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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NUMBER: SC14-1796

LOWER TRIBUNAL CASE NUMBER: 162009CF002002AXXXMA

JUSTIN MCMILLIAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

ANN E. FINNELL
Florida Bar No.: 0270040
2114 Oak Street
Jacksonville, Florida 32204
Phone: 904-791-1101
Fax: 904-791-1102
E-Mail: AFinnell@fmnlawyers.com

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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). Reference to the Appellee's Answer Brief will be designated as AB and will be followed by the appropriate page number, e.g. (AB, p. 123).

ARGUMENT

A. ISSUE I/CLAIM 2(B): Trial counsel was ineffective for failing to provide background information to Defendant's mental health expert regarding his exposure to wartime conditions, his symptoms of post-traumatic stress disorder (PTSD), and his genetic heritage.

Appellee argues trial counsel was not ineffective for failing to provide background information to Mr. McMillian's mental health expert because Mr. McMillian failed to provide information regarding his exposure to wartime conditions, his symptoms of PTSD and his genetic heritage to his counsel and repeatedly denied such information existed. This argument is fundamentally flawed. Counsel has a duty 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) (emphasis added). 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). In this case, there were many "red flags" and had counsel preformed a meaningful, as opposed to cursory and rushed, investigation, they would have discovered Mr. McMillian was exposed to wartime conditions, displayed symptoms of PTSD and had mitigating genetic heritage.

As to Mr. McMillian's exposure to wartime conditions, 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. Even if Mr. McMilliam

was not forthcoming and specifically denied exposure to combat, his denial did not excuse counsel's duty to investigate. Ironically, one of the features of PTSD is a reluctance of the sufferer to discuss the traumatic experience. While Dr. Herkov may have had the advantage of Mr. McMillian being more forthcoming with him, he testified 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. (PC, p. 967). This means information related to the attacks on Mr. McMillian's camps was readily available to counsel; yet, it appears they never bothered to perform even a simple internet search. Dr. Herkov also noted that 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).

At the evidentiary hearing, Mr. McMillian testified as to his exposure to wartime conditions and was asked why he never provided this information to trial counsel. Mr. McMillian testified that Mr. Till simply asked him where he worked while in Iraq and Mr. McMillan informed him that he worked for KBR; however, Mr. Till never inquired into the issue further. (*Id.* at 1391). Mr. McMillian explained that he never volunteered this information because Mr. Till never asked, and the issue was not something that Mr. McMillian wanted to discuss. (*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).

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). 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).

Perez Staples, whose name was specifically provided to counsel by Mr. McMillian, testified at the evidentiary hearing. (*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). 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).

During the evidentiary hearing, 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). 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, a military veteran himself, also testified during the evidentiary hearing. 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 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).

It is clear Mr. McMillian's trial counsel did little more than inquire for whom Mr. McMillian worked 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 to which Mr. McMillian was exposed for the five year period he spent overseas. In order to ensure a meaningful investigation, not only should counsel have attempted to corroborate the

information Mr. McMillian provided, they should have asked more meaningful questions and done more than scratch the surface. Indeed, even a simple internet search of the camps where Mr. McMillian was stationed along with the dates he was stationed there would have revealed his exposure to Taliban attacks. Counsel's failure to investigate Mr. McMillian's camps coupled with their failure to follow up with anyone who worked with him overseas evidences their ineffectiveness. Such failures also led counsel to overlook the possibility of PTSD, which, in turn, meant relevant questions about PTSD symptoms were never asked.

In addition to counsel's failure to advise Dr. Krop of Mr. McMillian's exposure to wartime conditions, counsel also failed to provide Dr. Krop with information about Mr. McMillian's symptoms of PTSD. Appellee argues that Mr. McMillian failed "to provide trial counsel with information which could assist in presenting mitigating evidence in the nature of PTSD. . . ." (AB, p. 24). However, this argument overlooks the fact that had counsel preformed more than a cursory investigation and been aware Mr. McMillian was exposed to wartime conditions, they would have been alerted to the possibility of PTSD. Had counsel considered presenting evidence of PTSD, they could have asked proper questions of witnesses which would have inevitably elicited responses similar to those at the evidentiary hearing.

