

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NUMBER: SC17-1486

LOWER TRIBUNAL CASE NUMBER: 16-2010-CF-001450-AXXX-MA

CECIL SHYRON KING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

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, especially because of the seriousness of the claims at issue.

PRELIMINARY STATEMENT

This proceeding involves the appeal of the Fourth Circuit Court's denial in part of Mr. King's Third Amended Motion to Vacate Judgment and Sentence Under Rule 3.851 with Special Request for Leave to Amend and Defendant's Supplement to his Sixth Amended Motion to Vacate Judgments of Conviction and Sentence ("Third Amended Motion Under 3.851"). The motion was brought pursuant to Fla. R. Crim. Pro. 3.851. The trial court granted penalty phase relief under Rule 3.851 due to error under *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d (Fla. 2016). Accordingly, this appeal does not address the penalty phase.

Cecil King will be referred to as "Mr. King." 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 volume number and page number, e.g. (DIR. ROA, Vol. I, 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 page number, e.g. (DIR. ROA, Exh. 1, p. 1).

STATEMENT OF THE CASE

This is an appeal of the Fourth Circuit Court's denial in part of Mr. King's Third Amended Motion to Vacate Judgment and Sentence Under Rule 3.851 with Special Request for Leave to Amend and Defendant's Supplement to his Sixth Amended Motion to Vacate Judgments of Conviction and Sentence, brought pursuant to Fla. R. Crim. Pro. 3.851.

Mr. King was charged by indictment on March 25, 2010, with one count of murder in the first degree for the death of Renie Telzer-Bain, which occurred on or between December 28, 2009, and December 29, 2009, one count of armed burglary with assault or battery, one count of grand theft auto, one count of dealing in stolen property, and one count of false verification of ownership on pawnbroker transaction form (less than \$300 received). On February 6, 2010, the Office of the Public Defender for the Fourth Judicial Circuit was appointed to represent the Mr. King. Assistant Public Defenders, Quentin T. Till, Refik W. Eler, and Debra D. Billard were assigned to handle Mr. King's case by the Public Defender's Office.¹ Mr. Till was the lead attorney for Mr. King's guilt phase of trial and Mr. Eler was the lead attorney for Mr. King's penalty phase of trial. On March 30, 2010, the State Attorney's Office for the Fourth Judicial Circuit filed a Notice of Intent to Seek the Death Penalty. Trial commenced with jury selection on April 4, 2011.

The trial ended on April 8, 2011, with a jury verdict of guilty as to each charge. Mr. King was adjudicated guilty on each count. On April 14, 2011, the penalty phase commenced before the same jury that was empaneled for the guilt

¹ Shawn Arnold, a private attorney, was permitted by the trial court to assist in Mr. King's defense.

phase. The jurors returned a verdict recommending the death penalty by a vote of 8-4 for one count of capital murder. A *Spencer* hearing commenced on May 25, 2011. Following the *Spencer* hearing, on October 27, 2011, the court sentenced Mr. King to death for the murder of Renie Telzer-Bain. The court found several mitigating factors. *King v. State*, 130 So. 3d 676, 683 n.3 (Fla. 2013).

Mr. King timely filed his initial Motion to Vacate Judgments of Conviction and Sentence on February 24, 2015, and his Amended Motion to Vacate Judgments of Conviction and Sentence on August 26, 2015. The post-conviction court conducted a case management conference on August 27, 2015. The Court granted an evidentiary hearing on Grounds One, Two, Three, and Four, including all of the sub-claims contained within those grounds; the Court denied an evidentiary hearing on Grounds Five and Six. Mr. King filed a Second Motion for Leave to Amend Defendant's Motion to Vacate Judgment and Sentence Under Rule 3.851 With Special Request for Leave to Amend and Motion to Enlarge Page Limitations on February 8, 2016, to address the United States Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), which was granted by the Court on February 16, 2016. On March 14, 2016, Mr. King filed a Third Motion for Leave to Amend Defendant's Motion to Vacate Judgment and Sentence Under Rule 3.851 With Special Request for Leave to Amend and Motion to Enlarge Page Limitations, which was later granted by the court. The State filed its Answer on March 21, 2016. On October 19, 2016, and October 21, 2016, respectively, Mr. King filed a Fourth and Fifth Motion for Leave to Amend Defendant's Motion to Vacate Judgment and Sentence Under Rule 3.851 With Special Request for Leave

to Amend and Motion to Enlarge Page Limitations to address the Florida Supreme Court's ruling in *Hurst v. State*, 202 So. 3d (Fla. 2016), which were later denied without prejudice by the court on October 26, 2016. On January 27, 2017, Mr. King filed a Sixth Motion for Leave to Amend Defendant's Motion to Vacate Judgment and Sentence Under Rule 3.851 With Special Request for Leave to Amend and Motion to Enlarge Page Limitations to address the United States Supreme Court's ruling in *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and the Florida Supreme Court's ruling in *Hurst v. State*, 202 So. 3d (Fla. 2016) and *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), which the court later denied without prejudice, with leave to file a motion which contained the additional *Hurst v. Florida* and *Hurst v. State* claims on February 1, 2017. On February 7, 2017, Mr. King filed Defendant's Supplement to his Sixth Amended Motion to Vacate Judgments of Conviction and Sentence under Rule 3.851 based upon *Hurst v. Florida* and *Hurst v. State* and the State filed its Answer on March 10, 2017.

An evidentiary hearing was conducted on February 16, 2016, through February 19, 2016; November 3, 2016; and February 1, 2017. On May 11, 2017, the State and Defendant's post-conviction counsel made legal arguments on Defendant's Supplemental Motion. After hearing oral arguments of counsel on Defendant's Supplement to his Sixth Amended Motion to Vacate Judgments of Conviction and Sentence Under Rule 3.851 Based Upon *Hurst v. Florida* and *Hurst v. State* and the State's Answer to Defendant's *Hurst* Claim, the court made an oral ruling on May 11, 2017, for Mr. King to be granted a new penalty phase in

light of *Hurst v. Florida* and *Hurst v. State*. On June 9, 2017, Mr. King filed his “Written Closing Argument” and the State filed the “State’s Corrected Postconviction Hearing Memorandum of Law” to “correct minor typographical errors” on June 22, 2017. The trial court denied, in part, Defendant’s Third Amended Motion to Vacate Judgment and Sentence Under Rule 3.851 with Special Request for Leave to Amend and Defendant’s Supplement to his Sixth Amended Motion to Vacate Judgments of Conviction and Sentence Under Rule 3.851 Based Upon *Hurst v. Florida* and *Hurst v. State* on July 11, 2017. Mr. King timely filed a Notice of Appeal on August 8, 2017, commencing the instant proceedings.

STATEMENT OF THE FACTS

On direct appeal, this Court outlined the facts elicited in trial. *See King v. State*, 130 So. 3d 676 (Fla. 2013). Mr. King here discusses the additional facts elicited during the Rule 3.851 proceedings.

On February 1 and 5, 2010, detectives interviewed Mr. King. The contents of these interviews were played to the jury during Mr. King’s trial without a single objection from trial counsel, despite there being nearly two dozen statements that allowed the jury to hear the officers’ opinion of Mr. King’s guilt, their belief that Mr. King was a liar, that Mr. King’s story of innocence was a falsehood, that Mr. King was a “cold-blooded” murderer with no remorse, and that the officers had the “right guy” because they had insurmountable evidence against Mr. King.

When asked about trial counsel’s failure to object while Mr. King’s interviews were played for the jury, Mr. Eler testified he delegated all

responsibility of the redactions of the interrogation to Mr. Till, and that he did not review the interrogation tapes because that was Mr. Till's portion of the trial. (PC, p. 4804.) Mr. Till testified that he probably did not do a perfect job in the redactions. (*Id.* at 4976.) Mr. Till stated that though he filed a motion to suppress prior to trial, he never thought to object during trial because he had spent nearly "one hundred hours" working with the State regarding the redactions from the interrogations. (*Id.* at 4953-55, 4975-76.) Mr. Till and the defense team were appointed as attorneys for Mr. King on August 6, 2010—eight months prior to the start of trial—yet Mr. Till testified he did not have the ability to go over the redactions line by line. (*Id.* at 4976.)

At trial, Detective Cayenne testified to a significant amount of information of which he did not have first hand knowledge. When asked about trial counsel's failure to object to the multiple improper hearsay statements elicited through Detective Cayenne's testimony, Mr. Eler testified he did not object to these statements because it was Mr. Till's portion of the trial. (*Id.* at 4823.) Mr. Till testified he does not object all of the time and considered whether the statements really hurt Mr. King. (*Id.* at 4979.) Mr. Till testified that the statements "may be improper, but who cares if it's not prejudicial?" (*Id.* at 4979.) Mr. Till testified he believes it's a "sign of a younger lawyer who objects to everything that's trying to be brought out." (*Id.* at 4979.)

Numerous inferences were made about a bloody shirt that was found at Mr. King's home at trial, yet the shirt had no relation to the case, something to which the State later conceded. (PC, pgs. 4960-61) (DIR. ROA, Vol. XV, pgs. 1021-22.)

Mr. Till, who handled the cross-examination of Detective Cayenne, testified that the “bloody shirt was a smoke screen. It had nothing to do with this case.” (PC, pgs. 4960-61.) He further testified that he didn’t know “why it got blown out of -- out of proportion. It was a --a shirt that Cecil King was surprised in the interrogation tape and--and was not Cecil King’s blood type, it was not Ms. Telsor’s [sic] blood type. It was just like a red herring or something just thrown in there.” (*Id.* at 4960-61.)

The items presented by the State at trial included a bloody shirt, which did not include King’s DNA and which the State conceded was irrelevant, hairs and fibers found on the bloody shirt, the victim’s socks, the victim’s fingernail clippings, and DNA found on a piece of cantaloupe at the murder scene which was the only DNA linking Mr. King to the murder. When trial counsel was asked about hiring experts, Mr. Till testified the Public Defender’s Office has the ability to hire confidential experts. (*Id.* at 4980.) Mr. Eler similarly testified he could have hired a confidential DNA expert, and that in fact, Mr. Till spoke with Mr. Budowle, a DNA expert. (*Id.* at 4794-95.) After consulting with Mr. Eler, Mr. Till made the decision not to hire a DNA expert to test the above referenced items and testify on Mr. King’s behalf. (*Id.* at 4982.) Mr. Till testified it was Mr. Eler who would have had to retain a confidential DNA expert for the defense, as Mr. Eler wrote the checks at the Public Defender’s Office. (*Id.* at 4984.)

Mr. Hitt, the State’s DNA expert testified in the guilt phase of trial as to the DNA results. (DIR. ROA, Vol. XVI, pgs. 1201-88.) Mr. Eler testified it would have been important for Mr. Budowle to look at Mr. Hitt’s results to see if there

were any issues regarding the cantaloupe testing or the type of DNA detected on the cantaloupe. (*Id.* at 4795.) Mr. Eler stated if there was no saliva found on the cantaloupe, an attorney could argue the “different forms and trans -- emissions and deposits” of the DNA. (*Id.* at 4795-96.) Neither Mr. Till nor Mr. Eler could remember if Mr. Hitt’s report or bench notes were ever examined by Mr. Budowle, who had a conversation with Mr. Till on February 28, 2011; trial counsel ultimately made the decision not to hire Mr. Budowle *before* Mr. Hitt’s deposition on March 15, 2011, a mere twenty (20) days before trial. (*Id.* at 4834-35, 4988-89.)

Kevin Noppinger, a DNA expert retained by post-conviction counsel, reviewed the Florida Department of Law Enforcement’s (FDLE) “FDLE,” results as well as Mr. Hitt’s testimony and deposition, and did not agree with some of the FDLE’s findings. (*Id.* at 5646-50.) Mr. Noppinger opined the partial DNA profile obtained from the victim’s two socks had foreign alleles, which did not match the victim, Myles Telzer, or Mr. King. (*Id.* at 3310.) Mr. Noppinger determined the bloody tank-top shirt that was paraded in front of the jury was never searched in CODIS. (*Id.* at 5649.)

DNA expert Noppinger testified the particular part of the cantaloupe melon at issue could have been frozen for further testing at a later time. (*Id.* at 3306-07.) Mr. Noppinger testified the cantaloupe was never tested to conclusively show it was specifically saliva DNA found on the cantaloupe melon; Mr. Noppinger testified that by retesting the cantaloupe other individuals could have been included to link another person to the cantaloupe or to show a second or third person at the crime scene. (*Id.* at 3307, 3340.)

Mr. Noppinger testified more testing could have been done with the victim's socks than what was performed by the FDLE. (*Id.* at 3308-09.) Mr. Noppinger testified FDLE should have reported foreign alleles were detected on this item, as the foreign alleles indicated DNA from another individual, not consistent with Mr. King, was present on the socks. (*Id.* at 3319-20.) Mr. Noppinger testified the foreign alleles were insufficient for inclusion purposes, but could have been used for exclusion purposes, as they were human. (*Id.* at 3318-19.) Mr. Noppinger testified Mr. Hitt's bench notes did not indicate from where on the socks the swabbing was taken. (*Id.* at 3311.) The State's expert at Mr. King's evidentiary hearing, Ms. Clark, testified the entire sock was swabbed. (*Id.* at 4396-4401.)

Mr. Hitt and Mr. Noppinger found no DNA present in the victim's fingernail clippings. (*Id.* at 3327-28.) However, Mr. Noppinger did testify that a Y-chromosome testing kit could possibly find a male DNA sample under the victim's fingernails, which was not performed by FDLE. (*Id.* at 3341-42.) Mr. Noppinger testified it would have been important to have a qualified lab technician review the hairs and fibers to determine if they were of evidentiary value and whether further testing was necessary. (*Id.* at 3312.)

