IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1051

DUSTY RAY SPENCER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE NINTH CIRCUIT COURT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant appeals the circuit court's denial of his Motion for Postconviction Relief prosecuted pursuant to Rule 3.850, Florida Rules of Criminal Procedure. Record references to preceding proceedings will be referred to as follows:

"R." – record on direct appeal;

"T." - transcript of guilt phase proceedings at trial

"R2." – record on direct appeal from remand;

"PC-R." – record of postconviction proceedings; and

"EX." – exhibits from postconviction hearing.

REQUEST FOR ORAL ARGUMENT

Because of the seriousness of the claims at issue and the stakes involved, Appellant, a death-sentenced inmate on Death Row at Union Correctional Institution, urges this Court to permit oral argument on the issues raised in his appeal.

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STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

On February 6, 1992, an Orange County grand jury indicted Mr. Spencer for first-degree murder, aggravated assault, attempted first-degree murder, and aggravated battery. (R. 491). On October 14, 1992, another Orange County grand jury handed down an amended indictment for the same charges (R. 602). The charges were alleged to have arisen out of two separate incidents between Mr. Spencer and his wife, one occurring on January 4, 1992 and the other occurring on January 18, 1992 (R. 602-603).

Mr. Spencer was tried by a jury and found guilty on November 7, 1992 (R. 1081). On December 8, 1992, the jury recommended a sentence of death for the first-degree murder conviction by a vote of 7-5 (R. 1148). The trial court followed the jury recommendation and sentenced Mr. Spencer to death on December 21, 1992 (R. 1230). On September 22, 1994, this Court affirmed the conviction, but vacated Mr. Spencer's death sentence because the trial court erroneously instructed the jury on and considered the aggravating circumstance of "cold, calculated, and premeditated" and erroneously failed to consider the two statutory mitigating circumstances dealing with mental health. Spencer v. State, 645 So. 2d 377 (Fla. 1994). On remand for "reconsideration" in lieu of these errors, the trial court, without impaneling a jury, sentenced Mr. Spencer to death on January 18, 1995 (R2. 149).

This Court affirmed Mr. Spencer's resentencing. Spencer v. State, 691 So. 2d 1062 (Fla. 1996). On October 6, 1997, the United States Supreme Court denied Mr. Spencer's Petition for Writ of Certiorari to the Florida Supreme Court. Spencer v. State, 118 S. Ct. 213 (1997).

On September 24, 1999, Mr. Spencer filed his Amended Motion to Vacate Judgment and Sentences (PC-R. 622-735). On December 21, 1999, the lower court held a hearing in this matter pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993). Subsequent to the Huff hearing, the lower court ordered a limited evidentiary hearing (PC-R. 792-97). The evidentiary hearing was held on March 2-3, 2000. Thereafter, the lower court entered an order denying Mr. Spencer's 3.850 in its entirety (PC-R. 832-89). This appeal follows.

II. STATEMENT OF THE FACTS

A. Guilt-Phase Testimony

At trial, the State called Timothy Johnson who testified that he is 18 years old and was the son of Karen Spencer (T. 4510). He lived at home with his mother and had known Mr. Spencer for three and one-half years (T. 452). Johnson testified that in December 1991 his mother and Mr. Spencer had begun having problems and that Mr. Spencer had moved out (T. 453). Mr. Spencer moved back in just before Christmas and then back out right after Christmas, staying approximately 4-5 days (Id.). On

the morning of January 4, 1992, Johnson was awakened by his mother's screams and ran to her bedroom where Mr. Spencer was hitting her with his hands (T. 462-63). Mr. Spencer then grabbed an iron from a shelf in Mrs. Spencer's room and hit Johnson with it several times (T. 463). Mr. Spencer followed Johnson into his room where Johnson was again hit with the iron (T. 465). At this time, Mrs. Spencer left the house (T. 466). Johnson testified that he never saw Mr. Spencer hit Mrs. Spencer with the iron (T. 464).

Johnson testified that on the night of January 17, 1992, he got home at around 10 p.m. and went to bed around 11 p.m. (T. 476-77). Krista Mays, his brother's girlfriend, was there that night, but he doesn't know what time she left (T. 477). The next morning, Johnson woke up to the sound of yelling and ran out the front door with a .22 rifle (T. 478). Johnson ran around to the side of the house where he looked into the backyard (T. 479). He testified that he saw Mr. Spencer hitting Mrs. Spencer with a brick (Id.). Mr. and Mrs. Spencer were about ten feet from the opened sliding glass door at the back of the house (T. 480). Johnson ran up to Mr. Spencer and hit him in the head with the rifle (T. 481). Mr. Spencer then hit Mrs. Spencer's head against the side of the house, after which she said, "stop" (T. 481, 483). Johnson did not see any cuts on Mrs. Spencer's face (T. 484). After hitting Mrs. Spencer's head against the wall, Mr.

Spencer pulled out a knife (Id.). Johnson testified that the knife looked like a steak knife and that Mr. Spencer did not normally carry a pocketknife (T. 491). Mr. Spencer approached Johnson with the knife when Johnson tried to lift Mrs. Spencer (T. 493-96). When Mr. Spencer approached Johnson, he put Mrs. Spencer down and ran to a neighbor's house (T. 498). Johnson testified that Mr. Spencer was wearing clear, plastic gloves (T. 501). Johnson waited at the neighbor's house until the police arrived (T. 505).

On cross-examination, Johnson testified that he did not hear any conversation between the Spencers on the morning of January 4th or 18th, 1992 (T. 538, 541). Mr. Spencer did not hit Mrs. Spencer with the iron on January 4th nor did he chase after her when she left the house (T. 541, 551).

On redirect, Johnson testified that he did not see a knife when he first came upon the altercation in the backyard on January 18th (T. 542). When Mr. Spencer was hit with the gun, he did not immediately come at Johnson (T. 543). Johnson testified that he never saw Mr. Spencer wearing the gloves until that morning (T. 549).

Johnson further testified on cross-examination that Mr. Spencer was home for Christmas and exchanged gifts with Johnson and Mrs. Spencer (T. 552). Mrs. Spencer's parents were there for a Christmas dinner (T. 553).

Deputy Ronald Weyland of the Orange County Sheriff's Office testified that he responded to the Spencer home on the morning of January 4th (T. 618). After inspecting the Spencer home, Weyland proceeded to a neighbor's home where he took statements from Tim Johnson and Karen Spencer (T. 621). Weyland later went to the hospital to take photos of Johnson and Mrs. Spencer (T. 622). Auxillary patrolman Bill Anthony was with Weyland on January 4th (T. 624). Weyland retrieved the iron from the scene and processed it for prints (T. 624-25).