Appellee states that there was "no testimony presented that he [Mr. McMillian] partook in odd behavior upon his return . . . The only evidence present at the evidentiary hearing indicating that McMillian suffered from PTSD was the testimony of Dr. Herkov, to whom McMillian had reported the necessary symptoms for such a diagnosis." (AB, p. 29). This statement is clearly false and ignores not only the testimony of Mr. McMillian, but also of Perez Staples, Nicole Thomas, Nicole McMillian, Edward McKinnon, Keith Broomer and Dorrell Grant, all of whom 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. (PC, p. 1181, 1196-1208, 1253, 1284, 1311, 1355).

Mr. McMillian testified at the evidentiary hearing that he did provide his attorneys 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). Counsel failed to contact some of these individuals, such as Perez Staples, and the ones who were contacted were not asked questions aimed at discovering symptoms of PTSD. Indeed, 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).

With regard to counsel's failure to provide Dr. Krop with information about Mr. McMillian's genetic heritage appellee asserts that Dr. Krop was aware of Mr. McMillian's mother's intelligence and mental health issues. However, appellee argues "it is of no consequence since Dr. Krop conducted his own evaluation of McMillian, which included intelligence testing. It was McMillian's intelligence level which was relevant for purposes of the penalty phase; it was McMillian who was on trial, not is mother." (AB, p. 32). Appellee's argument ignores the main point: Dr. Krop was not provided with the necessary information from Mr. McMillian's trial counsel to perform a meaningful mental health evaluation, nor did counsel follow up on Dr. Krop's recomendations.

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. (PC, p. 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). Mr. Gazelah even 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). 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).

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).

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. Appellee attempts to deflect away from counsel's deficient performance by repeatedly shifting the focus away from counsel's ineffective investigation to Mr. McMillian. Appellee asserts "[t]he record . . . reflect[s] that McMillian never told his attorneys of any wartime experiences or symptoms of PTSD." (AB, p. 26). Appellee's assertion is wrong for two reasons. First, this analysis incorrectly shifts the investigative burden to the Defendant instead of his counsel. It assumes that the only way counsel could have obtained information was from Mr. McMilliam himself. As discussed above, counsel failed to perform even a simple search of the camps where Mr. McMillian was stationed, failed to ask relevant questions to witnesses, which would have elicited responses regarding PTSD symptoms, and completely failed to interview anyone who was overseas with Mr. McMillian.

Second, Mr. McMillian had not been previously diagnosed with PTSD and the diagnosis of PTSD means the person affected does not want to discuss the traumatic experience because it causes additional emotional trauma. It is illogical to expect a person with PTSD to tell their attorney about the emotional events which brought on the PTSD, let alone diagnose themselves, as appellee seems to think Mr. McMillian should have done.

Appellee's reliance on cases like *Funchess v. Wainwright*, 772 F.2d 683 (11th Cir. 1985), *Stewart v. Sec'y, Dep't of Corr.*, 476 F.3d 1193 (11th Cir. 2007), and *Williams v. Head*, 185 F.3d 1223 (11th Cir. 1999) is misplaced. In each of the cases cited, the defendant presented evidence to counsel that was corroborated by independent sources and then later the defendant attempted to say counsel was deficient. That is not the case here. There is no evidence anyone ever denied Mr. McMillian was expose to wartime conditions. Indeed, it appears that after counsel inquired of Mr. McMillian the issue was abandoned entirely. No witnesses were ever asked about things like behavior changes upon Mr. McMillian's return from overseas or increased use of drugs and alcohol.

Appellee contends that even if Dr. Herkov had testified to Mr. McMillian's PTSD, "his testimony, if provided at trial, would have been given little weight in light of the overwhelming evidence of McMillian's guilt and aggravating circumstances." (AB, p. 33). In other words, appellee contends that even if trial

counsel were ineffective in not presenting PTSD mitigation, prejudice has not been established simply because there was overwhelming evidence of Mr. McMillian's guilt. Appellee is incorrect. The Florida Supreme Court has held that prejudice is established when counsel fails to investigate and present evidence of mental illness and/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)).

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. ISSUE II/CLAIM 2(A): Counsel was ineffective for failing to properly investigate and interview potential mitigation witnesses who had information about Defendant's mental health, background and character.