As to the hair and fibers on the bloody shirt, Mr. Noppinger testified that they could have been checked, but acknowledged that often not all evidence collected is tested, only the most important. (*Id.* at 3332-37.) Mr. Eler testified evidence not tested by the FDLE may have been important to develop an alternate suspect and it would have been important to try to put someone else at the crime scene, even if it was with Mr. King. (*Id.* at 4799-4800.) Yet, Mr. Eler testified that

he “think[s] [the defense attorneys] just made the tactical and strategic decision based on what [they] knew in the case . . . and [they] didn’t want it to contradict the theme of the case. So that’s why it wasn’t done.” (*Id.*)

When asked why trial counsel did not retain or consult with a shoe print expert, Mr. Till testified the footprints were found in the yard and on the door, which were not the point of entry to the house and therefore were not relevant. (*Id.* at 4962.) Various shoeprints were found at other locations at the victim’s residence including outside the garage door, where it appeared someone tried to kick the door in, and outside the fence. (DIR. ROA, Vol. XIII, pgs. 596-99.)

Mr. Bodziak, who was retained by post-conviction counsel testified the door itself was not seized and preserved for future testing and therefore, it was difficult to take a two-dimensional impression in residue or mud. (PC, pgs. 3354-55.) Mr. Bodziak testified if a shoe size is at issue, one should identify the brand of shoe and obtain samples from the manufacturer in different sizes to determine the actual shoe size. (*Id.* at 3357.) Mr. Bodziak testified comparisons were never made from these shoe impressions. (*Id.* at 3357-58.)

Trial counsel allowed Detective Pfister to testify to the dimensions of the shoeprint, and the State later conceded Detective Pfister “was never qualified as a shoe expert, [or] a shoeprint expert.” (*Id.* at 3353.) Detective Pfister testified the measurement of the shoe print on the victim’s door was around 11.61 inches. (PC, p. 3359) (DIR. ROA, Vol. XIII, p. 599.) Mr. Bodziak found this testimony not credible, as he measured the shoeprint to be around 11.41 inches, which is equivalent to a size 8 or 9 shoe. (PC, pgs. 3359-60.) Mr. Bodziak further testified

that the casts of the shoeprints were never cleaned and were covered in soil. (*Id.* at 3362.) Mr. Bodziak examined the casts of the shoeprints and was able to determine the shoe brand was a Nike Air Tail Wind, which was later discontinued by Nike. (*Id.* at 3362-63.) Mr. Bodziak testified that the only accurate way to obtain measurements “was to seize the door,” which is no longer available to King. (*Id.* at 3366.)

When asked why trial counsel failed to retain a latent print expert, Mr. Till mentioned that he was worried that any additional evidence on the issue may have opened the door to other damaging testimony for Defendant. (*Id.* at 4962-63.) Mr. Eler testified the defense team collectively decided not to retain or consult with a fingerprint expert. (*Id.* at 4748.)

Mr. Brown testified the ziplock container lid found on the counter of the east wall in the kitchen was of evidentiary value and contained prints of someone other than Mr. King. (*Id.* at 3464-70.) Mr. Brown, who was hired by post-conviction counsel, was able to exclude Mr. King from the lid. (*Id.* at 2711.) At trial, Thomas Howell, the State’s latent print expert, testified the print on the lid was of no value. (DIR. ROA. Vol. XIV, p. 863.) Post-conviction counsel identified this latent print as belonging to Myles Jared Telzer. (PC, pgs. 4266-67.)

Trial counsel was asked about their failure to retain a cellphone expert to rebut Detective Cayenne’s testimony and to rebut Detective Cayenne's misleading statements presented by the State to the jury prejudicing Mr. King's case. Mr. Eler testified that it was Mr. Till’s decision to not retain, consult, or present a cell phone expert. (PC, p. 4748.) Mr. Eler also testified it would have been helpful if they had

been able to show Detective Cayenne was not qualified to testify regarding the cell phone. (*Id.* at 4803.)

Post-conviction counsel consulted and retained Robert Wyman, an expert in GPS and cell phones. After Mr. Wyman was presented with cell phone records in Mr. King's case, Mr. Wyman testified there were three towers of interest in this case, but there was no information presented at the trial about the range of any tower or antenna. (*Id.* at 3401.) There was no data as to direction within the records provided, testified Mr. Wyman, other than a coded number with no database showing what the decoded number is. (*Id.* at 3402.) Mr. Wyman testified this was important because only someone from the phone company could determine the directionality of the tower at that time, not a detective. (*Id.* at 3402-03.) Mr. Wyman testified a dish has nothing to do with helping a person determine what direction the call was coming from or directionality of the signal, contrary to Detective Cayenne's testimony. (*Id.* at 3412.) The way that a tower faces and the structure of the tower has nothing to do with directionality; it is only the antennas mounted to the tower that determine this. (*Id.*) Without an azimuth,² there is no way to know what direction the antenna was pointing. (*Id.* at 3413.) Mr. Wyman stated without this information from the cell phone company, no one, not even an expert, could give a specific direction from a tower or tell how far away from the tower Mr. King's phone was. (*Id.* at 3414-15.)

At trial, the State played portions of controlled wire tapes between Rashad Montfort and Mr. King at trial, and told the jury this was only part of the

² An azimuth was explained in depth by Mr. Wyman at the evidentiary hearing.

conversation. (DIR. ROA, Vol. XIII, pgs. 726-27.) The State stopped the wire tapes at several locations. (DIR. ROA, Vol. XIII, pgs. 726-40.) The State asked Mr. Montfort to explain what was said during the conversation between Mr. Montfort and Mr. King. *Id.* When trial counsel was asked which attorney was responsible to cross-examine Mr. Montfort on these issues, Mr. Eler testified it was Mr. Till's responsibility. (PC, p. 4824.)

On the two wire tapes, Mr. King did not admit that he loaned the vehicle to Mr. Montfort. Mr. Montfort testified that Mr. King loaned him the victim's vehicle and that both he and Mr. King had a conversation about Mr. King loaning him the vehicle, but there is no evidence on the wire tapes that Mr. King admitted to loaning Mr. Montfort this vehicle, having possession of this vehicle, or having the keys to the vehicle. (DIR. ROA, Vol. XIII, pgs. 732-40.) Mr. King's fingerprints were also never found inside of the vehicle. (DIR. ROA, Vol. XVI, p. 1349.)

SUMMARY OF THE ARGUMENTS

The post-conviction court erroneously denied Grounds II, VI, and VIII raised in Mr. King's Third Amended Motion Under 3.851. The evidentiary hearing demonstrated Mr. King's trial counsel failed to provide effective assistance of counsel in accordance with *Strickland v. Washington*, 466 U.S. 688 (1984). The court erred in failing to find that counsel provided prejudicially ineffective assistance on the following grounds:

Ground II – Trial counsel was ineffective at the guilt phase for failing to present evidence and challenge the State's case;

Ground VI – Trial counsel was ineffective at the guilt phase of trial and when the errors are viewed individually and cumulatively, it cannot be considered harmless;

Ground VIII – Trial counsel was ineffective at the guilt phase of trial for failing to make proper objections during statements made in the State’s First and Second Closing Arguments, in failing to object to Rashad Mr. Montfort’s testimony, and in failing to object to Detective Cayenne’s testimony.

ARGUMENT

A. INTRODUCTION

After conducting an evidentiary hearing, the post-conviction court erred in finding that Mr. King failed to establish deficient performance by trial counsel and prejudice at the guilt phase of his capital trial in violation of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and his corresponding rights under the Florida Constitution. Further, Mr. King’s convictions are materially unreliable due to trial counsel’s deficient performance throughout the entirety of Mr. King’s case. Trial counsel, for example, did not conduct a proper investigation; failed to object to numerous inadmissible and improper statements throughout Mr. King’s trial and the State’s closing arguments; and failed to put on a *single* expert witness regarding DNA, shoeprint impression, cell phone, or latent print evidence.

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 Court most recently found ineffective assistance of counsel in *Ellerbee v. State*, 2017 WL 6523682 (Fla. Dec. 21, 2017), holding that the two requirements of an ineffective assistance of counsel claim, counsel's performance was deficient and the deficiency prejudiced the defendant, were met. *Id.* at *5. The Court has further stated:

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.

Maxwell v. Wainwright, 490 So. 2d. 927, 932 (Fla. 1986) (citations omitted). In *Occhicone v. State*, 768 So.2d 1037 (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.” *Id.* at 1048.

Accordingly, ineffective assistance of counsel has been found where trial counsel’s failure to communicate led to a deficient trial presentation. The Eleventh Circuit Court of Appeals has held that an “attorney is not necessarily required to investigate every evidentiary lead; an attorney's decision to limit his or her investigation may be reasonable under the circumstances. . . . [h]owever, such decisions must flow from an informed judgment.” *Harris v. Dugger*, 874 F.2d 756, 763 (1989). In *Harris*, the Court held that where two lawyers were duly responsible for a case, and both believed the other was responsible for preparing for a specific aspect of trial, the lawyer’s failure to prepare precluded them from making strategic decisions and they thus rendered inadequate assistance of counsel.

Id. at 763. *See also Blake v. Kemp*, 758 F.2d 523, 533 (11th Cir. 1985) (attorney’s failure to make any preparations during the penalty phase of a capital murder trial “deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness.”).

Similarly, the Court held that where a lead attorney, who was working on two criminal cases simultaneously, stated, on the record, that he was exhausted and could not his client a “fair trial today or this week” was ineffective when he did not adequately prepare for his client’s trial. *See King v. Strickland*, 748 F.2d 1462 (1984) (facts stated in *King v. Strickland*, 714 F.2d 1481 (1983)). 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. 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. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, *Brewer v. Aiken*, 935 F.2d 850 (Fla. 7th Cir. 1991), or on the failure to properly investigate or prepare. *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

A reasonable strategic decision is based on *informed* judgment. *Henry v. State*, 862 So.2d 679, 685 (Fla. 2003).

Additionally, a reasonable defense strategy requires consultation with expert or introduction of expert evidence. As the United States Supreme Court noted:

Prosecution experts, of course, can sometimes make mistakes. Indeed, we have recognized the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts, noting that “[s]erious deficiencies have been found in the forensic evidence used in criminal trials One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) (citing Garrett & Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L.Rev. 1, 14 (2009)). This threat is minimized when the defense retains a competent expert to counter the testimony of the prosecution’s expert witnesses; it is maximized when the defense instead fails to understand the resources available to it by law.

Hinton v. Alabama, 134 S. Ct. 1081, 1090 (2014). Counsel has an obligation to conduct a thorough investigation of a defendant’s background. *Porter v. McCollum*, 558 U.S. 30, 39 (2009); *see also Wiggins v. Smith*, 539 U.S. 510, 522 (citing to the ABA Standards for Criminal Justice and “establishing that ‘thorough investigation[s]’ are ‘virtually unchallengeable’ and underscoring that ‘counsel has a duty to make reasonable investigations’”); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Williams v. Taylor*, 529 U.S. 362 (2000). 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).

Counsel's prejudicial deficiencies here were similar to the deficiencies of counsel in the above-cited cases. Counsel here provided ineffective assistance under the standards of the Sixth and Fourteenth Amendments.

Finally, it should be noted that this Court has previously been faced with ineffective assistance of counsel claims from the very counsel in Mr. King's case, and found counsel to be ineffective for not adequately preparing for trial and providing counsel with proper representation. *See Bevel v. State*, 221 So. 3d 1168 (2017) (finding Mr. Eler and his co-counsel ineffective for conducting a constitutionally inadequate mitigation investigation and remanding for a new penalty phase).

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); *see Cuyler v. Sullivan*, 446 U.S. 335, 341-42 (1980) ("Whether effective assistance has been afforded is a mixed question of law and fact"). The trial court's factual findings that are supported by competent, substantial evidence are given deference, but legal conclusions are reviewed de novo. *See Sochor*, 883 So. 2d at 771-72; *Mungin v. State*, 932 So.2d 986, 998 (Fla. 2006).

C. MR. KING WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL AND SUCH FAILURES TO PRESENT EVIDENCE AND CHALLENGE THE STATE'S CASE

PREJUDICED THE OUTCOME OF MR. KING'S GUILT PHASE PROCEEDINGS IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 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 Ground Two of Mr. King's Third Amended Motion under Rule 3.851. All of Defendant's sub-claims relate to trial counsel's ineffective assistance of counsel during the guilt phase. After the evidentiary hearing, the post-conviction court denied each sub-claim, finding that trial counsel was effective. However, this ruling has no legal basis and is not supported by competent, substantial evidence.

I. Trial counsel failed to adequately redact inflammatory statements during the interrogation video of Mr. King.

The jury was exposed to many unduly prejudicial and inadmissible statements by Detective Cayenne during his interrogation of Mr. King when trial counsel failed to object and adequately litigate the admissibility of the statements.

To show counsel's performance was unreasonable, a defendant must establish, as stated above, no competent counsel would have taken the action that his counsel did take. *See Strickland v. Washington*, 466 U.S. 668 (1984); *see also Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Williams v. Taylor*, 529 U.S. 362 (2000). Florida law is clear that a witness's opinion as to credibility, guilt, or innocence, of the accused is inadmissible. *Jackson v. State*, 107 So. 3d 328 (Fla. 2012); *see also Seibert v. State*, 923 So. 2d 460, 472 (Fla. 2006). Inflammatory comments, like those made during the interrogation video of Mr. King, are particularly troublesome when a jury is

repeatedly exposed to an interrogating officer's opinion regarding innocence and guilt because a policeman's role, much like a prosecutor's, can carry a particular significance that can be attached to the jury regarding any expression of the officer's personal beliefs.