The State next called Dr. Clarence Bowman, an emergency room physician at Princeton Hospital in Orlando who testified that he treated Tim Johnson and Karen Spencer on January 4th (T. 640-41). Bowman testified that Karen Spencer told him she was beaten with an iron (T. 648). Johnson told Bowman that he was hit with an iron (T. 654). Bowman stated that Karen Spencer was treated for facial lacerations (T. 649).

Deputy Richard Hosier of the Orange County Sheriff's Office testified that he responded to the Spencer home on January 18th (T. 659). Hosier noticed bricks in the vicinity of the body with blood spatters on them (T. 663). The kitchen area showed signs of a struggle (T. 665).

Orange County Deputy Sandra Blume testified that she responded to the Spencer home on January 18th and observed blood-stained bricks near Mrs. Spencer's body (T. 693).

On cross-examination, Blume testified that there were bricks arranged in a landscape border near the body and the blood-stained bricks were similar to these (T. 694).

Next, the State called Dr. William Anderson, the Chief Medical Examiner of Orange County (T. 702). Dr. Anderson testified that he went to the scene of the homicide on January 18th where he viewed the scene and the body of Karen Spencer (T. 707). Dr. Anderson described stabbing wounds to Mrs. Spencer's facial area and a blunt force injury to her forehead (T. 726-27). Dr. Anderson also testified as to blunt force injury to the back of the head and stab wounds to the chest (T. 731-36). Karen Spencer's right arm revealed the existence of defensive wounds according to Dr. Anderson (T. 738). Facial injuries, cardiopulmonary injuries, and brain injuries all contributed to cause of death, with the cardiopulmonary injuries being the most serious (T. 742).

On cross-examination, Dr. Bowman testified that he could not determine the time sequence of the injuries (T. 749). He saw no evidence of brick material in his examination of Mrs. Spencer's face and scalp (T. 750).

The State next called Debra Chiota, a crime scene technician for the Orange County Sheriff's Office (T. 785). Chiota arrived at approximately 9:00 a.m. on January 18th and helped process the scene (T. 788). Chiota testified that she observed the bricks

near the body and that they appeared to be out of their usual order (T. 803). Chiota gathered the parts of the broken gun from the scene and took them into evidence (T. 819). The parts of the gun were found within 12 feet of the body (T. 826).

Krista Mays testified that she knew members of the Spencer family, including Mr. and Mrs. Spencer (T. 850). She is the boyfriend of Mrs. Spencer's son, Rodney Johnson, and was at the Spencer home on the night of January 17th (T. 851). After talking to Mrs. Spencer, Mays left around 2:00 a.m., at which time Tim Johnson was already asleep (T. 871).

Next, Chester Blekfeld testified that he is a crime scene technician with the Orange County Sheriff's Office and that he responded to the Spencer home on January 18th with Deputy Chiota (T. 894-95). Blekfeld testified that he collected a part of the shattered gun that had blood on it (T. 898).

Benjamin Abrams testified that he worked for the Spencers' painting business for approximately one and one-half years prior to Mrs. Spencer's death and that his routine was to come to the Spencer home in the morning to pick up a work van (T. 903). Abrams continued to work for Mrs. Spencer after Mr. Spencer had moved out of the house (Id.). Abrams was supposed to be running the business after the Spencers separated (T. 906). Abrams testified that Mr. Spencer turned over a briefcase to him after the January 4th incident (T. 907). Abrams further testified that

he and Mr. Spencer attended a party at a company work shed on January 1, 1992 (T. 913). Abrams testified that Mr. Spencer jokingly said he would like to throw Mrs. Spencer off of his boat (T. 915). Abrams arrived at the Spencer home just before the police on January 18th, expecting to go to work (T. 919).

On cross-examination, Abrams testified that Mrs. Spencer was the estimator for the painting business and that Mr. Spencer was responsible for purchasing and labor (T. 921). When Mr. Spencer handed over the briefcase to Abrams, he did not mention harming Mrs. Spencer (T. 924). When Mr. Spencer made the "boat statement", he had been drinking a lot (Id.). Mr. Spencer was "totally kidding" when he made the statement and Abrams felt no need to call the police (T. 926).

Charles Badger testified that he is a crime lab analyst for the Florida Department of Law Enforcement and that he found a stain of human blood on a portion of the gun he received from the crime scene (T. 980, 993).

B. Penalty-Phase Testimony

At penalty phase, the state called the medical examiner, Dr. Anderson (R. 99). Anderson testified that many of Mrs. Spencer's wounds were inflicted while she was alive (R. 99). Defensive wounds were present (R. 100). Dr. Anderson testified that injuries to Mrs. Spencer's face would not have been caused by a brick (R. 120).

On cross-examination, Anderson testified that he could not state the time sequence of the wounds (R. 108). Dr. Anderson stated that he saw no blunt force injuries to Mrs. Spencer's facial area and that the facial bleeding was not caused by a brick (R. 110). The defensive wounds were superficial (R. 112). Dr. Anderson testified that Mrs. Spencer could have slipped in and out of consciousness (R. 118).

Deputy Weyland testified that Mrs. Spencer told him that Mr. Spencer had made threatening statements to her during the January 4th iron incident (R. 137). On cross-examination, Weyland testified that Tim Johnson did not hear the threatening statements (R. 138).

The first defense witness at penalty phase was Dr. Kathleen Burch, a clinical psychologist (R. 151). Dr. Burch examined Mr. Spencer over two days in September, 1992 (R. 154). Dr. Burch performed a neuropsychological and psychological battery (R. 155). Additionally, Dr. Burch received a life history and history of the offense (R. 156). Dr. Burch, despite finding the existence of a long history of drug and alcohol abuse, found no significant brain damage (R. 159). Dr. Burch testified that Mr. Spencer was not malingering (R. 162). Dr. Burch further testified that personality testing indicates that Mr. Spencer has a personality disorder characterized by built up anger which may explode and vulnerability under stress (R. 163). Dr. Burch

testified that Mr. Spencer suffered emotional and sexual abuse as a child and that he was abusing alcohol by age 14 (R. 172-74). Mr. Spencer's history revealed no significant period of sobriety since adolescence (R. 175). Mr. Spencer suffers from a paranoid personality disorder that produces brief psychotic episodes (R. 177). Dr. Burch testified to the presence of both statutory mental health mitigators (R. 178). Mr. Spencer would not be a threat in a prison environment (Id.). Finally, Dr. Burch testified that Mr. Spencer told her that he went to the Spencer home on January 18th to get the title to his car (R. 179).

On cross-examination, Dr. Burch testified that previous threats made by Mr. Spencer to Mrs. Spencer would not change her opinion as to statutory mitigation (R. 184). Dr. Burch testified that the threats may have been the result of fantasy (R. 185). Mr. Spencer's MMPI testing indicated an impulsive, nonreflective personality (R. 195). The personality disorder likely set in during early adulthood and has worsened (R. 196). Dr. Burch testified that Mr. Spencer's ability to conform his conduct to the requirements of the law was impaired because of his impaired reality testing and combined substance abuse (R. 204). Dr. Burch stated that Mr. Spencer did not remember the actual murder (R. 209). Mr. Spencer's history of alcohol and drug abuse effected, to a great extent, his behavior at the time of the crime (R. 213). At the time of the crime, Mr. Spencer had been drinking

constantly and was impaired as a result of his constant alcohol consumption (R. 213, 215).