Appellee argues that "[b]ecause McMillian did not provide the names of the witnesses to trial counsel and expressly addressed his satisfaction with the witnesses called at trial to the trial judge, he cannot now argue ineffectiveness." (AB, p. 42). However, this argument ignores the fact that "the 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 v. Smith*,

539 U.S. 510, 536 (2003). 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.

Here, counsel had evidence that Mr. McMillian was stationed overseas during a war. 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.

C. Issue III/Claim 2(C): Counsel was ineffective for failing to waive the mitigating circumstances of no significant criminal history.

Appellee claims counsel's decision not to waive the "no significant criminal history" mitigator was reasonable since the evidence the State used to rebut this mitigator was already admissible because "(1) McMillian opened the door and testified to his prior fleeing and eluding charge on cross-examination by the State; and (2) Dr. Krop's report, which had been provided to the State, addressed McMillian's prior criminal history, allowing Dr. Krop to be questioned about it on cross-examination by the State." (AB, p. 7-8). Appellee relies on *Rolling v. State*, 825 So.2d 293 (Fla. 2002) for the proposition that counsel's performance must be judged from their perspective at the time while trying to eliminate the distorting effects of hindsight.

Here, if counsel's performance is evaluated by looking at their actions at the time of trial, it is clear their decision to waive the "no significant criminal history" mitigator is unreasonable. It is typical for counsel to decide what mitigators to waive and which ones to rely on *before* trial. This means that at the time counsel decided not to waive the mitigator, Mr. McMillian had never testified, no doors had been opened and it was not foreseeable that they would be opened during the guilt phase. The fact that Dr. Krop's report addressed Mr. McMillian's prior criminal history is simply further evidence of counsel's deficient performance. If they intended to rely on the "no significant criminal history" mitigator, counsel should have moved to limit Dr. Krop's testimony to those issues relevant to his opinion.

The bottom line is that counsel's performance fell below professional norms when they failed to waive the "no significant criminal history" mitigator. By failing to waive the mitigator, counsel knew prejudicial evidence would be presented to the jury. In hindsight it is easy to say that the jury had already heard the prejudicial evidence; however, at the time the decision was made to rely on the "no significant criminal history" mitigator, such decision was unreasonable and prejudiced Mr. McMillian.

D. ISSUE IV/CLAIM 2(D): 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 Mr.

McMillian's adultery and made inflammatory comments about the victim's death.

Appelle assert that failing to object during the penalty phase closing argument was not ineffective because such comments were based on facts in evidence. However, 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 and prejudices of the jury. *Brooks v. State*, 762 So.2d 879, 900 (Fla. 2000). 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). 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)).

The prosecutor reminded the jury of Mr. McMillian's adultery no less than four times and 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). It is hard to conceive that these comments were meant for any other purpose than to inflame the prejudice and passions of the jury. There was no legal reason to keep referring to Mr. McMiallian's adultery, it was merely a

vindictive tactic meant to prejudice the jury against Mr. McMillian. Indeed, even Mr. Gazela acknowledged at the evidentiary hearing that the prosecutor made a number of inflammatory references during his penalty phase closing argument. (PC, p. 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).

The prosecutor's arguments during penalty phase closing argument amounted to non-statutory aggravating circumstances and were meant to taint the minds of the jurors. Accordingly, trial counsel should have objected. Counsel's failure to object was unreasonable and prejudicial. 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.

E. ISSUE V/CLAIM 1(A)(b): Counsel was ineffective for failing to investigate the circumstances giving rise to notification of the police that Mr. McMillian's medical condition had improved and that police were allowed access to Mr. McMillian before he had an opportunity to confer with counsel.

Appellee argues, "Till argued the very issue McMillian complains was not argued in his brief – that his statements were not voluntary based on his medical condition." (AB, p. 61). This argument completely ignores the fact that at the evidentiary hearing, Mr. Till acknowledged his Motion to Suppress failed to state any grounds upon which to suppress Mr. McMillian's statement, he never spoke

with Dr. Krop about whether the gunshot wound affected Mr. McMillian's memory and he never called Dr. Krop, or any expert, to testify about why Mr. McMillian's treatment could have affected his statement to the police. (PC, p. 743, 749-750). Appellee asserts that the video of Mr. McMillian's interrogation at Shands along with testimony of the interrogating officers that his statements were knowing and voluntary is the best evidence of Mr. McMillian's medical condition. (AB, p. 62). However, the issue of whether Mr. McMillian's statements were freely and voluntarily made 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.