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 recognized that ultimately, it is for the jury to decide the issue of the defendant's guilt, innocence, and credibility and thus, opinion testimony as to these issues is improper. *Id.*

On February 1 and 5, 2010, detectives interviewed Mr. King. The contents of these interviews were played to the jury during Mr. King's trial and the following, nearly two dozen statements, were played to the jury at the trial without a *single* objection:

February 1, 2010 Interview

- “What you need to know about me and him, we're two honest men. Okay? And we didn't just—obviously didn't just get in homicide because of our good looks. . . .” (DIR. ROA, Vol. XIV, p. 968.)

- “[W]e think we’re good detectives. So we know when you’re being honest and when you’re not being honest.” (DIR. ROA, Vol. XIV, p. 972.)
- “I kind of now [sic] you’re blowing smoke up my butt.” (DIR. ROA, Vol. XIV, p. 973.)
- ““Okay. That’s more than a major coinkadinky, if you know what I mean. Okay. That just—it doesn’t happen. Okay? I know the area from patrolling. Okay? Items don’t usually stay in those areas out too long in vacant apartments so- -” (DIR. ROA, Vol. XIV, p. 974.)
- “Yeah, you’re right. You’re not dumb enough. But what I think you’re thinking, you think you’re smarter than he and I. You think you’re smarter—you think you’re smarter than the judge that signed the 1.2 million bond. You think you’re smart enough, Cecil. You think—Cecil, you’ve been hanging out since the day. The big day. Okay?” (DIR. ROA, Vol. XIV, p. 989.)
- “I can tell you something again. I know you did not get those suitcases loaded with those items from that apartment, vacant behind yours. You’re rolling the dice, Cecil. Sliding back again.” (DIR. ROA, Vol. XV, p. 996.)
- “That alibi is shot. I know you did it.” (DIR. ROA, Vol. XV, p. 996.)
- “But if you keep feeding me this bullshit you ain’t going to give me a choice, man.” (DIR. ROA, Vol. XV, p. 998.)
- “And what’s it going to look like, okay, when the day of reckoning comes, like I said, you know what it’s going to look like? This motherfucker has no remorse for what he’s done. Okay? And you know what happens to guys who have absolutely no remorse for doing what happened to that lady?” (DIR. ROA, Vol. XV, p. 1000.)
- “The average Joe citizen from Jacksonville gets to look at this and gets to see all the evidence and gets to see. You know, we get to go up there and tell everybody what you told us and the different lies that we caught you in.” (DIR. ROA, Vol. XV, p. 1012.)
- “And where we match DNA at and where we match fingerprints at, what each witness says. All right? And I can tell you now the picture that’s

being painted in a cold-blooded, ruthless, bastard. Yes, sir. Yes, sir. 83 year old women.” (DIR. ROA, Vol. XV, p. 1012.)

- “[T]o see what you’re looking and man up sitting in that comer because you look like a cold-blooded murderer.” (DIR. ROA, Vol. XV, p. 1014.)
- “You’re taking—you’re taking a big chance on this a lot of things there, Cecil. All right? You took a big chance sitting here in that comer feeding us that bullshit for three hours.” (DIR. ROA, Vol. XV, p. 1016.)
- “I believe—I believe you’ll come up with a story about that. Some—some sterling silver was found in your residence.” (DIR. ROA, Vol. XV, p. 1017.)
- “Never going to do it [confess].” You ought to be ashamed of yourself, man.” (DIR. ROA, Vol. XV, p. 1019.)

February 5, 2010 Interview

- “You have the opportunity to show some remorse.” (DIR. ROA, Vol. XV, p. 1045.)
- “‘Here’s where we’re at, bro. We know it. We-We’ve got the right guy. How are you-how are we going to perceive you?’ ‘Don’t stick to your story, man. It’s not-it’s not going to look good. Tell us the truth.’” (DIR. ROA, Vol. XV, p. 1046.)
- “There’s nobody that’s going to believe that you came across some bag at some abandoned apartment that had both of this lady’s stuff in it and, oh, yeah, your DNA is in the murder scene. There’s nobody that’s going to believe you, bro, because it’s not the truth. Okay? We know that. . . .” “‘It’s that good of a case.’ ‘Right now it looks like because you planned a fricking murder to go over and kill an 83 year old lady.’” (DIR. ROA, Vol. XV, p. 1050.)
- “We sit in this room all the time, man, and talk to people. But you got to tell us the truth, man. What you’ve told us is not the truth. We know that. No doubt about it. You can sit there and shake your head and it’s going to go away. Okay? Because it’s worse with you shaking your head with no explanation. Just tell us why.” (DIR. ROA, Vol. XV, pgs. 1050-51.)

Both individually and collectively, these comments, *none* of which were objected to, allowed the jury to hear the officers' opinion of Mr. King's guilt, their belief that Mr. King was a liar, that Mr. King's story of innocence was a falsehood, that Mr. King was a "cold-blooded" murderer with no remorse, and that the officers had the "right guy" because they had insurmountable evidence against Mr. King. Allowing the jury to hear these statements was not harmless error.

Trial counsel's failure to object while the interviews were played was explored during the evidentiary hearing. Mr. Eler testified that he delegated all responsibility of the reactions of the interrogation videos to Mr. Till, and that he did not review the interrogation tapes because that entered Mr. Till's arena of responsibility in the trial. Mr. Till testified that he did *not* redact everything that he could have (PC, p. 4976.) He stated that though he filed a motion to suppress *prior to trial*, he never thought to object *during* trial because he had spent nearly "one hundred hours" working with the State regarding the redactions from the interrogation videos (*Id.* at 4977.) Mr. Till did not seem to question why he was working within the confines of what the State—the *opposing counsel who was seeking to convict Mr. King*—thought was "fair" in regards to which statements from the video would be played to the jury, but he felt confident that he worked with the State "within reason" to redact whatever he wanted. (*Id.* at 4955.)

Though Mr. Till testified that he knew what Florida law was at that time, citing to *Jackson v. State*, 107 So. 3d 328 (Fla. 2012), (PC, p. 4954), he did not remove, and did not attempt to remove, all of the improper statements listed above. Even more puzzling was that, although Mr. Till and the defense team were

appointed as attorneys for Mr. King on August 6, 2010, and although Mr. Till spent a “hundred” hours working with the State on specific redactions, he somehow did not have the ability to go over the redactions line by line, especially as the trial for Mr. King did not start until April 2011. (*Id.* at 4954-55.)

The post-conviction court argued in its ruling that Mr. King failed to meet his burden in demonstrating counsel’s performance fell below an object 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 relied, in its finding, on Mr. Till’s testimony that he recalled filing a motion to obtain redactions *prior* to trial (*Id.* at 2964) but does not address the unreasonableness of why Mr. Till did not press the trial court for a ruling on each objectionable statement and why he did not object *during* trial; the court simply accepted Mr. Till’s and the State’s “negotiation³” as to what would be presented at trial based on their views of what presentation would be “fair.” (*Id.* at 2964.) Additionally, the court does not grapple with the unreasonableness of trial counsel’s failure to flag the inappropriate statements, listed above, for the trial court.

Furthermore, the court does not address the issue that if trial counsel understood the applicable case law and had performed a proper investigation and presentation of argument, most, if not all, of the inappropriate statements from the interrogation videos listed above would have been suppressed. Indeed, in

³ The term “negotiation” here uses Mr. Till’s words. The discussions between Mr. Till and the State were a pretrial discussion between trial counsel to identify what the State conceded was inadmissible. This discussion, however, did not benefit Mr. King.

rendering its finding, the post-conviction court ignores *Martinez*, and that 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. King.

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

II. Trial counsel failed to object to State witness Detective Cayenne's hearsay testimony at trial.

As stated above, federal law requires defendant to establish that competent counsel must establish counsel's performance was unreasonable because no reasonably competent counsel would have taken that action. *See Strickland v. Washington*, 466 U.S. 668 (1984); *see also Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Williams v. Taylor*, 529 U.S. 362 (2000). In Mr. King's case, trial counsel did not act as reasonably competent counsel would have by failing to object to multiple improper and prejudicial hearsay statements by Detective Cayenne. Statements made to a detective by a non-testifying witness for no other purpose but to explain the investigation is clear, prejudicial hearsay. *Saintilus v. State*, 869 So. 2d 1280, 1281-82 (Fla. 4th DCA 2004); *Schaffer v. State*, 769 So. 2d 496, 498 (Fla. 4th DCA 2000) ("Where the implication from in-court testimony is that a non-testifying witness has made an out-of-court statement offered to prove the defendant's guilt, the testimony is not

admissible.”). Multiple improper statements were elicited through Detective Cayenne’s testimony during direct and redirect testimony at trial:

- “I spoke with Lyza Telzer, which is the daughter-in-law of the victim, as well as her son, Dana Telzer . . .” (DIR. ROA, Vol. XIV, pg. 875) where Detective Cayenne discovered the victim was “[v]ery meticulous. Very meticulous and very neat and she worried a lot about the cleanliness of the household.” (DIR. ROA, Vol. XIV, p. 876.)
- Detective Cayenne further testified that “[w]hat Ms. Telzer advised me was that there was several pieces of what you would consider antique jewelry, jewelry that was collected by the victim a long time ago. It has its own uniqueness to it. We were also, you know, able to ascertain that she had some silverware that was left in a specific area of the bedroom that was very near and dear to her. So that’s what she gave me a list of.” (DIR. ROA, Vol. XIV, p. 877.)
- Detective Cayenne learned a TV was missing from the victim’s residence (DIR. ROA, Vol. XIV, p. 877.)
- Detective Cayenne spoke with several residents of the apartment complex Mr. King stayed at and they believed “the car that was in front of their apartment complex was the one that they had observed on the news.” (DIR. ROA, Vol. XIV, p. 879.) The witnesses, however, were not able to say who was driving the car.
- Detective Cayenne’s partner, Detective Romano, observed the victim’s shoeprint size was smaller than the shoeprints that were found on her door. (DIR. ROA, Vol. XIV, p. 884.)
- Detective Cayenne learned that FDLE established a DNA profile from a piece of fruit was a male profile. (DIR. ROA, Vol. XIV, pgs. 884-85.)
- Detective Cayenne learned that fingerprints from the victim’s vehicle came back to Robert Epps and Rashad Montfort. (DIR. ROA, Vol. XIV, p. 885.)
- Mr. Montfort was forthright during his statement and “we believed that he was forthright and honest with the information that he was providing to us.” (DIR. ROA, Vol. XIV, p. 886.)

- Mr. Montfort told Detective Cayenne he got the victim's vehicle from Mr. King. (DIR. ROA, Vol. XIV, p. 887.)
- Detective Cayenne found out after speaking with Lyza Telzer that she and her son Miles, along with his friend, Jordan, had gone to the victim's residence the night prior to her murder. (DIR. ROA, Vol. XIV, p. 887). Jordan told them he did not eat anything when he went to Ms. Telzer's residence. (DIR. ROA, Vol. XIV, p. 888.)
- Detective Cayenne interviewed "Monk Man" or "Mark Man," Arnold Sampson, and cleared them of pawning any of the victim's items. (DIR. ROA, Vol. XIV, pg. 889-90.) Detective Cayenne was provided these two names from Mr. Montfort during his interview. (DIR. ROA, Vol. XIV, p. 890.)
- Mr. Montfort told Detective Cayenne he had gotten keys from Mr. King, and Mr. King advised Montfort that the victim's vehicle was going to be parked around the corner from the front of his apartment which was over on Witchard Street 891. (DIR. ROA, Vol. XIV, p. 891.)
- Mr. Montfort also told Detective Cayenne that Mr. King had told him to park the vehicle by the blue apartments off of Beaverton Street and 18th, which would have been about two blocks away from the front of his apartment complex. (DIR. ROA, Vol. XIV, p. 891.)
- Mr. King's directions to Montfort to park the vehicle were strange to Detective Cayenne because "if it's my vehicle, I would want my vehicle to be parked in front of my apartment if somebody borrowed it . . ." (DIR. ROA, Vol. XIV, p. 891.)
- Mr. Montfort told Detective Cayenne he called Mr. King a couple times to use the car, and that Detective Cayenne pulled Montfort's cell phone records to make sure he was telling the truth. (DIR. ROA, Vol. XIV, pgs. 892-93.)
- Detective Cayenne met with James Roman, who told him he was on vacation in West Virginia for the holidays. (DIR. ROA, Vol. XIV, pg. 894). Mr. Roman also told him that Mr. King worked for him for about three or four months prior to the victim's murder, and that Mr. King was his only employee. (DIR. ROA, Vol. XIV, p. 894.)

- Mr. Roman told Detective Cayenne a straw hat in his possession belonged to Mr. King and provided Detective Cayenne with the hat. (DIR. ROA, Vol. XIV, p. 894.)
- Detective Cayenne spoke with the DNA expert Mr. Hitt concerning getting DNA off the straw hat, but Mr. Hitt told him it would be better to get cheek swabs. (DIR. ROA, Vol. XIV, p. 896.)
- Detective Santiago went to the pawn shop to get a physical picture of the item that was pawned, and then this picture was shown to Ms. Telzer “who pretty much knew the uniqueness of the jewelry.” (DIR. ROA, Vol. XIV, p. 897.) Ms. Telzer told Cayenne that the piece of jewelry was going to belong to the victim. Ms. Telzer said she was sure because she had the same one. (DIR. ROA, Vol. XIV, p. 897.)
- Detective Cayenne pulled the phone records from Mr. King and discovered he made a phone call at 5:24 a.m., indicating it was “using a tower that was near that the JTA bus station downtown at 201 West Union Street.” (DIR. ROA, Vol. XIV, p. 898.)
- Mr. Richards found the victim’s garage door open at approximately 10:00 am to 10:30 am. (DIR. ROA, Vol. XIV, p. 904.)
- Detective Cayenne spoke with the bus driver who told them the bus ran on schedule, but that he would not have been able to identify the individuals that the bus picked because it was rush hour. (DIR. ROA, Vol. XIV, p. 906.)
- Detective Cayenne found it unusual that Mr. King said after his house was burglarized he found the victim’s items, because “it [the burglary to King’s residence] wouldn’t be, at the time in reference to when his apartment was burglarized till we discovered the victim Renie Telzer-Bain.” (DIR. ROA, Vol. XV, pgs. 1023-24.)
- The DNA swab from the fruit recovered at the victim’s residence matched the cheek swabs of Mr. King. (DIR. ROA, Vol. XV, p. 1025.)
- If somebody that just committed a murder and took hundreds of items of jewelry, pawning a gold bracelet would be a way to stay under the radar because “the bracelet wouldn’t have the identifying pendants on it that can, I guess, tell the pawn broker that it’s not going to be the person

who's pawning it if there's a name on it." (DIR. ROA, Vol. XV, p. 1169.)