Patricia Spencer testified that she is the mother of Mr. Spencer (R. 276). Mr. Spencer grew up in Hopewell Township, Pennsylvania and joined the Marines during his senior year of high school (R. 277). Mr. Spencer's hobbies were hunting and fishing (R. 278).

Cheryl Dobbins next testified that she is Mr. Spencer's sister and that she was sexually molested by her father, Raymond Spencer (R. 282). The sexual abuse occurred numerous times between age 8 and 14 (Id.). She testified that Mr. Spencer had written her a letter stating that he had also been sexually molested by their father (R. 283).

On cross-examination, Dobbins testified that Mr. Spencer and his father did not have a close, loving relationship (R. 285). The letter that she received from Mr. Spencer was written in the context of asking her to forgive her father for what he had done (Id.).

Raymond Spencer, Mr. Spencer's father, testified that he sexually molested Mr. Spencer when he was approximately 13 or 14 years old (R. 288). He also sexually molested his daughter (Id.).

John Marancek testified that he is a lifelong friend of Mr. Spencer (R. 293). Marancek testified that Mr. Spencer began

constant drinking and drug use by age 13 (Id.).

Dennis Worrell also testified that he was a childhood friend of Mr. Spencer's and a witness to Mr. Spencer's early drinking and drug use (R. 299).

Ted Kafalas also grew up with Mr. Spencer and remembers Mr. Spencer's early abuse of alcohol and drugs (R. 301-03). Kafalas and Mr. Spencer joined the Marines together (R. 304). Kafalas testified that he and Mr. Spencer moved to Florida together in 1973 (Id.). At that time the two drank excessively (R. 304-05). During this period they were also using drugs, including acid, thai stick, cocaine and marijuana (R. 306).

Next, Hank Petrilli testified that he is a police officer in Hopewell Township (R. 309). Petrilli testified that when Mr. Spencer was an adolescent, he picked him up several times when he was intoxicated (R. 311).

The defense next called Paul Faber who was stationed with Mr. Spencer while in the Marines (R. 313). They were stationed in Guam and were both part of a search and rescue team (R. 313-14). Faber testified that Mr. Spencer was mature and responsible and often was in charge of the team (R. 315). Faber also testified that Mr. Spencer used drugs, including purple haze, mescaline, microdot and acid R. 316).

Ben Abrams next testified for the defense that Mr. Spencer was his employer (R. 318). Mr. Spencer ran a successful

business, treating his employees "excellent" (R. 319). Mr. Spencer cared about the business a great deal (Id.).

Joseph Cleaves testified that he was a foreman for Mr. Spencer's painting business (R. 324). Cleaves testified that Mr. Spencer was the best person he ever worked for and would often loan money to Cleaves if he needed it (Id.).

Mike Bryant testified that he has known Mr. Spencer approximately 10 years (R. 327). Bryant testified that he and Mr. Spencer helped to save the life of a mutual friend named Timmy Meyers who had stopped breathing after an accident involving a dislodged automotive fan (R. 327-28). Bryant testified that Mr. Spencer performed C.P.R. on Meyers and that Bryant and Mr. Spencer drove Meyers to a location where an emergency helicopter could land (R. 328-29).

Leland Meyers testified that Mr. Spencer helped to save the life of his son, Timmy (R. 330). The doctors told him his son would have died without Mr. Spencer's help (R. 331).

Finally, Dr. Jonathon Lipman testified that he has a PhD. in neuropharmacology (R. 335). Dr. Lipman examined Mr. Spencer over three days in September 1992 and conducted a detailed clinical review (R. 338). Dr. Lipman took a drug use history from Mr. Spencer and gave a clinical analysis questionnaire (R. 339). Dr. Lipman indicated that the results from this questionnaire were consistent with Dr. Burch's MMPI testing (R. 343). Dr. Lipman

testified that Mr. Spencer is somewhat withdrawn, submissive, shy and timid (R. 340). Dr. Lipman conducted an addiction severity analysis of Mr. Spencer which indicated significant psychiatric and alcohol addiction problems (R. 341-42). Dr. Lipman testified that Mr. Spencer has little resistance to stress (R. 344). Mr. Spencer began abusing alcohol and drugs at an early age to become intoxicated and thereby avoid resolving conflicts about his sexual maturity (R. 346). Mr. Spencer has an extensive history of drug use from the time of adolescence (R. 347-48). Dr. Lipman testified that based on his interviews, Mr. Spencer was drinking up to a case of beer and a liter of hard liquor every day in the two weeks preceding Mrs. Spencer's death (R. 350). Although Mr. Spencer's blood alcohol level at the time of the crime was zero, he was still in a state of intoxication produced by constant consumption of alcohol (R. 351). Dr. Lipman stated that he felt both statutory mental health mitigators applied to Mr. Spencer (R. 355-56).

On cross-examination, Dr. Lipman testified that Mr. Spencer was in a constant state of intoxication at the time of Mrs. Spencer's death (R. 359). Dr. Lipman testified that he corroborated Mr. Spencer's alcohol consumption by speaking with the Zink family who were friends of Mr. Spencer (R. 367). Lipman further testified that Mr. Spencer's alcohol use was probably worse than Mr. Spencer indicated (Id.). Mr. Spencer told Dr.

Lipman that he went to the house on January 18th to get his car title (R. 368). Mr. Spencer told Dr. Lipman that he entered the back door of the house and that Mrs. Spencer began screaming at him (R. 370). Mr. Spencer then grabbed Mrs. Spencer to cover her mouth and the two fell out the door and onto the back porch (Id.). Mrs. Spencer then hit Mr. Spencer with a brick and he grabbed the brick and hit her with it (R. 370-71). Mr. Spencer was then hit in the head with a rifle and the next thing Mr. Spencer remembers is coming out of a fog and having a knife in his hands (R. 371). Dr. Lipman testified that the fog or blackout is called a dissociative state (R. 378). Nothing in Dr. Lipman's testing indicated that Mr. Spencer was being deceptive (R. 380).

C. Evidentiary Hearing Testimony

At the evidentiary hearing, Don Smallwood testified that he was Mr. Spencer's trial attorney along with attorney Nick Kelly (PC-R. 96). They had an investigator on the case (PC-R. 97). This was their first murder case (PC-R. 98). Smallwood believed that there were nine months between his appointment and trial and that this was a sufficient amount of time for preparation (PC-R. 99). Smallwood was to be primarily responsible for handling guilt phase and Kelly penalty phase, but they worked on both phases together (PC-R. 100). The spilt in responsibility was primarily for purposes of handling witnesses and argument (PC-R.