In response to Mr. McMillian's assertion that counsel was ineffective for failing to raise Sixth Amendment claims in the motion to suppress relating to statements about the attempted murder, appellee argues that prejudice has not been established because Mr. McMillian must demonstrate that the motion to suppress would have been successful. (AB, p. 63). Appellee does not address Mr. McMillian's 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 because it is clear these claims would have been successful. 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. 1st DCA 1999). 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.

Mr. McMillian is not claiming that counsel did not prevail on the motion to suppress, as appellee claims. Rather, Mr. McMillian is claiming that counsel failed to argue that his statements relating to the attempted murder should have been suppressed since he was already represented by counsel on that charge. Mr. McMillian is also claiming that counsel was deficient because counsel failed to call any witness who could have accurately explained Mr. McMillian's medical condition at the time his statements were made. Had counsel competently litigated the motion to suppress, it is likely the court would have granted the motion and Mr. McMillian would have only received life.

F. ISSUE VI/CLAIM 1(A)(c): Counsel was ineffective for failing to move to suppress Mr. McMillian's statements regarding the attempted murder charge on which he had been absentee booked and all other statements made January 29, 2009 as fruit of the poisonous tree.

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. 520-521.) Rather, the groundless Motion simply declares that Mr. McMillian's "constitutional rights were violated" without further support. (*Id.*) Mr. Till testified at the evidentiary hearing 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. (PC, p. 737-738). When asked why, Mr. Till stated, "I don't know." (*Id.* at 756-757).

Both Till and appellee rely heavily on *Montejo v. Louisiana*, 556 U.S. 778 (2009), which they assert stands for the proposition that a defendant may waive his Sixth Amendment right to counsel whether or not he's already represented. (DIR. ROA, p. 755) (AB, p. 67). However, their reliance ignores that 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). 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. Accordingly, under *Owen*, any waiver in the absence of counsel was invalid sine it was the police who initiated questioning.

Appellee's reliance on *Montejo* is misplaced and does not address *Owen.* Counsel was ineffective in outright neglecting to make any argument regarding Mr. McMillian's Sixth Amendment right to counsel and failing to challenge his statements relating to the attempted murder charge on that basis. 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).

G. ISSUE VII/CLAIM 1(B): Counsel was ineffective for failing to move to redact statements made by the police during their recorded interview of Mr. McMillian which contained victim impact information, hearsay that was not otherwise admissible, and personal beliefs in Mr. McMillian's guilt and/or the implausibility of his version of events.

Appellee argues that Mr. McMillian's reliance on *Martinez v. State*, 761 So.2d 1074 (Fla. 2000) is misplaced because *Martinez* dealt with the admissibility of opinion testimony elicited from law enforcement during trial and Mr. McMillian's case involved opinion testimony presented to the jury in the form of an interrogation video. (AB, p. 71). Appellee's argument is illogical and ignores

the cases cited by Mr. McMillian which stem from *Martinez*. Specifically, the Florida Supreme Court found in *Jackson v. State*, 107 So. 3d 328 (Fla. 2012) 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."

Mr. McMillian's case is similar to *Jackson*, 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. Appellee argues Mr. McMillian was not prejudiced by the admission of such statements because they provided context to Mr. McMillian's statements. (AB, p. 72). 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 the 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.

H. ISSUE VIII/CLAIM 1(D): Counsel was ineffective for moving to consolidate Mr. McMillian's capital homicide with the separate offense of attempted first degree murder of a law enforcement officer because consolidation was contrary to the law, was a denial of Mr. McMillian's due process rights and this "strategy" was never discussed with him.

Appellee dismisses this claim stating, "[u]ndoubtedly, the evidence of the other crime would have been admitted." (AB, p. 77). Appellee relies heavily on the evidentiary hearing testimony of the prosecutor, Bernie de la Rionda, that he had anticipated filing a motion to consolidate or a Williams Rule motion on behalf of the State. (AB, p. 75). In addressing whether joinder was proper, appellee states "[i]t is clear that the two charges in this case were related. However . . . the focus here should be on whether trial counsel was ineffective for seeking consolidation." (AB, p. 76).