- If somebody is behind on their rent and they need money, that's a pretty good thing to start with to stay under the radar. (DIR. ROA, Vol. XV, p. 1169.)
- Detective Cayenne believed Mr. King knew that they were questioning him about his involvement in the victim's murder. (DIR. ROA, Vol. XV, p. 1170.)
- There was nobody who provided any information whatsoever that would corroborate Mr. King's story that he found all the victim's items in the vacant apartments. (DIR. ROA, Vol. XV, p. 1171.) "None of the witnesses spoken to would be able to tell us that they observed Mr. King unloading that-those pieces from that vehicle." (DIR. ROA, Vol. XV, p. 1171.)
- Mr. Roman told him the only bus he knew Mr. King to take was the one to the Town and Country bus station. (DIR. ROA, Vol. XV, p. 1174.)

Trial counsel testified at the evidentiary hearing that counsel's strategy was to not object to the statements above; indeed, trial counsel stated they chose not to object to these statements. Mr. Eler testified he did not object to these statements because they fell into Mr. Till's portion of the trial and were not Mr. Eler's responsibility (PC, p. 4804.) Mr. Till testified that he usually does not object "all the [sic] time," (*Id.* at 4979) and instead determined whether the statements at trial really hurt Mr. King (*Id.* at 4979). Mr. Till did not seem to be aware that having Detective Cayenne testify to records from a cell phone company is hearsay if he did not produce the records, and that hearsay statements are improper if they were offered as hearsay, irrelevant, speculative, and/or improper opinion testimony. *Fla. Stat. § 90.801-805 (2011)*. Instead, Mr. Till opined "[i]t may be improper, but who cares if it's not prejudicial?" and that he believes it's a "sign of a younger

lawyer who objects to everything that's trying to be brought out.” (PC, p. 4979).

Such a belief is not tantamount to a reasonable tactical decision.

The post-conviction court found that:

[I]n this case, the detectives' tactics elicited admissions from Defendant regarding pawning the victim's jewelry, having been in her home, being *in* possession of luggage which contained her property, and his cousin having driven the victim's car. . . . Moreover, many of the statements regarding the veracity of Defendant's comments were in response to his contradictory answers and answers which contradicted the evidence. Additionally, the Court finds these statements were of the type that would be understood by a rational jury to be techniques being used by the detectives.”

(*Id.* at 2965.) The court then quantified the evidence against Mr. King which it held was harmful: (1) the jury heard that Mr. King had previously been employed by a lawn service company that serviced the victim's yard; (2) Mr. King admitted having been inside the victim's home; (3) the victim's stolen Cadillac was located near Mr. King's apartment; and (4) Mr. King's cousin, Montfort, testified that Mr. King loaned him the victim's Cadillac. (*Id.* at 2965-66.) The post-conviction court, however did not take into account that most of these statements listed above did not come from Detective's Cayenne knowledge of the events but rather a third-person narrative that the Detective Cayenne and the rest of the detectives were not privy to. As such, the jury heard statements from a source—Detective Cayenne—who, in his power as a law enforcement agent, invariably came across as someone with first-hand knowledge of the statements listed above. Thus, the jury could render its opinion on Mr. King's guilt based on unconstitutional statements that trial counsel should have objected to.

Additionally, trial counsel's failure to object deprived Mr. King of an adversarial trial; when Detective Cayenne testified to these hearsay statements, trial counsel had no means of questioning the veracity of the statements. *U.S. v. Cronin*, 466 U.S. 648, 659 (1984) ("Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable."). Perhaps more puzzling as to why Mr. Till did not object at trial, despite his belief that only young attorneys readily object to obvious constitutional violations, is that during the defense's cross-examination of Detective Cayenne at trial, the prosecution lodged numerous hearsay objections pertaining to what various witnesses told Cayenne, all of which were *sustained by the trial court*. (DIR. ROA, Vol. XV, pgs. 1080-1090, 1099.) The trial court would have likely sustained trial counsel's hearsay objections had they been made to the comments above, as the prosecution asked nearly identical questions during their questioning of Detective Cayenne. Had trial counsel objected to in a similar manner, trial counsel would have kept out statements that were highly prejudicial to Mr. King. Due to the trial counsel's ineffectiveness, Detective Cayenne testified to a significant amount of information of which Detective Cayenne did not have first hand knowledge; trial counsel should have objected and forced the State to require other witnesses like Mr. Montfort, Ms. Tezler, and Mr. Roman to testify in lieu of allowing Detective Cayenne to make numerous improper statements. There was no circumstance, for example, where it was reasonable for the juror to hear Detective Cayenne testify about Ms. Tezler's opinion on the victim's jewelry or his

own opinion of Mr. Montfort’s “forthrightness.” Furthermore, taken as a whole, all of the statements listed above, cumulatively deprive Mr. King of a meaningful adversarial testing.

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

III. Trial counsel failed to object to the introduction and repeated inferences to a bloody shirt found in Mr. King’s residence.

Due to trial counsel’s ineffectiveness, a bloody t-shirt, with no relevance to the crimes Mr. King was charged with, was repeatedly referenced throughout the trial and used to inflame the passions and minds of the jury sitting in Mr. King’s case.

Strickland’s two-part test requires a defendant to demonstrate that counsel’s performance was deficient and “there was a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 669. Reasonably competent attorneys in Florida must abide by Florida law, which states that relevant evidence is only admissible if its probative value is substantially outweighed by the danger or unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. *Miller v. State*, 42 So. 3d 204, 224 (Fla. 2010).

In this case, numerous inferences were made about a bloody shirt that was found at Mr. King’s home. The shirt had no relation to the case; *the State conceded the shirt had no relevance to the case.* (DIR. ROA, Vol. XV, pgs. 1021-

1022.) Inexplicably, trial counsel allowed statements regarding the shirt to be heard several times by the jury.

During the evidentiary hearing, the defense attorneys stated that the approach they used at trial was that it was the State's burden to prove the alleged crime occurred. Mr. Till, who handled the cross-examination of Detective Cayenne, testified that the "bloody shirt was a smoke screen. It had nothing to do with this case." He further testified that he didn't know "why it got blown out of -- out of proportion. It was a --a shirt that Cecil King was surprised in the interrogation tape and --and was not Cecil King's blood type, it was not Ms. Telsor's [sic] blood type. It was just like a red herring or something just thrown in there." (PC, pgs. 4960-61.) Mr. Till testified that he discussed the bloody shirt in closing argument to show what a poor job the police did when they were investigating. (*Id.* at 4961.) Mr. Till seemed unaware that a jury who listened to the evidence put on the State, may have used the continuous mention of a bloody shirt to further incriminate Mr. King. Indeed, Mr. Till did not make a *single objection* as to the relevance of the shirt. Furthermore, it's likely the jury thought the shirt had some sort of relevance. As was testified to in the evidentiary hearing, the bloody shirt took on a large part of the case and was repeated throughout the trial. It's not at all unlikely that the jury thought that the shirt had some relevance to Mr. King; it is likely that they thought the shirt was shown to them repeatedly and discussed throughout the entirety of the several-day trial. Even if the jury did not think that the shirt had a direct relation to the State's case-in-chief, the jury

would have thought the shirt belonged to someone Mr. King hurt because it was paraded multiple times in front of the jury.

The post-conviction court in its ruling argued that the discussion of the shirt was minimal in the context of a four-day trial. (*Id.* at 2966.) The court also noted that the State *conceded the shirt was irrelevant to the case.* (*Id.* at 2966.) The court's analysis, however, fails to account that because trial counsel did not object, the shirt, which was not relevant to the case, was brought in front of the jury on numerous occasions. The shirt was paraded around throughout trial in both Detective Cayenne and Florida Department of Law Enforcement DNA expert, Jason Hitt's testimony, during trial counsel's closing argument, and generally throughout trial, becoming a feature of a trial in which it had no relevance. Had trial simply lodged an objection based on the prosecution's own concession this item had no evidentiary value to the case, the trial court would have certainly barred its introduction.

Contrary to the post-conviction court's findings, deficient performance was established, as there is no logical rationale for allowing a bloody t-shirt to inflame the passions and minds of the jury sitting in a murder trial of a client who is charged with bludgeoning a victim with a hammer. Accordingly, the post-conviction court's finding that trial counsel's errors neither constituted ineffective assistance nor prejudice to Mr. King is contrary to the evidence presented at the evidentiary hearing and not supported by law.

IV. Trial counsel was deficient in failing to investigate and present expert witnesses at Mr. King's trial, prejudicing the outcome of the proceedings.

Trial counsel was deficient for not putting on a *single* expert witness throughout the entirety of Mr. King's trial. 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. *See Kimmelman v. Morrison*, 477 U.S. 365 (1986); *see also Wiggins v. Smith*, 539 U.S. 510 (2003); *Hinton v. Alabama*, 134 S. Ct. 1081, 1090 (2014).

Trial counsel here failed to put on a *single* witness where the State put on *three* different experts regarding fingerprinting, DNA, and shoe imprinting. According to Section 90.702, Florida Statutes, 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." *Fla. Stat. §90.702 (2016)*. In *McMullen v. State*, 714 So. 2d 368, 371 (Fla 1998), the Florida Supreme Court acknowledged expert testimony is needed when the facts testified to require special knowledge or experience in order for the jury to render a decision.

Here, the defense attorneys' failure to investigate Mr. King's claims of innocence and present expert witnesses to the jury was not a reasonable trial strategy and severely prejudiced Mr. King. Without presenting witnesses to combat the State's evidence, the jury was left to believe testimony of the State's experts.

Additionally, though trial counsel, as attorneys from the Public Defender's Office in Jacksonville, had the ability to hire confidential experts to test items, they failed to retain a *single* expert in Mr. King's case. Not only did they not provide

their own experts, no attempt was made by counsel to rebut expert testimony with their own testimony. Here, counsel utterly failed their client.

V. Trial counsel was deficient in failing to both present a DNA expert at Mr. King's trial and use a DNA expert to rebut the State's expert witness.

Trial counsel was inefficient for failing to put on a DNA expert in Mr. King's cases. The jury heard testimony from the State's witnesses, including evidence that Mr. King's DNA was allegedly swabbed from a single piece of cantaloupe left behind on the victim's kitchen table. This was unquestionably the most damaging evidence against him as it put him inside the victim's home. Nonetheless, trial counsel failed to present the testimony of a DNA expert to rebut this evidence. Although trial counsel cross-examined the evidence the State's expert put on regarding the destruction of the cantaloupe following a single swab of the fruit, counsel did not present a *single witness*, to (1) establish contrary to the testimony, perishable items, can and should be saved to allow for additional testing; (2) rebut the testimony of the State's expert; and (3) establish that there were holes in the chain of custody, opportunity for cross-contamination, and other flaws in the testing process that created a probable indicia of tampering. Trial counsel did not present any testimony that rebutted the State's DNA testimony, either by a DNA expert or by retesting by the defense, to prove Mr. King's innocence. The items presented by the State at trial included a bloody shirt, which did not match Mr. King's DNA, and was deemed irrelevant, hairs and fibers found on the bloody shirt, the victim's socks, the victim's fingernail clippings, and DNA

found on a piece of cantaloupe at the murder scene which was the only DNA linking Mr. King to the murder.

Mr. Till testified at the evidentiary hearing that the Public Defender's Office has the ability to hire confidential experts to conduct independent DNA testing, with Mr. Eler similarly echoing that he could have hired a confidential DNA expert. (PC, pgs. 4980, 4794-95). Mr. Eler testified that Mr. Till did speak to Mr. Budowle, a DNA expert, but after consulting with Mr. Eler, Mr. Till made the decision not to hire a DNA expert to test the above referenced items and to testify on Mr. King's behalf (*Id.* at 4794-95.) Mr. Eler further testified that Mr. Till "made as much as one phone call to confirm that we shouldn't do any further testing. It wasn't me." (*Id.* at 4792.) Mr. Till testified he merely called Mr. Budowle twice. (*Id.* at 4982-83.) He stated that he followed up with Mr. Budowle on February 28, 2011, shortly before trial, regarding touch DNA and possibly the preservation of the cantaloupe. (*Id.* at 4982-90.) Mr. Till testified he was informed the profile looked weak and that his best approach was to argue there was no evidence and the strength of the evidence was weak. (*Id.* at 4983.) Though Mr. Budowle offered to review the DNA results for free, (*Id.* at 4982), Mr. Eler testified that he was uncertain if Mr. Budowle reviewed Mr. Hitt's results, something which would be important regarding the cantaloupe or the type of DNA found on the cantaloupe (*Id.* at 4785.) Additionally, neither Mr. Till nor Mr. Eler could remember if Mr. Hitt's report or notes were ever examined by Mr. Budowle and defense ultimately made the decision not to hire Mr. Budowle before Mr. Hitt's deposition on March 15, 2011, a mere *twenty* (20) days before trial. Mr.