102).

Smallwood testified that the theory of defense was lack of premeditation (PC-R. 104). The investigator was responsible for locating witnesses and he was directed based on the theory of defense (PC-R. 104-05). Smallwood testified that he was aware of Ben Abrams and felt that he could testify as to lack of premeditation and shed some light on the Spencers' relationship (PC-R. 105-06). Smallwood felt like Abrams was the only witness he had (PC-R. 133). Smallwood remembers talking to Curtis Zink and Andy Brachhold (Id.). Smallwood testified that if he had evidence of the Spencer's volatile relationship, he would have used it (Id.). Smallwood testified that there were two possible reasons why no witnesses were called in defense (PC-R. 108). One reason was that they had no witnesses and the second possible reason was to retain a rebuttal argument in closing (PC-R. 109). Smallwood testified that preserving the rebuttal argument was not that important and that, if they had helpful witnesses, they would have called them (Id.). Smallwood felt the evidence of lack of premeditation was in the cross-examination of state witnesses and in the argument to the jury (PC-R. 135). Smallwood stated that he tried to use state witnesses, specifically Tim Johnson, to show that Mr. Spencer was in a heightened emotional state (PC-R. 110).

Smallwood said that his strategy in regard to the gloves was

to "ignore them" (PC-R. 112). Smallwood remembered the prosecutor putting on the gloves during closing argument and thought she may have been crying (PC-R. 112-13).

There were no formal plea offers from the state although the prosecutor did come to Smallwood before guilt phase closing arguments and say "why don't you go ahead and plead your guy up right now and we'll go straight to penalty phase" (PC-R. 114). Smallwood testified that he felt that the state wanted to make an example of Mr. Spencer because of his being released on bond prior to Mrs. Spencer's death (PC-R. 116). After the killing, the courts established an unwritten "Spencer Rule", pursuant to which no bond was set for people arrested on domestic violence charges (PC-R. 117). The publicity in this case was significant and Smallwood felt that this contributed to the fact that there were no plea offers (PC-R. 118). The publicity continued during the trial (Id.).

Smallwood did not want victims of domestic violence on the jury (Id.). Smallwood did not remember juror Lois Noble and could not say what he liked about her as a potential juror (PC-R. 120-23).

Smallwood stated that he remembered the prosecutor's statement in her opening regarding Krista Mays' testimony (PC-R. 123-24). Smallwood felt that he may not have objected because it would have damaged the prosecutor's credibility if she couldn't

produce the evidence (PC-R. 125). Smallwood testified that he did not remember the prosecutor's statement in opening that Tim Johnson had seen Mr. Spencer strike Mrs. Spencer with the iron (PC-R. 126). Smallwood said that, if Tim Johnson's statement reflected differently, then he may have just "missed it" in terms of objecting to the prosecutor's opening (PC-R. 127).

Smallwood testified that he "flat missed" the discrepancy between Tim Johnson's deposition and trial testimony regarding whether he had ever seen Mr. Spencer wear latex gloves (PC-R. 130). He felt this would have been important and he should have impeached Johnson on this point (Id.).

Smallwood agreed that his concession in opening argument that Mr. Spencer had hit Mrs. Spencer with the iron was contradictory to Tim Johnson's testimony (PC-R. 131).

Smallwood felt that he did not concede guilt in closing argument but instead argued against premeditation (PC-R. 135).

Smallwood testified that he didn't recall a report from Dr. Rose regarding treatment of Mrs. Spencer after the iron incident, but assumes that if the state produced it, he had it (PC-R. 138).

Smallwood testified that he did not call the experts at guilt phase because he did not want the state to delve into their conversations with Mr. Spencer, specifically as the conversations related to the issue of premeditation (PC-R. 142). Smallwood did not recall what Mr. Spencer told the experts about Mrs. Spencer's

death (PC-R. 143). He said that he could not say yes or no as to whether they considered putting the experts on to prove lack of premeditation (Id.). Smallwood did not recall the experts' explanation for Mr. Spencer's lack of memory, but, if he had a supportable argument for lack of premeditation, he would want to use it (PC-R. 144). Smallwood testified that he did understand that evidence put forth in guilt phase could be considered in mitigation (PC-R. 145). He stated that the information the experts had was important to disprove the CCP aggravator (PC-R. 181).

Smallwood said that he never talked to auxiliary patrolman Bill Anthony and doesn't recall if his name was provided (PC-R. 147).

On cross-examination, Smallwood agreed that he emphasized the fact that Tim Johnson did not see Mr. Spencer hit his wife with the iron (PC-R. 149). Smallwood testified that he was aware of Mr. Spencer's relationship with his previous wife and, further, that he wanted to keep this out of evidence (PC-R. 153). Smallwood testified that he had a letter from Mr. Spencer stating that he had hit his wife with the iron and that this was a factor in deciding not to call the experts at guilt phase (PC-R. 155). Smallwood and Kelly would have immediately begun to review and analyze the experts' reports (PC-R. 159). Smallwood stated that they would have considered Dr. Burch's report for guilt and

penalty phase (PC-R. 161). Smallwood felt he was able to utilize Abrams' statement (PC-R. 161-63). He felt that he tried to demonstrate the domestic aspect of the Spencer relationship and that Mr. Spencer's friends had limited knowledge of the relationship (PC-R. 165). Smallwood said he had no doubt that the state was aggressively seeking the death penalty (PC-R. 168). He stated that the information he had was that Mr. Spencer wore the gloves in order to get the car title (PC-R. 172). Smallwood testified that this showed intent so he wanted to keep it out of evidence (PC-R. 173). Smallwood said he did not consider statements that Mr. Spencer made to Tim Johnson on January 18th in terms of whether the statements were incompatible with a defense of lack of premeditation (PC-R. 176). Smallwood felt the statements attributed to Mr. Spencer on that day were "something somebody who's out of control would make" (Id.). Smallwood considered Dr. Lipman's findings in regard to Mr. Spencer's intoxication level (PC-R. 177).

Next, Nick Kelly testified that he was co-counsel along with Mr. Smallwood (PC-R. 184). Kelly stated that there were discussions about using the experts at guilt phase, but he felt this would have lessened the experts' effect at the penalty phase (PC-R. 186). Kelly also said that calling the experts only at penalty phase was done in part to prevent the state from calling their own expert (PC-R. 187). Additionally, Kelly thought he

remembered some damning statements Mr. Spencer made to the experts although he couldn't recall what they were (PC-R. 187-89). Dr. Lipman was hired to show how Mr. Spencer's alcohol and drug abuse effected his state of mind at the time of the killing (PC-R. 188). The experts were hired before the guilt phase (PC-R. 189). The defense asserted was lack of premeditation accompanied by frenzy and emotion (PC-R. 190).