First, appellee asserts that the two cases were related but does not discuss how. 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. Further, 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. Therefore, Mr. Till should have been aware of the law governing consolidation and should have realized that consolidation was grossly inappropriate. Had the State moved to consolidate or filed a Williams Rule

notice, Mr. Till should have objected because the only 'connection' was Mr. McMillian's alleged guilt in both cases.

Second, in determining whether trial counsel was ineffective for seeking consolidation, the starting point should be whether such a "strategy" comported with the law. As discussed, consolidation was improper. The fact Mr. Till hoped his "strategy" would result in the jury finding Mr. McMillian not guilty of the attempted murder, or guilty of a lesser included offense, does not change the fact Mr. McMillian was severely prejudiced when the jury heard a multitude of evidence regarding the attempted murder charge, which ultimately bolstered proof of the capital murder charge. Additionally, the timing of the motion to consolidate suggests that counsel was not ready for trial on the attempted murder charge and moved to consolidate solely to gain additional time for trial.

I. ISSUE IX/CLAIM 1(E): Trial counsel was ineffective for failing to object to the testimony of the victim's parents, Janice and Harold Stubbs, and to State's exhibit # 54.

Appellee contends that the testimony of the victims' parents "was relevant to the State's case and was not present solely to elicit sympathy from the jury." (AB, p. 77). Appellee claims that Mr. McMillian's reliance on *Lewis v. State*, 377 So.2d 640 (Fla. 1979) and *Ashmore v. State*, 214 So.2d 67 (1st DCA 1968) is misplaced because the testimony of the victim's parents:

> addressed Danielle's relationship with McMillian prior to her death, her move, this conversation which had transpired between Janice

> Stubbs and McMillian regarding the end of the relationship with Danielle, the events of the day on which Danielle's body was discovered, McMillian's calls to Janice regarding Danielle's whereabouts, and the condition of her townhome. It is clear that the State did not present the testimony of Mr. and Mrs. Stubbs to garner sympathy, but rather to show motive, opportunity, to show when she was killed, where and how.

(AB, p. 85).

Appellee's assertion that the State presented the testimony of the victim's parents to show motive, opportunity, and when, where and how she was killed does not change the fact that any probative value of their testimony was completely outweighed by the prejudice to Mr. McMillian. The probative value of the testimony provided by the mother was substantially outweighed by the danger of unfair prejudice. 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. The prejudicial nature of the mother's testimony was evidenced by the victim's brother causing an outburst in the courtroom as a result of the testimony. 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.

The father provided additional testimony describing the condition of the crime scene. However, 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.

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. 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.

J. ISSUE X/CLAIM 1(F): Counsel was ineffective for allowing Detective Wolcott to testify to cell phone information without objection as such information violated Mr. McMillian's right to confrontation and permitted Detective Wolcott to give opinions without having been qualified as an expert.

Appellee argues "Wolcott testified to information which is common knowledge to anyone who owns and uses a cell phone in today's world." (AB, p. 89). 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. 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.

K. ISSUE XI/CLAIM 1(H): Counsel was ineffective for failing to object to inflammatory guilt phase closing argument by the prosecutor which resulted in a denial of Mr. McMillian's due process right to a fair trial.

Appellee argues that counsel was not ineffective in failing to object during the guilt phase closing argument because the prosecutor's comments were based on facts in evidence and therefore admissible. (AB, p. 90). However, even Mr. Till recognized that many of the comments in the prosecutor's closing argument were improper. With regard to comments about Mr. McMillian's adultery, 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." (PC, p. 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 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).

Appellee relies on *Ferguson v. State*, 593 So.2d 508 (Fla. 1992) for the proposition that as long as the prosecutor does not dwell upon improper comments and they were not severely inflammatory or damaging, counsel's failure to object does not amount to ineffective assistance of counsel. (AB, p. 96). Appellee then goes on to assert that "[b]ased on the fact that the comments were brief, none of the comments were improper and even if they were, Till's trial strategy not to object was reasonable. . . ." (AB, p. 96).

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 juror's emotions and fears. As such, there can be no doubt that the comments were severely inflammatory and damaging warranting an objection from trial counsel.

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 20th day of May, 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
Ann E. Finnell, Fla. Bar No.: 0270040
FINNELL, MCGUINNESS, NEZAMI, & ANDUX, P.A.
2114 Oak St.
Jacksonville, FL 32204
Phone: 904-791-1101
AFinnell@fmnlawyers.com