Hitt's deposition did not take place until twenty days before the commencement of trial; therefore, there is no conceivable way Mr. Budowle was able to review Mr. Hitt's deposition transcripts or findings to determine if there were issues which could have been raised at trial. After Mr. Till provided Mr. Eler with his opinion on the DNA expert, Mr. Till testified it was Mr. Eler, another part of the Public Defender's Office, who would have had to retain a confidential DNA expert for the defense, as Mr. Eler wrote the checks at the Public Defender's Office. (*Id.* at 4984.) Counsel did not present a DNA expert to rebut the State's case. Had counsel obtained a DNA expert, the jury would have heard a qualified expert, not just counsel, attack the veracity of the State's evidence.

Mr. Hitt, the State's DNA expert, testified in the guilt phase of trial as to the DNA results. Mr. Eler testified it would have been important for Mr. Budowle to look at Mr. Hitt's results to see if there were any issues regarding the cantaloupe testing or the type of DNA detected on the cantaloupe. (*Id.* at 4785.) Mr. Eler stated if there was no saliva found on the cantaloupe, an attorney could argue the "different forms, trans - .. emissions and deposits" of the DNA. (*Id.* at 4795-96.) On cross-examination by post-conviction counsel, Mr. Eler justified these actions by stating that the theme of the case was to show Mr. King was a "good guy." (*Id.* at 4728.) However, knowing that (1) the medical examiner could not exclude the possibility that more than one individual was involved in this crime; (2) it was important for a jury to hear another suspect could have been responsible for the victim's death; and (3) presenting evidence of a second suspect could have changed the outcome of Mr. King's trial, has nothing to do trial counsel's strategy.

Kevin Noppinger, a DNA expert retained by post-conviction counsel, reviewed the Florida Department of Law Enforcement's ("FDLE") results as well as Mr. Hitt's testimony and deposition, and did not agree with FDLE's findings (*Id.* at 5646-50.) Mr. Noppinger opined the partial DNA profile obtained from the victim's two socks had foreign alleles, which did not match the victim, Myles Telzer, or Mr. King (*Id.* at 3310.) Had defense counsel retained a DNA expert, they could have testified that foreign alleles were detected on the socks. It is also important to note Mr. Noppinger found the bloody tank-top shirt that was paraded in front of the jury was never searched in Combined DNA Index System ("CODIS") which should have been brought to a jury's attention because trial counsel could have argued a CODIS hit could have linked another individual to the bloody shirt. (*Id.* at 5646.)

Mr. Noppinger further testified the particular part of the cantaloupe melon at issue could have been frozen for further testing at a later time. Mr. Noppinger, after reviewing the records in this case, was not able to determine the source of the DNA on the cantaloupe. (*Id.* at 3306-07.) Mr. Noppinger testified the cantaloupe was never tested to conclusively show it was specifically saliva DNA found on the cantaloupe melon; post-conviction counsel is now precluded from testing the cantaloupe for saliva DNA because the evidence has been destroyed. Mr. Noppinger testified that by retesting the cantaloupe, other individuals could have been included to link another person to the cantaloupe or to show a second or third person at the crime scene. (*Id.* at 3307, 3340.) Mr. King no longer has the ability

to retest the sample DNA recovered from the cantaloupe as the cantaloupe was not preserved.

The post-conviction court additionally denied post-conviction counsel's request to test the victim's socks. Mr. Noppinger testified more testing could have been done with the victim's socks than what was performed by the FDLE. (*Id.* at 3308-09.) The FDLE found that due to the limited DNA results obtained from the victim's two socks, there was insufficient DNA to be able to include Mr. King as a contributor. However, after review, Mr. Noppinger opined he did not agree with this conclusion. The partial DNA profile obtained from the socks had foreign alleles, which did not match the victim, Myles Telzer, or Mr. King. (*Id.* at 3310.) Mr. Noppinger testified FDLE should have reported foreign alleles were detected on this item, as the foreign alleles indicated DNA from another individual, not consistent with Mr. King, was present on the socks. (*Id.* at 3319-20.) When Mr. Eler was asked whether it would be important to test foreign alleles confidentially by post-conviction counsel, he testified it may be important or may not be important because it is not the defense's job or burden of proof to prove who committed the crime, but rather it is the State's burden. (*Id.* at 4797.) However, trial counsel *never* argued to the jury at Mr. King's trial that there were foreign alleles on the socks to try to prove to the jury the State did not meet its burden or that another individual was responsible for the murder. Mr. Noppinger testified the foreign alleles were insufficient for inclusion purposes, but could have been used for exclusion purposes, as they were human. (*Id.* at 3318-19.) Mr. Noppinger testified detectable alleles were found at nine locations, which was enough to

exclude individuals. Although Mr. Hitt found the data was insufficient for inclusion purposes, Mr. Hitt made no mention to the jury that this data could have been used to exclude individuals, specifically Mr. King, and defense counsel never inquired of this. Mr. Noppinger testified Mr. Hitt's bench notes did not indicate from where on the socks the swabbing was taken. The State's expert at Mr. King's evidentiary hearing, Ms. Clark, testified the entire sock was swabbed. Mr. Noppinger testified it is important to know where on the sock the swabbing came from because the top part of the sock may include DNA from another person grabbing or touching the sock, whereas the bottom parts could include DNA from touching or walking on the floor. (*Id.* at 3311.) Mr. King was denied the opportunity to retest the victim's socks or have an independent DNA expert review Mr. Hitt's findings and consequently, the jury was left without knowing foreign alleles were present on the victim's sock, which did not belong to Mr. King.

Mr. Hitt and Mr. Noppinger also found no DNA present in the victim's fingernail clippings. (*Id.* at 3327-28.) The post-conviction court denied undersigned counsel's request to test the hairs and fibers located on the bloody shirt and the victim's socks and Mr. King is being denied the request to show prejudice in this case. The hairs and fibers located on the bloody shirt found at Mr. King's apartment and the hairs and fibers located on the victim's socks were never tested for DNA. Mr. Noppinger testified it would have been important to have a qualified lab technician review the hairs and fibers to determine if they were of evidentiary value and whether further testing was necessary. (*Id.* at 3312.) However, this was not done. Mr. Noppinger testified he would have examined all

of the evidence and taken notes of what he observed and that even though the State is limited in the amount of evidence they are able to test due to the funding, such evidence can always be submitted to a private lab if needed. (*Id.* at 3312.) Additional testing of the hairs and shirt could have produced a better profile from the minor contributor that could have been used to link another individual to the victim's killing since the identity of the killer was a genuine issue at trial. Mr. King suffered prejudice because these items were never tested, examined, or entered into CODIS, and therefore he was deprived of the opportunity to identify an alternative suspect.

The post-conviction court argued in its ruling that Mr. Noppinger agreed with Mr. Hitt's analysis of the DNA results on the cantaloupe, specifically that Mr. King's DNA was found on the fruit, and had no issues with Mr. Hitt's other findings either. (*Id.* at 2947.) Mr. Noppinger noted, however, that the foreign alleles were only sufficient to exclude an individual and were insufficient for inclusion purposes and that the alleles could have been transferred to the victim's socks from innocuous activity such as simply walking around her home. The court further noted that Mr. Noppinger agreed with Hitt's findings that there was no DNA under the fingernail clippings of the victim's left or right hand, so the only further testing that could have been done was Y-DNA testing to match the male chromosome if one was present. (*Id.* at 2972.) As to the hair and fibers on the bloody shirt, Mr. Noppinger testified that they could have been checked.

The post-conviction court also noted that Mr. King admitted to previously being in the victim's home and having the victim serve him fruit. (*Id.* at 2973.)

Additionally, the court argued that trial counsel cross-examined Mr. Hitt about the acids in the cantaloupe and how they could have affected the DNA results (*Id.* at 2973.) The post-conviction court believed that counsel was able to get Mr. Hitt to concede that it was possible that the citric acid in the cantaloupe could have degraded the DNA sample, and that trial counsel noted this in his closing argument. (*Id.*) Moreover, the court held counsel elicited testimony that this fruit, despite being out on the counter, was not discovered until many hours after the victim was found and police had been on the scene and that the cantaloupe was destroyed after the State obtained its swab, but prior to Mr. King being able to gather his own evidence. (*Id.* at 2972.)

The post-conviction court further testified that both Mr. Till and Mr. Eler both testified that they consulted a DNA expert, Bruce Budowle, and that each noted that the expert told him it was probably better not to retest and not to have two people testifying regarding Mr. King's DNA. (*Id.* at 2972-74.) Mr. Eler further testified that in motioning the court to test items for DNA, they could have tipped off the State to test an item further. (*Id.* at 2974.) Finally Mr. Till and Mr. Eler both stated that the defense team made the strategic decision to bring out the weaknesses in the DNA evidence for this case and what might have been discovered if fruit had not been destroyed, rather than presenting a defense DNA expert. (*Id.*) The court found this to be a reasonable strategic decision and that it was reasonable to limit investigation into further DNA, especially in light of the fact that counsel had heard Mr. King confessed to an investigator for the defense. (*Id.*) The court also found the shirt to not have a sufficient nexus in the crime to

warrant such an expert. (*Id.*) This, however, as stated above, ignores the fact that counsel only consulted with the expert a maximum of twice; it's also unlikely Mr. Till and Mr. Eler gave Mr. Budowle any of the state witness's notes or findings in their consult, or that they waited until after Mr. Hitt's deposition to make a final determination as to the need for a DNA expert. Indeed, Mr. Budowle could not have made a determination based upon the full panoply of information available to Mr. Eler and Mr. Till. Had trial counsel provided Mr. Budowle with sufficient information, including the deposition, they could have made an informed decision to call, or not the expert. Instead, they unreasonably cut their investigation short, and made a decision based on their abbreviated consideration of a DNA expert, which does not deserve deference of a reasonable strategic decision.

The post-conviction court noted its belief that the speculative nature of this claim as Mr. King cannot state certainly that any further testing would have yielded any results, let alone positive results. (*Id.*) The court found that trial counsel was not deficient for failing to present the testimony of a defense expert in DNA as alternate courses of action were considered and a reasonable, strategic decision was made to combat the DNA evidence through thorough cross-examination and argument, rather than through an expert. (*Id.*)

The post-conviction's ruling was erroneous. Mr. Eler testified that evidence not tested by the FDLE may have been important to develop an alternate suspect and it would have been important to try to put someone else at the crime scene, even if that person was with Mr. King. Yet, Mr. Eler testified that he "think[s] [the defense attorneys] just made the tactical and strategic decision based on what

[they] knew in the case . . . and [they] didn't want it to contradict the theme of the case. So that's why it wasn't done." (*Id.* at 4800.) Contrary to what Mr. Eler believed, however, not consulting, hiring, or presenting a DNA expert—knowing how important an alternate suspect would be—was not a strategic or a tactical decision that would harm “a good guy theme” that counsel was trying to pursue. The DNA testing of the socks, hairs and fibers, bloody shirt, and cantaloupe went unchallenged at trial and was never entered into CODIS. The jury was therefore left to conclude that because Mr. King's DNA was found on a piece of cantaloupe, he must be the killer. Because a DNA expert was never retained by defense counsel and presented to the jury to rebut Mr. Hitt's testimony, the jury had no alternative but to accept Mr. Hitt's testimony as true and accurate. Had defense counsel requested the DNA results to be run in CODIS and any of the above referenced items matched the prints found in the victim's car or another item found in the victim's house, there would have been enough evidence to conclude someone other than Mr. King murdered the victim. Trial counsel's representation of Mr. King fell below acceptable professional standards in several respects rendering Mr. King's guilty verdict unreliable. Each of these failures severely prejudiced Mr. King. There is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different.

VI. Trial counsel was deficient in failing to obtain a shoe impression expert and rebut the State's expert.

Defense counsel failed to retain or consult with a shoe expert to examine the prints found at the victim's home. Mr. Till testified footprints were found in the yard and on the door, not at the point of entry to the house, and therefore were not

relevant. (*Id.* at 4962.) Mr. Till did not, however, address various shoeprints which were found at other locations at the victim's residence, including outside the garage door—where it appeared someone tried to kick the door in—and outside the fence. The State argued that because the prints recovered from the house were large and King's shoes were a size 12, 13, and 14, with the majority size 13, the prints were left by Mr. King. A shoeprint expert put on by trial counsel could have rebutted that argument.

Post-conviction counsel retained Mr. Bodziak, a footwear expert. Mr. Bodziak testified the door itself was not seized and preserved for future testing and therefore, it was difficult to take a two-dimensional impression in residue or mud. (*Id.* at 3354.) Mr. Bodziak testified it is not possible to State how many kicks were on the door, but he was able to find multiple impressions. (*Id.* at 3355-57.) Mr. Bodziak testified if a shoe size is at issue, one should identify the brand of shoe and obtain samples from the manufacturer in different sizes to determine the actual shoe size. (*Id.* at 3357.) The State did not identify the brand of shoe impression on the victim's door; trial counsel neither asked the State's witness, nor obtained their own expert to identify the brand of the shoe impression on the victim's door. Further, Mr. Bodziak testified comparisons were never made from these shoe impressions. (*Id.* at 3357-58.)