On cross-examination, Kelly testified that he was directed by Dr. Burch as to what areas to cover in her examination (PC-R. 193).

Curtis Zink testified that he is a friend of Mr. Spencer's and had known him for 12 or 13 years prior to the Spencers' marriage (PC-R. 196-97). Mr. Spencer typically carried a knife on his person, specifically a case knife with a sheath (PC-R. 197). Zink spoke with Mr. Spencer's trial attorneys (Id.). Zink testified that he saw Mr. Spencer the night before Mrs. Spencer's death (PC-R. 198). Mr. Spencer was at Zink's house where he spent the night (Id.). Zink believed that Mr. and Mrs. Spencer had spoken on the phone that night (Id.). Mr. Spencer told Zink that he was going to the Spencer house the next day to get his car title (PC-R. 201).

Bonnie Britton next testified that she and Curtis Zink live together and that she knew both Mr. and Mrs. Spencer (PC-R. 205-06). Britton testified that she was at the Zink house on a day

when Mrs. Spencer came by and asked Mr. Spencer how it felt to be wanted for attempted murder (PC-R. 206). This happened between the iron incident and Mrs. Spencer's death (Id.). At this time Mr. Spencer asked her if he could please have his car title (Id.). Britton testified that, on the night before Mrs. Spencer's death, Mr. Spencer was at the Zink house (PC-R. 209). Mr. Spencer said he was going to the Spencer house the next morning to get his car title and a few personal items (Id.).

On cross-examination, Britton stated that she and Curt talked to Mr. Spencer on the night of January 17, 1992 and he never mentioned killing Mrs. Spencer (PC-R. 212).

Ben Abrams testified that he was an employee of the Spencers and worked for them at the time they separated (PC-R. 214). Abrams testified that he previously witnessed Mrs. Spencer hit Mr. Spencer (PC-R. 215). Mrs. Spencer took control of the business, taking all the accounts and possession of the vehicles (Id.).

Andrew Brachold testified by deposition. His deposition was entered as Defense Exhibit 7 (PC-R. 363). Brachold testified that he knew the Spencers and had become acquainted with them at the marina where Mr. Spencer kept his boat (EX. 7, pp. 4-5). Brachold noticed that the relationship gradually deteriorated (EX. 7, p. 6). Brachold became friends with Mr. Spencer and they discussed the pending divorce (EX. 7, p. 7). Mr. Spencer told

Brachold that his desire was to get the things he brought into the marriage, including his car and other personal possessions (Id.). Brachold had a conversation with Mr. Spencer about the impending divorce on January 17, 1992 (Id.). Mr. Spencer did not say anything about killing Mrs. Spencer (Id.). Mr. Spencer stated that it was his intention to go to the house and get some of his personal belongings (EX. 7, p. 8). Mr. Spencer had no transportation at that point (Id.). Brachold stated that Mr. Spencer commonly carried a knife on his person (EX. 7, p. 9). Brachold testified that he was available and willing to testify at the time of trial (EX. 7, p.14).

On cross-examination, Brachold testified that he thought he remembered talking to an investigator for Mr. Spencer at the time of trial (EX. 7, p. 12). Further, he stated that Mr. Spencer's lawyers brought him to Orlando to testify if needed (EX. 7, p. 15).

Bill Anthony testified that he is a reserve deputy for the Orange County Sheriff (PC-R. 218). On January 4, 1992, he assisted Deputy Weyland in investigating the iron incident (PC-R. 219). Deputy Weyland took a statement from Mrs. Spencer while in Mr. Anthony's presence (Id.). Mrs. Spencer did not say anything about being hit by an iron (PC-R. 220). This statement was taken after she had spoken with the treating physicians (PC-R. 221).

On cross-examination, Anthony testified that Deputy Weyland

was there when the statement from Mrs. Spencer was taken (PC-R. 223).

Prosecutor Dorothy Sedgwick testified that she prosecuted the Spencer case (PC-R. 227). Sedgwick stated that she did not cry during her guilt phase closing argument (PC-R. 228). She testified that her voice "quavered" as she was putting on the gloves to demonstrate to the jury (PC-R. 229). Sedgwick felt this was an emotional murder case (PC-R. 233). After viewing a videotape news compilation introduced into evidence by the state, Sedgwick agreed that during her closing argument she was "emotional" (PC-R. 240).

Sedgwick felt the gloves were evidence of premeditation (PC-R. 229). Sedgwick felt that using the gloves in her closing argument was justified because the defense had successfully argued that Mr. Spencer had the gloves on incidentally (PC-R. 230). Therefore, she felt she needed to aggressively address this point (Id.). She could not recall how or where the defense made the gloves an issue (PC-R. 249). Sedgwick stated that despite Mr. Smallwood's testimony that his strategy was to "ignore" the gloves, she felt the defense had made them an issue (PC-R. 257-58).

Sedgwick stated that she does not recall Tim Johnson testifying that he saw Mr. Spencer hit Mrs. Spencer with an iron (PC-R. 236). Sedgwick testified that it was not a mistake when

she said in her opening argument that Tim Johnson had witnessed Mrs. Spencer being hit with the iron (PC-R. 237). The opening statement was a result of pre-trial interpretation of the evidence (Id.). She now feels she should not have been as confident that Johnson would say he saw Mr. Spencer hit Mrs. Spencer with the iron (PC-R. 252). However, despite Tim Johnson's testimony, she still thinks that he saw Mr. Spencer hit Mrs. Spencer with the iron (Id.).

On cross-examination, Sedgwick testified that she thought Mr. Spencer's defense counsel had made their best efforts to suggest that Mr. Spencer's wearing of the gloves was coincidental (PC-R. 242). She felt she needed to attack this effort (PC-R. 243).

Dr. Kathleen Burch testified that she was retained by Mr. Spencer's trial attorneys in August 1992 (PC-R. 259). She did not remember discussing testifying in the guilt phase (Id.). Mr. Spencer discussed the killing with Dr. Burch and stated to her that he went to the house to get the title to his car and that he wore gloves so as not to leave fingerprints (PC-R. 261). Mr. Spencer stated that, in retrospect, he knew this did not make much sense (PC-R. 262). Mr. Spencer never gave Dr. Burch any other explanation for why he went to the house (Id.). Mr. Spencer told Dr. Burch that he and his wife were involved in a mutual struggle on the back porch when he was hit with the gun

(PC. 263). The next thing he remembered was having the knife in his hand and Tim Johnson saying "you killed her" (Id.). Although she had to be initially skeptical about Mr. Spencer's amnesia, he has a number of personality characteristics that are consistent with dissociative phenomena (PC-R. 264). Also, her suspicions faded after speaking with Dr. Lipman about his testing and expertise on the affects of alcohol (PC-R. 293). Dr. Burch testified that she felt testimony regarding Mr. Spencer's dissociative state would be useful in negating the element of premeditation (PC-R. 265). Dr. Burch stated that people in a dissociative state can and do move and that their actions are automatic and not by choice (PC-R. 269). Mr. Spencer also related a dissociative episode from his childhood (PC-R. 271). Dr. Burch testified that there is a reasonable likelihood that Mr. Spencer was in a dissociative state during the actual killing and that his actions in this regard were not premeditated (PC-R. 270). Dr. Burch stated that she could have rendered these opinions in 1992 (PC-R. 273).

