of the State Attorney, Fourth Judicial Circuit by e-service; and to Mr. Stephen White, Esq., Associate Deputy Attorney General, Office of the Attorney General by e-service this 30th day of January, 2015.

**CERTIFICATE OF COMPLIANCE REGARDING FONT**

**I HEREBY CERTIFY** that this Appellant's Initial Brief is submitted using Times New Roman, 14 point font, pursuant to Florida Rule of Appellate Procedure, Rule 9.210. Further, the undersigned, pursuant to Florida Rule of Appellate Procedure, Rule 9.210(a)(2), gives this his Notice and files this Certificate of Compliance regarding the font in this Initial Brief.

Respectfully Submitted,

/s/ Ann E. Finnell  
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