Trial counsel allowed Detective Pfister, who was not a qualified shoe print expert, (*Id.* at 3353), to testify to the dimensions of the shoeprint, which is especially problematic as Mr. King's shoes, found at his home, did not match the tread of the shoes on the door. Detective Pfister testified the shoe print on the

victim's door was around 11.61 inches, and implied this measurement corresponded with a larger shoe size like Mr. King wore. (*Id.* at 3359.) Mr. Bodziak found this testimony not credible, as he measured the shoeprint to be around 11.41 inches, which is equivalent to a size 8 or 9 shoe. (*Id.* at 3359-60.) Mr. Bodziak further testified that the casts of the shoeprints were never cleaned and were covered in soil. (*Id.* at 3362.) Therefore, no individual has ever examined those shoeprints. Because trial counsel failed to retain or at the very least, consult with a shoeprint expert, the jury was led by the State to believe Mr. King's shoe impressions were found on the victim's door simply because he wore a larger shoe size. Mr. Bodziak examined the casts of the shoeprints and was able to ultimately determine the shoe brand was a Nike Air Tail Wind, which was later discontinued by Nike. (*Id.* at 3362-63.) This brand of shoe is no longer available on the market, and thus it is no longer possible to compare different shoe sizes to the cases to discredit Detective Pfister. The shoe would have easily been obtainable during Mr. King's trial.

Mr. Bodziak testified Detective Pfister's measurements would not have been accurate if she used the photograph of the door as her measurement, because "the camera was not perpendicular to the back of the camera . . . the lens was not perpendicular, the photograph was taken at an angle and the scale that [was] in th[e] picture is so far off, and it has no value to give any kind of accurate enlargement from which a sizing comparison can be made." (*Id.* at 3366.) Mr. Bodziak testified that the "only accurate way" to obtain measurements "was to seize the door," which is no longer available to Mr. King. (*Id.*) Various shoeprints

were found at the victim's residence including outside the garage door where it appeared that someone tried to kick the door in, and outside the fence. Numerous pairs of shoes were collected from Mr. King's residence and none matched the shoe impressions from the crime scene. The shoe impressions from the crime scene could have come from another individual who was responsible for killing the victim. The State drew the inference that because the prints recovered from the house were large and that shoes collected at Mr. King's house were size 12, 13, and 14 (the majority being size 13) the prints could have been left by Mr. King and could not have been left by Mr. Montfort, who has a smaller shoe size. (DIR. ROA, Vol. XIV, pgs. 883-84.) Trial counsel was deficient here in failing to retain a shoe impression expert to accurately determine what shoe size the prints were collected from the scene and to demonstrate that they were left by someone with a different shoe size than Mr. King, who may have been responsible for the victim's murder.

The post-conviction court stated in its ruling that Mr. Bodziak's concluded any testimony regarding shoe size based on what the crime scene investigator had to use would be inaccurate and misleading. (PC, pgs. 2975-76.) The court further found that Mr. Till cast doubt on the State's case by arguing during closing argument that the shoe impressions located outside the victim's home were never matched to any shoes recovered from Mr. King. (*Id.* at 2975-76.) Specifically, Mr. Till argued that the investigator was not qualified to determine the shoe size, and that although such an expert was available to the State, the State did not use that resource. (*Id.* at 2976-77.) However, the court overlooked that it was Mr.

Till—Mr. King’s defense attorney who was trying to prevent Mr. King from being convicted of murder—and not a seasoned professional like Mr. Bodziak that rebutted the State’s witness.

The court also noted that Mr. Till testified at the evidentiary hearing that he did not feel such an expert was warranted because the shoeprint lacked connection to the case in that the print was not a match to any of Mr. King’s shoes. (*Id.* at 2976.) Moreover, Mr. Till mentioned he was worried that any additional evidence on the issue may have opened the door to other damaging testimony for Mr. King. (*Id.* at 2977.) The court also noted Mr. Till mentioned concern that the State would then be able to elicit testimony regarding a footprint analysis for the burglary next door to the victim’s house and testimony that Mr. King had also pawned some of the victim’s neighbor’s property after evidence of that crime had been excluded from the trial. (*Id.*) Thus, the court found counsel made a strategic decision not to call a shoeprint expert and cannot be found to be deficient and that the testimony regarding the size of the shoeprint was minimal. The court believed that even if this evidence had not been presented or counsel had presented an expert to rebut this testimony, Mr. King has shown no reasonable probability the result of the trial would have been different. (*Id.*)

However, the court’s finding is erroneous. Had defense counsel retained a shoe expert to testify, the jury would have learned an accurate determination of the size of the footprint was not be possible because there were multiple impressions found on the door, the scale was inaccurate, and the door was never preserved. An expert would have shown that Pfister’s testimony was misleading to the jury

without having the door because heel to toe dimensions are not accurate without samples due to the tremendous variations of shoe types, shoe profiles, and manufacturers. A shoe print expert would have testified the shoe impressions located on the door and in the soil were partial impressions, not properly lit to be photographed, and only fragments were shown. Ms. Pfister testified she could not tell whether the impression was partial or full, but it was Mr. Bodziak's opinion that unless the jury was instructed on what a full or partial impression is, the jurors would probably in their minds have a different definition of what was meant by a partial impression.

Ultimately, the jury was misled to believe the shoe print belonged to Mr. King, and further was misled to conclusively believe Mr. King committed this murder. Trial counsel's representation of Mr. King fell below acceptable professional standards in several respects rendering Mr. King's guilty verdict unreliable. Each of these failures severely prejudiced Mr. King; there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different.

VII. Trial counsel was ineffective in failing to obtain a latent print expert and rebut the State's expert testimony.

Mr. Eler testified the defense team collectively decided not to retain or consult with a fingerprint expert. (PC, p. 4748.) Had trial retained a fingerprint expert, they could have proven to the jury the ziplock container lid found on the counter of the east wall in the kitchen was of evidentiary value and contained prints of someone other than Mr. King. The lid could also have been used to include or exclude possible suspects as post-conviction fingerprint expert Elzner

Brown testified. Mr. Brown, who was hired by post-conviction counsel, was able to exclude Mr. King. (*Id.* at 2711.) At trial, the State's latent expert Thomas Howell testified the print on the lid was of no value; had defense counsel retained an expert, they could have proven to the jury this print was of value and was not related to Mr. King, thereby raising reasonable doubt on Mr. King's behalf. Post-conviction counsel presented evidence that this latent print belongs to Myles Jared Telzer. (*Id.* at 4266-67.)

The post-conviction court argued in its ruling Mr. Brown agreed with the results of eleven of twelve fingerprint lifts from the victim's home. (*Id.* at 2978.) Mr. Brown stated that the twelfth lift, referred to as "No. 6," obtained from the zip-lock container in the victim's kitchen, was originally determined by Detective Howell to be of no value. (*Id.* at 2978.) However, Mr. Brown found the print of comparison value. Mr. Brown testified that the print did not match the victim, Mr. King, Mr. Epps, or Mr. Montfort. (*Id.* at 2978.) Conversely, Mr. Brown testified that he could not conclusively state the print did not match the victim because the copy of the victim's prints were of "poor quality" and admitted that the print could be anybody's, including Mr. King. (*Id.*) Mr. Brown, on the other hand, reiterated that he did not match the print to Mr. King, Mr. Epps or Mr. Montfort. (*Id.*)

The court noted that at trial testimony revealed that the fingerprints located in the victim's Cadillac matched Epps and Montfort. (*Id.*) None of the prints recovered from the vehicle or the victim's house matched Mr. King. (*Id.*) The only print found to have matched Mr. King was on the pawn slip for the bracelet. (*Id.*) However, Mr. King fully admitted to pawning the bracelet in his

interrogation. (*Id.*) Because there was no testimony indicating fingerprints recovered from the Cadillac or the victim's home matched Mr. King's fingerprints, the court found it unnecessary to present the testimony of an expert on the subject as there was no testimony or evidence presented by the State for the defense to rebut. (*Id.* at 2979.) Furthermore, the court stated that trial counsel adequately cross-examined the State's witness and obtained testimony favorable for Mr. King's case, including that Mr. King's fingerprints were found nowhere in the victim's house or car. (*Id.*) The court found that trial counsel reiterated this point in his closing argument and that the post-conviction expert's testimony presented at the evidentiary hearing does not support relief in this case. (*Id.*) The post-conviction ultimately found that counsel did not act deficiently in failing to present a defense latent fingerprint expert and that Mr. King failed to meet his burden of showing that the testimony of an expert would have likely changed the outcome of the proceeding. (*Id.*)

Ultimately, however, the jury was not given accurate information about the zip lock container lid found on the counter in the kitchen. At trial, Howell testified the print on the lid was of no value; had defense counsel retained an expert, they could have proven to the jury this print was of value and was not related to Cecil King, thereby raising reasonable doubt on Mr. King's behalf. Trial counsel's representation of Mr. King fell below acceptable professional standards in several respects rendering Mr. King's guilty verdict unreliable. Each of these failures severely prejudiced Mr. King; there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different.

VII. Trial Counsel was ineffective in failing to object to Detective Cayenne's improper cellphone testimony and failing to present a cell phone expert at trial in rebuttal where Detective Cayenne was unqualified to testify about cellphone technology and his testimony was misleading.

The jury in Mr. King's case heard misleading testimony from Detective Cayenne, an unqualified expert witness, regarding cell phones, including the directionality of cell phone towers, where Mr. King was when the phone calls, and cell phone records the State obtained. Trial counsel did not put on a single expert to rebut any such testimony. Testimony at the evidentiary hearing revealed that Detective Cayenne's testimony was erroneous—no one except a person who works for the cell phone company could have testified to directionality, a cell phone expert could have provided reasonable doubt as to where Mr. King was when the phone calls were made; and an expert could have rebutted Detective Cayenne's unqualified testimony.

Mr. Eler testified that it was Mr. Till's decision to not retain, consult, or present a cell phone expert to rebut Detective Cayenne's testimony. (PC, p. 4758). Mr. Eler testified to the following questions asked on by post-conviction counsel on cross examination:

Q: Would it be fair to say that it would have been good to have the information to be able to object and say under these circumstances Cayenne was not qualified to make the statements that he did about the cell phone?

A: It would be helpful if you could do that with any witness. Mr. Till - like I said, I would defer to Mr. Till. He researched and he may have wanted that evidence in. I don't know. I really don't know. So I would probably defer to him for those kind of questions.

Q: All right. So you can't answer either one of them?

A: I don't feel comfortable answering that because that was a decision he made.

(*Id.* at 4803.) Mr. Eler also testified it would have been helpful if they had been able to show Detective Cayenne was not qualified to testify regarding the cell phone, yet failed to retain a cell phone expert. (*Id.*) Post-conviction counsel consulted and retained Robert Wyman, an expert in GPS and cell phones. After Mr. Wyman was presented with cell phone records in Mr. King's case, Mr. Wyman testified there were three towers of interest in this case, but there was no information presented at the trial about the range of any tower or antenna. (*Id.* at 3801.) Mr. Wyman further testified cell towers operate using antenna to pick up calls and the antenna range can vary depending on the date and time, the volume and capacity, or the number of subscribers using the system. (*Id.* at 3400-01.) The only relationship between directionality and distance is an antenna is pointed in a certain direction. (*Id.* at 3402.) There was no data as to direction within the records provided, testified Mr. Wyman, other than a coded number with no database showing what the decoded number is. (*Id.*) This is important, because as Mr. Wyman testified, only someone from the phone company could determine the directionality of the tower at that time, not a detective. Mr. Wyman testified if someone was at a bus station using a phone, the phone does not necessarily ping off the closest tower and does not always access the same tower. (*Id.* at 3402-03.) Only the phone company has the information to determine whether a phone would "ping" off a different tower at any particular time. Mr. Wyman pointed out that in order to determine what cell tower a phone call would ping off of, one would need information on the directionality of the tower antenna. It is also important to note

that a dish on a tower is optional. Mr. Wyman testified a dish has nothing to do with helping a person determine what direction the call was coming from or directionality of the signal, contrary to Detective Cayenne's testimony. (*Id.* at 3412.) The way that a tower faces and the structure of the tower has nothing to do with directionality; it is only the antennas mounted to the tower that determines this. (*Id.*) Contrary to Detective Cayenne's testimony, Mr. Wyman testified that unless this information is provided by the phone company, one would not be able to make a determination as to directionality. (*Id.*) Without an azimuth, there is no way to know what direction the antenna was pointing. (*Id.*) Mr. Wyman stated without this information from the cell phone company, no one, not even an expert, could give a specific direction from a tower or tell how far away from the tower Mr. King's phone was. Mr. Wyman indicated it was misleading information to say, as Detective Cayenne testified, "that if the ping came from the southside versus the northside because of how the tower was facing versus how the antennas were set up by the phone company." (*Id.* at 3418.) According to Mr. Wyman, this "would be a statement not based on evidence and not scientific." There was no scientific basis for the State to argue in its closing argument "the ping of [the] tower at 5:25 faces southeast, faces south to Baymeadows, the other towers do not," and for the State to continue to argue that the ping therefore came from there. (*Id.* at 3419.)

Mr. Wyman believed it was critically important in Mr. King's case to "interpret what the hardware [was] on the tower and what its functions [were]," which was missing in this case. (*Id.* at 3423.) Likewise, the second call made

around 10:00 a.m. did not provide any information in Mr. King's case as to the directionality or range, and therefore, Mr. Wyman was unable to give an opinion as to where Mr. King was at the time the second call was made. This opinion would have provided the jury with reasonable doubt as to where Mr. King was at the time the phone calls were made. Absent information provided as to the azimuth, Mr. Wyman explained Mr. King could have made a phone call at 5:25 a.m. and 10:25 a.m. from the same location, but each call could hit two different towers. It is accurate to state, as Mr. Wyman noted, the 5:25 a.m. phone call was within the range of the tower near the bus station, but one cannot pinpoint the direction of the tower. Mr. Wyman testified there are several reasons, such as weather, cloud coverage, solar activity, physical obstructions, i.e. buildings or bridges, which may cause these phone signals to bounce and ping off of another tower. (*Id.* at 3443-44.) Lastly, Mr. Wyman testified Detective Cayenne spoke about a dish antenna pointing south, which was inaccurate and misleading testimony. Mr. Wyman agreed there would be a sector that would encompass any compass direction including the South, but would not be called a dish. (*Id.* at 3450.)