On cross-examination, Dr. Burch testified that it was her opinion at the time of trial that Mr. Spencer had been in a dissociative state (PC-R. 278). Dr. Burch stated that there is only a slight possibility that Mr. Spencer was malingering about his amnesia (PC-R. 286). Dr. Burch testified that Mr. Spencer, at the time of the killing, was impaired by alcohol and that its

toxic effects would still be present despite his blood-alcohol level (PC-R. 290). Mr. Spencer was in an altered state of consciousness at the time of the killing (PC-R. 291).

Dr. Jonathon Lipman testified that he is a neuropharmacologist and that he testified at the penalty phase of Mr. Spencer's trial (PC-R. 299-300). Dr. Lipman testified that a dissociative state is an altered state of consciousness (PC-R. 301). There are different causes, but the underlying common characteristic is automatistic behavior (PC-R. 310). In a dissociative state, a person can walk and talk without any conscious awareness of what they are doing (Id.). At the time of the offense, Mr. Spencer was sufficiently dissociated from his baseline consciousness (PC-R. 311). Dr. Lipman stated that the actual chemistry of Mr. Spencer's brain was effected at the time of the offense (PC-R. 308). Mr. Spencer's heavy alcohol use prior to the offense affected Dr. Lipman's opinion in several ways (PC-R. 311). Dr. Lipman stated that prior to the offense, Mr. Spencer was on a roller coaster of increasing and decreasing blood-alcohol content "without actually ever being sober" (PC-R. 313). Although Mr. Spencer's blood alcohol level at the time of the offense was zero, he was not sober and was, thus, still impaired (PC-R. 313-14). Also, Dr. Lipman noted that it is essential, in evaluating the effects of alcohol on the brain, to consider someone's underlying psychological structure (PC-R.

314). Therefore, his consultation with Dr. Burch was an important part of his evaluation (PC-R. 315). Dr. Lipman testified that Mr. Spencer's dissociative state was predictable given the intersection between his intoxication and personality disorder (PC-R. 317). Mr. Spencer's state of mind at the time of the offense was characterized by an impaired control of consciousness in concert with intoxication and rage (PC-R. 318). Dr. Lipman became involved in the case because of Mr. Spencer's history of drug and alcohol abuse and because of Mr. Spencer's intoxication at the time of the offense (PC-R. 306). Dr. Lipman testified that he certainly could have provided testimony at the guilt phase (PC-R. 309). Further, he was not consulted with about testifying at the guilt phase which was unusual (PC-R. 315). Mr. Spencer is not malingering about his lack of memory (PC-R. 332).

On cross-examination, Dr. Lipman testified that Mr. Spencer's dissociative episode was not an alcoholic blackout (PC-R. 322). Also, Mr. Spencer's lack of memory was not due to concussion-induced amnesia (PC-R. 328). Mr. Spencer was intoxicated and remained impaired at the time of the offense (PC-R. 344-45). Dr. Lipman stated that dissociative persons can speak quite well (PC-R. 326). Mr. Spencer was not in his normal state of consciousness during the dissociative period (PC-R. 327). The dissociative period is marked by the time Mr. Spencer

cannot remember (PC-R. 325). Dr. Lipman did not receive any information, from any source, that Mr. Spencer had a recollection of stabbing his wife (PC-R. 330).

On examination by the lower court, Dr. Lipman testified that he does not remember being asked to testify at the guilt phase (PC-R. 333). Dr. Lipman could have testified that Mr. Spencer's mind was impaired at the time of the offense (Id.). Dr. Lipman testified that Mr. Spencer's thinking was impaired and his judgment was clouded because of alcohol (PC-R. 334). Dr. Lipman stated that this was due to two weeks of binging (PC-R. 335). Dr. Lipman recalls explaining to Mr. Spencer's attorneys that Mr. Spencer was impaired by alcohol despite his blood-alcohol level (Id.). Dr. Lipman stated that Mr. Spencer had a viable voluntary intoxication defense (Id.). Dr. Lipman testified that were two states of altered consciousness at play during the offense (PC-R. 337). First, there is the chemical intoxication due to binging (Id.). Second, there is the explosive dissociative nature of the stabbing (PC-R. 338).

Deputy Tom McCann testified that he was the lead detective on the Spencer case (PC-R. 350). When McCann took Mr. Spencer into custody, he did not observe any injuries (PC-R. 351). On cross-examination, McCann testified that he only made a cursory visual check of Mr. Spencer's person (PC-R. 353).

SUMMARY OF THE ARGUMENTS

(1)(a). The lower court erred in holding that Mr. Spencer was not denied the fundamental right to a fair trial by the prosecutor's misconduct.

(1)(b). The lower court erred in holding that Mr. Spencer did not establish at the evidentiary hearing below that he was denied effective assistance of counsel at the guilt phase of his trial.

(1)(c). The lower court erred in holding that Mr. Spencer did not establish at the evidentiary hearing below that he was denied effective assistance of counsel at the penalty phase of his trial.

(1)(d). The lower court erred in holding that Mr. Spencer did not establish at the evidentiary hearing that the state withheld material, exculpatory evidence.

(2)(a). The lower court erred in denying Mr. Spencer an evidentiary hearing on his claim that he was denied the fundamental right to due process and a fair trial due to negative pre-trial publicity, a prejudicial trial atmosphere and ineffective assistance of counsel in failing to protect Mr. Spencer's rights both pre-trial and during trial.

(2)(b). The lower court erred in denying Mr. Spencer an evidentiary hearing on his claim that he was denied effective assistance of counsel at the guilt phase of his trial.

(2)(c). The lower court erred in denying Mr. Spencer an evidentiary hearing on his claim that he was denied effective assistance of counsel at the penalty phase of his trial.

(2)(d). The lower court erred in denying Mr. Spencer a hearing or relief on his claim that the state put forth material false evidence.

(2)(e). The lower court erred in denying Mr. Spencer a hearing or relief on his claim that rules prohibiting Mr. Spencer's lawyers from interviewing jurors deny Mr. Spencer adequate assistance of counsel in pursuing his postconviction claims.

(2)(f). The lower court erred in denying Mr. Spencer a hearing or relief on his claim that his trial proceedings were fraught with procedural and substantive errors which resulted in a cumulative denial of due process and the fundamental right to a fair trial.

ARGUMENT I

THE LOWER COURT'S RULING FOLLOWING THE POSTCONVICTION EVIDENTIARY HEARING WAS ERRONEOUS.

At the evidentiary hearing, Mr. Spencer presented evidence substantiating his claims regarding prosecutorial misconduct, ineffective assistance of counsel and Brady violations.

A. The Lower Court Erroneously Denied Appellant Relief On His Claim That The Prosecutor Engaged In Misconduct Which Denied Him His Fundamental Right To A Fair Trial In Violation Of The Fifth, Sixth And Fourteenth Amendments To The United States Constitution, Rendering The Outcome Of His Trial Unreliable.[1]

This Court has held that when improper conduct by a prosecutor "permeates" a case, relief is proper. Ruiz v. State, 743 So.2d 1 (Fla. 1999); Garcia v. State, 622 So.2d 1324 (Fla. 1993); Nowitzke v. State, 572 So.2d 1346 (Fla. 1990). The prosecutor's actions of donning a pair of latex gloves and exhibiting an emotional reaction in front of the jury during her closing argument at guilt phase, in addition to numerous other instances of misconduct, denied Mr. Spencer his fundamental right to a fair trial.[2] As discussed below, the prosecutor's conduct during her closing argument and throughout both phases of trial was improper in multiple ways. The prosecutor committed Golden Rule violations, improperly appealed to the emotions of the jury, elicited prohibited testimony, made false statements and improperly commented on Mr. Spencer's right to

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[1]Although Argument I is devoted to addressing claims that were denied after evidentiary development, Mr. Spencer will address all claims of prosecutorial misconduct, those denied with and without an evidentiary hearing, in this section of Argument I.

[2]Although the lower court's order granting an evidentiary hearing only permitted Mr. Spencer to present evidence as to the prosecutor's crying, evidence was presented at the hearing, without objection by the state, as to her donning latex gloves during her closing. Evidence was also presented at the evidentiary hearing, without objection by the state, as to the prosecutor's false statement during her opening argument at guilt phase that Timothy Johnson had seen Mr. Spencer strike his wife with an iron.

testify, all of which tainted Mr. Spencer's trial, both singularly and cumulatively, thereby denying him the fundamental right to a fair trial.

At the evidentiary hearing below, the State introduced a video compilation of news clips on the Spencer case from Channel 2 News in Orlando (PC-R. 240; EX. 1).[3] The video tape clearly shows the prosecutor donning a pair of latex gloves and raising them up for exhibition to the jury. At the same time the prosecutor exhibits the gloves to the jury, she is also shown reacting emotionally.

1. The Gloves

Prosecutor Dorothy Sedgwick testified that she was the prosecutor on the Spencer case (PC-R. 227). She testified at the evidentiary hearing that she felt the gloves were evidence of premeditation and that the defense "made their best efforts" to suggest that Mr. Spencer had the gloves on incidentally (PC-R. 242). As a result, she felt that she had to aggressively address the issue of the gloves with the jury (PC-R. 230). She felt the job the defense attorneys did on the glove issue required her to address the gloves the way she did (PC-R. 242). However, she could not recall how or where the defense interjected the glove issue

[3]It was agreed by both parties that the only relevancy of the tape for purposes of the hearing was that portion of the tape which showed the prosecutor's closing argument at the guilt phase of trial (PC-R. 239).

(PC-R. 249).

In contrast to Sedgwick's recollection regarding the glove issue, defense attorney Don Smallwood testified that his strategy was to keep the gloves out of evidence if possible and that after the gloves came in his strategy was to ignore them (PC-R. 112). Smallwood did not believe that he mentioned the gloves in his closing (Id.). Further, he stated that he had no evidence that Mr. Spencer was going to a painting job that morning (PC-R. 172).

An examination of the contrast between the testimonies of Sedgwick and Smallwood, as well as an examination of the trial record, reveals two things very clearly. One, the defense simply never interjected the issue of the gloves as stated by the prosecutor at the evidentiary hearing. In fact, Mr. Smallwood failed to impeach the testimony of Timothy Johnson when he stated at trial that he had never seen Mr. Spencer wear the gloves before the morning of Mrs. Spencer's death. Secondly, and related, the prosecutor's attempt to justify her actions in donning and displaying the gloves to the jury is simply disingenuous. There was no reason to "aggressively" display the gloves to the jury, other than to create an emotional response from the jury by such a blatant Golden Rule violation. This action by the prosecutor was a not so subtle attempt to have the jurors imagine what Mrs. Spencer saw and felt on the morning of her death, conduct clearly held to be unconstitutional by this Court. Bertolotti v. State,

476 So.2d 130 (Fla. 1985); Garron v. State, 528 So.2d 353 (Fla. 1988).

The facts of Mr. Spencer's case are analogous to those of Jenkins v. State, 563 So.2d 791 (Fla. 1st DCA 1990). In Jenkins, the court held that the prosecutor engaged in egregious conduct amounting to reversible error when he pointed a shotgun at the jury. Id. at 791. The Jenkins court analogized this conduct to that of Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979), wherein the court held that placing the jurors in the position of a crime victim is an "entirely unjustified 'golden rule' argument of a type which has been universally condemned." Jenkins at 791-92 (quoting Peterson).

In both Jenkins and the instant case, prosecutors utilized physical evidence from the trial to make an improper Golden Rule argument. This conduct on the part of the prosecutor has the effect of injecting unwarranted and unnecessary fear and emotion into the jury's deliberative process. This conduct also has the obvious effect of creating sympathy for the victim. In sum, this type of conduct has been condemned by this Court because of the taint that it places on the deliberative process of the jury, thereby denying defendants like Mr. Spencer the fundamental right to a fair trial.

The lower court erroneously holds that this claim is without merit, citing this court's holding in Mr. Spencer's first direct

appeal and the standard set forth therein. It cannot be contended that the prosecutor's actions in placing the jury in the shoes of the victim did not deprive Mr. Spencer of a fundamentally fair trial. It is not only likely, but probable, that such overreaching and inappropriate conduct influenced the jury to reach a more severe verdict than it otherwise would have.

2. Emotional Display During Closing Argument

The video compilation entered into evidence also shows the prosecutor, simultaneously with her donning of the gloves, exhibiting an emotional reaction which has been characterized in Mr. Spencer's 3.850 Motion as "crying" and by the prosecutor at the evidentiary hearing as "quavering" of her voice (PC-R. 233). In the lower court's order denying Mr. Spencer's 3.850 Motion after evidentiary hearing, the court explicitly found that the prosecutor did not cry during closing (PC-R. 844). However, at the Huff hearing held in this matter, the lower court stated, "She did cry" (Huff hearing transcript at page 24).[4] The difference in characterization is, however, a matter of semantics. The indisputable fact is that the prosecutor exhibited an emotional reaction during her closing argument.