The post-conviction court in its ruling found that Mr. Wyman admitted that the call had to have been made within range of the tower near to the bus station and that, generally, a call will ping off of the closest tower. (*Id.* at 2980.) The court mistakenly thought trial counsel conducted a thorough cross-examination of Detective Cayenne as to Detective Cayenne's qualifications on the subject of cellphone tracking, as well as on the limitations of such tracking, and was able to elicit a concession from Detective Cayenne that the cell phone pings did not

unequivocally place Mr. King at the bus station at the time of the call and further that it was possible King was at home, checking his messages at 5:25 a.m., the time of the call. (*Id.* at 2981.) The court mistakenly thought the “important aspect” of Mr. Wyman’s testimony was elicited at trial through counsel’s cross-examination of Detective Cayenne. (*Id.*) The court also found counsel effectively attacked the fashion in which evidence was collected and continued the attack during his closing argument when he referred to Detective Cayenne’s concession by saying, “[a]nd he admitted to it I didn’t have to call an expert.” (*Id.*) Additionally, the court found, at trial, counsel presented the testimony of a criminal defense investigator, Daniel Roberts, who testified that the bus station where the State claimed Mr. King was located at the time of the phone call has surveillance cameras. (*Id.*) Mr. Till used that testimony to support his theory of sloppy police work by suggesting the police could have easily verified if Mr. King was at the bus station, but chose not to do so. (*Id.* at 2981-82.) At the evidentiary hearing, the court found that Mr. Till explained that it was a strategic decision not to object to Detective Cayenne’s testimony, noting if Mr. Till had objected to Detective Cayenne’s testimony on the subject, the State would have simply brought in someone who was more qualified. (*Id.* at 2982.) Rather, counsel was able to elicit testimony to discredit Detective Cayenne’s testimony on the subject as outlined above. (*Id.*) Thus, the court found that Mr. King failed to identify how the expert’s testimony would establish that counsel’s actions were prejudicial. (*Id.*) The court further found that trial counsel did not act unreasonably by failing to

raise a hearsay objection to Detective Cayenne's testimony. However, the court's findings are incorrect.

Mr. King's trial counsel, however, was deficient in not retaining or consulting with a cell phone expert to rebut Detective Cayenne's misleading statements presented by the State to the jury prejudicing Mr. King's case. The jury would have viewed a cell phone expert to be more credible than testimony of a detective. Mr. King's counsel would have shown the jury that no one could testify *as* to the directionality of the tower because the cell phone company never provided those records; only a person who works for the cell phone company could have testified to directionality. Trial counsel could have shown that an azimuth is needed in order to show directionality, which was not provided to the State. A cell phone expert could have provided reasonable doubt as to where Mr. King was when the phone calls were made because it was unclear from what direction the 5:25 a.m. phone call was made and it is unclear from the records provided where Mr. King was during the 10:00 a.m. phone call. This critical evidence would have rebutted Detective Cayenne's testimony and proven it to be misleading at best. Trial counsel's representation of Mr. King fell below acceptable professional standards in several respects rendering Mr. King's guilty verdict unreliable. Each of these failures severely prejudiced Mr. King. There is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different.

D. THE POST-CONVICTION COURT'S FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO MAKE PROPER OBJECTIONS DURING STATEMENTS MADE IN THE STATE'S FIRST AND SECOND CLOSING

ARGUMENTS IN THE GUILT PHASE OF TRIAL, FAILING TO OBJECT TO RASHAD MONTFORT'S TESTIMONY, AND FAILING TO OBJECT TO DETECTIVE CAYENNE'S TESTIMONY IN THE GUILT PHASE OF TRIAL IS NOT SUPPORTED BY THE LAW OR COMPETENT, SUBSTANTIAL EVIDENCE IN VIOLATION OF MR. KING'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The post-conviction court ruled on Ground Eight without holding an evidentiary hearing. Ground Eight of Defendant's Third Amended Motion Under 3.851 addresses trial counsel's failure to make proper objections during the State's first and second closing arguments and trial counsel's failure to object to Rashad Montfort's and Detective Cayenne's testimony. The post-conviction court denied this claim. (PC, pgs. 2994-95.) With regard to trial counsel's failure to make proper objections during the State's closing arguments, the post-conviction court found that even assuming *arguendo* trial counsel performed deficiently, Mr. King could not show prejudice and there is no reasonable possibility the outcome of the proceeding would have been different had counsel objected to the four contested statements. (*Id.* at 2995.) As to trial counsel's failure to object to Rashad Montfort's testimony, the trial court found the State's questioning to be permissible and not misleading to the jury. (*Id.* at 2991-92.) With respect to trial counsel's failure to object to Detective Cayenne's testimony, the post-conviction court found the limited questioning of Detective Cayenne did not mislead the jury and even assuming counsel was ineffective for failing to object to Detective Cayenne's line of questioning, there was no reasonable probability the result of the proceeding would have been different. (*Id.* at 2992-93.)

However, these rulings have no legal basis and are not supported by competent, substantial evidence. The jury was left with the State's improper testimony during the closing arguments, including facts that were not present on the wire tapes and that Mr. Montfort told Mr. King that he would not implicate him in the crime, implying Mr. King was involved in this crime. Trial counsel's representation of Mr. King fell below acceptable professional standards in several respects rendering Mr. King's guilty verdict unreliable. Each of these failures severely prejudiced Mr. King; there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different.

- I. **The post-conviction court's finding that the outcome of the proceeding would not have been different even if trial counsel obtained a favorable ruling on the trial counsel's objections to the state's leading questions of Montfort, the questioning of Montfort was permissible and not misleading, and that trial counsel did not act deficiently is supported neither by the law nor competent substantial evidence.**

Ground 8, I (A) and I (B), discusses trial counsel's failure to object to the State's examination of Montfort, tainting the jury to believe Montfort asked Mr. King about the victim's vehicle and that Mr. King never denied having loaned the vehicle to Montfort. The post-conviction court denied this claim finding the State's line of questioning was permissible, not misleading, and counsel was not deficient as to this issue. (PC, pgs. 2991-92.) The post-conviction court also found that the result of the proceeding would not have been different even had counsel objected. (*Id.*)

"To prevail on a claim of ineffective assistance of trial or appellate counsel, a Petitioner must meet the two-prong test set forth in *Strickland v. Washington*, 466

U.S. 668 (1984). *Strickland's* two-part test requires a Petitioner to demonstrate that counsel's performance was deficient and 'there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" See *Strickland v. Washington*, 466 U.S. at 694; see also *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Williams v. Taylor*, 529 U.S. 362 (2000). "[A]n attorney is allowed to argue reasonable inferences from the evidence and to argue credibility of witnesses or any other relevant issue so long as the argument is based on the evidence." *Miller v. State*, 926 So.2d 1243, 1254-55 (Fla. 2006). Here, the State improperly elicited misleading testimony from Rashad Montfort, which included facts not in evidence; a competent attorney would have objected to these improper misleading questions asked by the State.

a. State's direct examination of Rashad Montfort.

At the start of the State's direct examination of Montfort, trial counsel objected once at the conclusion of the following improper, leading questions, asked by the State:

Q: And I'm talking about a time where he let you borrow a car? (improper, leading) (DIR. ROA, Vol. XIII, p. 709.)

Q: Okay. And at some point that same day you ended up using the car that he let you borrow? (improper, leading) (DIR. ROA, Vol. XIII, p. 710.)

Q: So the day that we are talking about is the day he lent you a car? (improper, leading) (*Id.*)

Although trial counsel objected once to the leading questions, trial counsel permitted the State to continue to question Montfort, without a ruling from the trial

court first, as to whether this line of questioning was proper and admissible. (*Id.*) The State continued to improperly use leading questions throughout direct examination. The post-conviction court conceded trial counsel never received a ruling on the objection because the State moved on with its questioning (PC, p. 2991.) The post-conviction court erred when finding that even if the trial court had sustained the objections made, the substantive testimony would have still been elicited; the State would have merely had to rephrase the questions. Assuming *arguendo* that the trial court would have sustained this objection and the State rephrased these questions, it would have still been improper for the State to mislead the jury into believing Mr. King loaned Montfort the vehicle. Had trial counsel obtained a ruling from the Court as to the admissibility of this line of questioning, trial counsel would have been able to keep out this line of questioning from the jury.

The State played portions of the wire tapes, and **told** the jury **this was the only** part of the conversation that was relevant. (DIR. ROA, Vol. XIII, pgs. 726-27.) The State stopped the wire tapes at several locations. The State asked Montfort to explain what was said during the conversation between Montfort and Mr. King and further misled the jury into believing Montfort at some point asked Mr. King about giving him the car.

During the State's direct examination of Montfort, the State asked Montfort, "Okay. So you're telling the defendant that you told the police - - **you lied for him**, in other words?" to which Montfort testified, "Yes, sir." (DIR. ROA, Vol. XIII, p. 732) (emphasis added). Defense counsel failed to object to this question,

and this was not part of the wire tapes. The State continued its line of questioning of Montfort:

Q: Okay. At this point he's - - you tell him, hey, they came to talk to me about the car you **let me hold** and he doesn't say anything, right?

A: Yes, sir.

Q: And you're trying to get him to talk about the car and about the murder, right?

A: Yes, sir.

Q: And he's not talking at all about it?

A: No, sir.

Q: He's not denying that **he loaned you the car, gave you the car?**

A: No, sir.

Q: He doesn't say what are you talking about, I don't know what you're talking about, does he?

A: No, sir.

Q: He doesn't say what are you talking about, I don't know what you're talking about, does he?

A: No, sir.

Q: Okay. **And this goes on for several more minutes, right?**

A: Yes, sir.

Q: Doesn't mention it.

(DIR. ROA, Vol. XIII, pgs. 734-35) (emphasis added). Trial counsel failed to object to this line of questioning as misleading and because it was not found on the wire tapes. The post-conviction court erred in finding this questioning was permissible because the jury heard each statement the State asked Montfort to

interpret and was free to interpret the conversation as they deemed appropriate, citing to *Hitchcock v. State*, 991 So.2d 337, 361 (Fla. 2008) (*finding* “Counsel cannot be deemed ineffective for failing to make a meritless objection”). This is not a meritless objection; this testimony led the jury to believe Mr. King lent the vehicle to Montfort, a key part of the State’s case, which severely prejudiced Mr. King. Even if the jury was free to interpret this conversation, the State bolstered its case by this line of questioning and trial counsel deficiently failed to correct this testimony on cross-examination or by questioning Montfort about what additional conversations were on the tape. This allowed the State to further mislead the jury into believing Mr. King lent Montfort the vehicle.

The State then played a portion of the second wire tape for the jury, where the following conversation between Montfort and Mr. King occurred:

VOICE ON TAPE: You tell (inaudible).

VOICE ON TAPE: (Inaudible) I don’t know.

VOICE ON TAPE: Huh?

VOICE ON TAPE: You say you don’t know, you don’t know.

(DIR. ROA, Vol. XIII, p. 738.) The State then asked Montfort, “And at this point **he tells you to say you don’t know, you don’t know, right?**” (DIR. ROA, Vol. XIII, p. 719) (emphasis added). Montfort replied, “Yes, sir.” (*Id.*) The State continued, “He’s **telling** you in terms of talking to the police, **say** you don’t know, you don’t know, right?” (*Id.*) (emphasis added). “Yes, sir,” Montfort responded. (*Id.*) Trial counsel failed to object to these questions as leading and failed to cross-examine Montfort on these statements. The post-conviction court erred in finding that this line of questioning was not misleading because these responses were not a part of the wire tapes, and therefore, misled the jury into believing that Mr. King

told Montfort to tell the police this, thereby prejudicing Mr. King's case. (Emphasis added.)

b. State's re-direct examination of Rashad Montfort.

During the State's re-direct examination of Montfort, the State asked Montfort the following:

Q: Mr. Montfort, the last thing that was just played for you speaks for itself. He **told you you don't know, you don't know**, meaning when you talk to the police **tell** them you don't know, right?

A: Yes, sir.

Q: Meaning not to **implicate** him?

A: Yes, sir.

(DIR. ROA, Vol. XIII, p. 766) (emphasis added). Trial counsel failed to object to this line of leading questions and failed to cross-examine Montfort regarding this testimony. The post-conviction court erred in finding that although trial counsel did not object to this line of questioning, trial counsel did not act deficiently as to this issue and the result of proceeding would not have been different even had counsel objected. (PC, p. 2992.) The post-conviction court reasoned that trial counsel was able to have Montfort testify that he believed Mr. King may have been simply telling him that if he did not know anything, that is all he could say to the police. (*Id.*) However, trial counsel never cross-examined Montfort on whether Mr. King told him not to "implicate" him. This ultimately misled the jury into believing Mr. King stated to Montfort he did not want Montfort to "implicate" him in this crime, that Mr. King played a role in this crime, and that Mr. King told Montfort what to say to the police.

Trial counsel's continued failure to object to the leading questions by the State and his failure to correct Montfort's testimony on cross-examination, allowed

the State to establish through misleading means that the wire tapes substantiated the fact Mr. King lent Montfort the vehicle, proving the vehicle belonged to Mr. King, an essential key to the State's case. There is a high probability that the outcome of the proceeding would have been different had trial counsel objected to Montfort's testimony and the State's line of questioning because the jury would not have been left with the presumption that Mr. King had a connection with the victim's vehicle and told Montfort to cover this up when questioned by the police. Accordingly, the post-conviction court erred in not finding Mr. King was prejudiced by trial counsel's failure to object to the State's closing arguments.

II. The post-conviction court's finding that the questions of Detective Cayenne did not mislead the jury and that there is not reasonable probability that the result of the proceeding would have been different even if trial counsel was ineffective in failing to object to these questions and failing to cross-examine Detective Cayenne is supported neither by the law nor competent substantial evidence.

Strickland's two-part test requires a Petitioner to demonstrate counsel's performance was deficient and 'there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *See Strickland v. Washington*, 466 U.S. at 694; *see also Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Williams v. Taylor*, 529 U.S. 362 (2000). Here, the State improperly elicited misleading testimony of facts not in evidence from Detective Cayenne; a competent attorney would not have failed to object to this improper misleading testimony.

During the State's examination of Detective Cayenne, Detective Cayenne testified to the following questions:

Q: Counsel asked you about whether or not you were successful with

the controlled wires with Mr. Montfort and Cecil King. But you said that meaning he wasn't successful meaning he didn't outright admit that I killed Ms. Telzer-Bain, is that correct?

A: That's correct.

Q: Did he have any response to when Mr. Montfort says, hey, **you know that vehicle you let me hold?**

A: Right. He didn't give any response at all. He didn't say a word.

(DIR. ROA, Vol. XV, pgs. 1173-74) (emphasis added). The post-conviction court erred in finding the questioning of Detective Cayenne did not mislead the jury and in finding that even assuming trial counsel was ineffective for failing to object to these two questions and failing to cross-examine, there is no reasonable probability the result of the proceeding would have been different in light of the jury's ability to hear portions of the conversations, counsel's arguments using the exchange to his advantage, and the evidence presented against Mr. King at trial. (PC, pgs. 2992-94.) The post-conviction court reasoned that through the questioning of Montfort, the State explained that while the wire recorded everything, including Montfort walking to Mr. King's home, urinating, and playing with Mr. King's dog, the State would only be playing clips of the conversation. (*Id.*) The post-conviction court further reasoned the jury heard the relevant portions of the conversation between Montfort and Mr. King (*Id.*) The post-conviction court concluded Montfort testified to loaning Mr. King the vehicle for an afternoon, wore a wire while talking to Mr. King for the purpose of having Mr. King talk about the car, but Mr. King never admitted to loaning Montfort the car. (*Id.*)

Defense counsel failed to object to this line of questioning, as these facts

were not in evidence, failed to cross-examine Detective Cayenne about this testimony, and most importantly, failed to establish that these facts were not present on the wire tapes. Montfort did not make a statement to Mr. King about lending him the Cadillac on the wire tapes. The post-conviction court erred in finding this line of questioning was not misleading; Detective Cayenne's testimony misled the jury into believing Mr. King loaned the vehicle to Montfort and because Mr. King did not give a response, Mr. King's response was incriminating in nature. Although, counsel argued Montfort was trying to set Mr. King up to protect himself and argued Mr. King said "nothing that's incriminating in any way, shape or form," counsel still failed to object to this misleading testimony and failed to cross-examine Detective Cayenne on this testimony. (DIR. ROA, Vol. XVII, pgs. 1397-98.) The jury was led to believe Mr. King played a role in the victim's murder, prejudicing the outcome of Mr. King's guilt phase of trial.

III. The post-conviction's finding that trial counsel was not deficient in failing to object and respond to the State's first and second closing argument in the guilt phase of Mr. King's trial and in finding Mr. King not prejudiced is not supported by the law or substantial, competent evidence.

"Attorneys are permitted wide latitude in closing arguments but are not permitted to make improper argument." *Merck v. State*, 975 So.2d 1054, 1061 (Fla. 2007) (citing *Gore v. State*, 719 So.2d 1197, 1200 (Fla. 1998)). "Closing argument is an opportunity for counsel to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." *Id.*

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

And what is his reaction? Like what are you talking about? I mean that's - - a person who doesn't know anything about this, I mean what are you talking about. No, that wasn't his reaction. What were his statement's about? What was he concerned about? Who did you tell? Who did you tell them you got it from. Of course, Mr. Montfort was, hey, I told them I got it from a baser. **Don't worry, I'm not going to tell them to implicate you.**

And then the second time he goes back, what statements, what does he say? Just **tell them you don't know. Just tell them you don't know.** But he's very - - see, this is a person who's very smart. He's not going to trip himself up in terms of the conversation with Mr. Montfort.

I've got a Cadillac here. Let me give you the keys. Divert the attention. This is somebody who is very methodical, who knows exactly what he is doing. **You heard him on that tape. You know his actions by what he did.** Divert attention from him, get away with the perfect murder.

(DIR. ROA, Vol. XVI, pgs. 1349, 1353-54) (emphasis added).

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

They told you that nothing he said on those controlled wires were incriminating. I would argue that what he did not say is even more incriminating. Hey, man, **you remember that car, you know the car you let me borrow?** What are you talking about? What car? That's pretty incriminating.

(DIR. ROA, Vol. XVII, p. 1445) (emphasis added).

Here, the post-conviction court found the prosecutor's improper comments made in closing arguments did not mislead the jury. (PC, pgs. 2994-95.) Trial counsel failed to object and respond to these improper closing arguments by the State and permitted the State to argue facts that were not in evidence, as well as

facts that were not present on the wire tapes. Further, trial counsel failed to address these improper comments in the Mr. King's closing argument. Trial counsel Till should have argued that Mr. King did not admit guilt, and further, did not **tell** Montfort to say "you don't know." (Emphasis added.) The jury was misled to believe that Montfort told Mr. King that he would not implicate him in the crime, implying Mr. King was involved in this crime. On the two wire tapes, Mr. King did not admit that he loaned the vehicle to Montfort. It was never stated on the wire tapes, "[l]et me give you the keys." (DIR. ROA, Vol. XVI, p. 1349.) Trial counsel failed to object to this improper argument and respond, which left the jury to assume Mr. King and Montfort had a conversation about Mr. King loaning the vehicle to Montfort. The jury was further misled into believing that Mr. King was guilty because he did not reply to Montfort. It was never stated on the wire tape that Montfort lent the vehicle to Mr. King, yet the jury was left with this interpretation due to the State's misleading argument.

The post-conviction court erred in finding these comments by the State were not misleading and the State properly advanced a legitimate argument based on the facts in evidence and a fair inference from those facts. However, Montfort never testified that he told Mr. King, "Don't worry, I'm not going to tell them to implicate you," and this statement was not found on the wire tape. Clearly, these facts were not in evidence and are misleading to the jury. Mr. King did not **tell** Montfort to say "you don't know," as the State indicated to the jury to implicate Mr. King's guilt. Although Montfort testified to Mr. King loaning him the victim's vehicle and that both he and Mr. King had a conversation about Mr. King

loaning him the vehicle, there is no evidence on the wire tapes that Mr. King admitted to loaning Montfort this vehicle, having possession of this vehicle, or having the keys to the vehicle. Mr. King's fingerprints were also never found inside of the vehicle. Yet, the State continued to argue to the jury what is more incriminating than the wire tape, was what was not said on the wire tape, such as "[h]ey man, **you remember that car, you know the car you let me borrow? What are you talking about? What car?**" (DIR. ROA, Vol. XVII, p. 1445) (emphasis added.) This improper, misleading statement left the jury to believe Mr. King was guilty because he did not reply to Montfort. Clearly, these facts were not in evidence found on the wiretap; the State did not properly advance a legitimate argument, misleading the jury to believe Mr. King was guilty.

The post-conviction court indicated the trial judge informed the jury to "[p]lease remember that what the attorneys say is not evidence." (PC, p. 2995.) Although this instruction was presented to the jury, the jury was left with the impression that Mr. King was guilty for not replying to Montfort because the jury was not otherwise given instruction by either the trial judge or trial counsel to disregard this line of questioning; trial counsel never objected or responded to this improper and misleading testimony.

When looking at the closing argument as a whole, the prosecutor's improper closing arguments constituted fundamental error because the jury was led into believing the following events occurred: (1) the jury was left to assume that Mr. King told Montfort to **tell** the police that "he doesn't know;" (2) that Montfort told Mr. King that he was going to lie to the police to protect Mr. King

and not to implicate Mr. King; and (3) that Montfort asked Mr. King about lending him the vehicle within a conversation that occurred on the wire tapes, and that Mr. King did not give any response to Montfort. Mr. King's responses were truly innocent for an individual who did not know he was being recorded. Yet, trial counsel's deficient performance in failing to object led the jury to believe Mr. King was in possession of the vehicle and loaned the vehicle to Montfort, which implied to the jury that Mr. King was involved in this crime. This enabled the State to use misleading testimony to prove Mr. King's guilt, and thus, requires reversal in this case. The verdict of guilty could not have been obtained without these improper comments and the evidence does not support the post-conviction court's ruling. As such, neither competent, substantial evidence nor the law supports the post-conviction court finding that trial counsel's errors did not constitute ineffective assistance of counsel and did not prejudice Mr. King's case.

E. THE POST-CONVICTION COURT'S FINDING THAT MR. KING IS NOT ENTITLED TO RELIEF ON A CLAIM OF CUMULATIVE ERROR IS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

After an evidentiary hearing was granted by the post-conviction court as to Grounds I, II, III, and IV, including all of the sub-claims contained within those grounds, the post-conviction court found Mr. King was not entitled to a claim of cumulative error because Mr. King's previous claims were either meritless, procedurally barred, or did not meet the *Strickland* standard of ineffective assistance of counsel. (PC, pgs. 3004-3005.)

The principle of cumulative error is simple: While a number of errors made during pre-trial and trial proceedings, standing alone, may not be cause

for reversal, their cumulative effect may substantially prejudice a defendant. *Perkins v. State*, 349 So. 2d 776, 778 (Fla. 2d DCA 1977.) *Perkins* held, “while a defendant is not entitled to an error-free trial, he must not be subjected to a trial with error compounded upon error.” *Id.*; see also *Carter v. State*, 332 So.2d 120 (Fla.2d DCA 1976), *Albright v. State*, 378 So. 2d 1234, 1236 (Fla. 2d DCA 1979). When error is compounded on error, courts have held that a defendant has been denied his constitutional right to a fair trial. *Id.* In order to succeed on a claim of cumulative error, the individual claims, forming the basis of cumulative error, must be upheld. See *Ventura v. State*, 794 So. 2d 553, 560 (Fla. 2001), *Bryan v. State*, 748 So. 2d 1003, 1008 (Fla. 1999) (Where allegations of individual error are found without merit, a cumulative error argument based thereon must fail.)

Mr. King did not receive the fundamentally fair trial to which he was entitled under the Sixth, Eighth and Fourteenth Amendments. See *Heath v. Jones*, 941 F.2d 1126 (11th Cir. 1991); *Derden v. McNeel*, 938 F.2d 605 (5th Cir. 1991). While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel have merit and significantly tainted Mr. King’s guilt. The errors as claimed in the Third Amended Motion Under 3.851 are hereby specifically incorporated into this claim and include: ineffective assistance of counsel in the guilt phase of Mr. King’s trial in failing to redact Mr. King’s interrogation video, in failing to object to Detective Cayenne’s hearsay testimony,

in failing to object to the introduction and repeated discussions to a bloody shirt, in failing to investigate and present expert witnesses to rebut the State's case in chief, and in failing to object to Detective Cayenne's improper cell phone testimony; and ineffective assistance of counsel in failing to object to statements made in the State's first and second closing arguments in the guilt phase of trial. These errors cannot be harmless. Under Florida case law, the cumulative effect of these errors denied Mr. King his fundamental rights under the Constitution of the United States and the Florida Constitution. *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986); *Ray v. State*, 403 So.2d 956 (Fla. 1981); *Taylor v. State*, 640 So.2d 1127 (Fla. 1st DCA 1994); *Stewart v. State*, 622 So.2d 51 (Fla. 5th DCA 1993); *Landry v. State*, 620 So.2d 1099 (Fla. 4th DCA 1993).

Based on the preceding claims, argument set forth within these claims, and evidence that is clear on the face of the record, Mr. King has been prejudiced by multiple errors on the part of both the trial counsel and the prosecution throughout the trial process contrary to the post-conviction court's findings. Mr. King's trial proceedings resulted in a conviction of the highest criminal charge and penalty. This conviction and sentence were resultant of a trial that was riddled with errors, the accumulation of which rendered Mr. King's trial fundamentally unfair and the result thereof unreliable.

Mr. King's trial was a sham—full of irrelevant and unduly prejudicial evidence and a lack of meaningful adversarial testing mounted by the defense. Mr. King's counsel did not put on a *single* expert to rebut the State's witnesses, who testified to DNA, shoe impressions, cell phone, and latent prints evidence

that allegedly implicated Mr. King. In addition, trial counsel utterly failed to defend Mr. King's rights, by failing to redact inflammatory interrogation videos, or object to the State's repeated references to an *irrelevant* bloody shirt that only served to inflame the jury. Additionally, trial counsel failed to object to the testimony of Detective Cayenne, object or impeach Mr. Montfort who was a key State witness, and object to the State's closing arguments.

CONCLUSION

For the foregoing reasons Cecil Shyron King prays this Honorable Court reverse and remand the trial court's denial of his Third Amended Motion to Vacate Judgments of Conviction and Sentence Under Rule 3.851 entered on July 11, 2017, thereby entitling Mr. King to a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided to Bernardo Enrique De La Rionda, Esq., Office of the State Attorney, Fourth Judicial Circuit, 220 East Bay Street, Jacksonville, FL 32202 via electronic service at SAO4DuvalCriminal@coj.net; to Jennifer L. Keegan, Esq., Assistant Attorney General, Office of the Attorney General, PL-1 The Capitol Tallahassee, FL 32399-10509 via electronic service at Jennifer.Keegan@myfloridalegal.com; and to Cecil Shyron King at Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026 on this 29th day of December, 2017.

BY: /s/ Gonzalo Andux

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CERTIFICATE OF COMPLIANCE AS TO FONT

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

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