Sedgwick testified that the emotional reaction happened as she displayed the gloves to the jury (PC-R. 229). She further

[4]The transcript of the Huff hearing held on December 21, 1999 was not repaginated for the Postconviction Record on Appeal.

testified that she had felt ill during the trial, which she tried to ignore, and was emotionally worn down (PC-R. 232-33). Sedgwick stated that she later found out that she had an "ectopic pregnancy" during the trial (PC-R. 233). She further felt that this was "an emotional murder case" (Id.). Sedgwick agreed this portion of her argument was emotional (PC-R. 240).

The prosecutor's emotional display in this case is similar to the facts of this Court's recent decision in Ruiz. In Ruiz, the prosecutor urged the jury during her closing argument to do their duty as her own father had done by serving his country in the Gulf War. Id at 6. This Court held that the prosecutor's action in Ruiz was an improper appeal to the jurors' emotions for several reasons. Id at 7. First, it personalized the prosecutor in the jury's eyes. Id. Additionally, it created sympathy for the prosecutor by the jury. Id. Further, it contrasted the defendant with the prosecutor's heroic father. Id.

In Mr. Spencer's case, the prosecutor's emotional display had the effect of personalizing her with the jury. By seeing this emotional outburst, the jury naturally would view the prosecutor in personal terms and speculate about the effect this "emotional murder case" may have had on her. Relatedly, the jury's natural reaction of viewing the prosecutor in personal terms would obviously lead them to feel sympathy for her. Finally, the prosecutor's emotional display was contrasted with Mr. Spencer's

outwardly unemotional demeanor during the trial (T. 784).

In both Ruiz and this case, the prosecutor's action appealed to the emotions of the jury. Admittedly, the prosecutor's action in Ruiz seems to be more willful and nefarious. There is no evidence the prosecutor in Mr. Spencer's case intended the emotional display that occurred. However, this is arguably more damaging than the action in Ruiz because of its perceived authenticity. Further, Ms. Sedgwick's actions must be viewed in the context of what she herself described as an "emotional murder case." Ms. Sedgwick's emotional display during her closing argument tainted the cool, neutral deliberative process that is contemplated when jurors decide one's guilt or innocence. It improperly injected emotion, sympathy and fear into the process. Regardless of how it is characterized or whether it was intentional, the display was not proper in the course of a fundamentally fair first-degree murder trial.

The lower court's holding on this issue is erroneously tied to its finding that Ms. Sedgwick did not "cry" (PC-R. 844). The holding seems to be that because she did not have tears streaming down her face, the emotional display by the prosecutor should be excused. This is an obviously inappropriate examination of whether or not the conduct effected the outcome of Mr. Spencer's trial. In sum, the lower court fails to examine the effect of the prosecutor's conduct. In fact, the lower court's finding that the

prosecutor did not "cry" is arguably erroneous based on a review of the videotape admitted into evidence. In any event, the prosecutor's admittedly powerful emotional argument was inappropriate, rendered the trial fundamentally unfair and likely influenced the jury's decision.

3. False Statement Regarding Iron

During her opening argument at guilt phase, the prosecutor stated that Timothy Johnson had witnessed Mr. Spencer beating Karen Spencer with an iron:

> MS. SEDGWICK: We will, through the testimony of witnesses, prove beyond and to the exclusion of every reasonable doubt that on January 4, 1992, Dusty Ray Spencer tried to kill Karen Spencer, beating her in the head repeatedly with a household iron, that that was witnessed by her son, Timothy Johnson.

(T. 422). The prosecutor's argument on this point was inconsistent with the actual evidence. During both his pre-trial deposition and trial testimony, Timothy Johnson indicated that he had not witnessed Mr. Spencer hitting Karen Spencer with an iron. The prosecutor's statement during opening argument was knowingly made and simply false. In reality, the only evidence of Karen Spencer being hit with an iron was a hearsay statement from the victim, brought in through Dr. Bowman (T. 648). The prosecutor's statement was an improper presentation of false evidence.

At the evidentiary hearing below, Ms. Sedgwick testified that she did not recall Timothy Johnson stating that he saw Mr. Spencer

hit Mrs. Spencer with the iron (PC-R. 236). She testified that Johnson was probably her most important witness at the trial and that she would have met with him prior to trial (PC-R. 250-51). She stated that after reviewing Johnson's pre-trial deposition, she felt it was a "matter of interpretation" as to what he would say regarding the iron (PC-R. 236). Further, she stated that after reviewing the 3.850 Motion, she felt she should not have been as confident about what Johnson would say (PC-R. 252). Ms. Sedgwick added that she still believes Johnson saw Mr. Spencer hit Mrs. Spencer with the iron, ***despite what he testified to*** (Id.).[5]

In this instance the prosecutor clearly put forth false evidence in her opening argument. This action by the prosecutor has been proscribed by this Court. Craig v. State, 685 So.2d 1224 (Fla. 1996). In Craig, as in the instant case, the prosecutor put forth facts during argument that were knowingly false. Id. at 1228. Additionally, Ms. Sedgwick's argument was material to Mr. Spencer's conviction for attempted first-degree murder as well as his conviction for murder, in that the "iron incident" was used as evidence of premeditation. Thus, Mr. Spencer was prejudiced by the prosecutor's statement in this regard.

The lower court's finding that this claim lacks merit is erroneously based on the fact that the prosecutor stated that she

[5]If the prosecutor's "belief" is based on some non-record fact, then she was intentionally introducing evidence she knew the jury would not otherwise hear and was, in fact, testifying.

believed that Johnson would testify that he had seen Mr. Spencer hit Mrs. Spencer with the iron (PC-R. 840). This finding ignores the disingenuousness of the prosecutor's explanation. The fact is that Ms. Sedgwick was at Johnson's deposition where he stated that he never saw Mrs. Spencer hit with an iron. Johnson's deposition was made under oath and made the prosecutor unambiguously aware of what he would testify to. Any statement to the contrary is simply false and the court's reliance on her explanation is misplaced.

4. Non-Hearing Instances Of Prosecutorial Misconduct

During her opening argument at guilt phase, the prosecutor improperly stated that evidence would be presented through witness Krista Mays that Mrs. Spencer was armed with a rifle on the evening of January 17, 1992:

> MS. SEDGWICK: And Krista Mays very visibly observed the way the fear acted on Karen Spencer. Krista Mays last memories of Karen Spencer are that when Krista Mays showed up at the house, that Karen Spencer answered the door with a gun in her hand.

(T. 426). This was an intentional and improper presentation to the jury of a hearsay statement for which there was no exception. The intentional comment brought evidence before the jury which the prosecutor knew was inadmissable.[6]

During direct examination of witnesses Timothy Johnson and

[6]In fact, the trial court later sustained objections to the admissibility of this evidence when the prosecutor tried to present it during the State's case-in-chief (T. 852).

Krista Mays, the prosecutor further elicited testimony that Karen Spencer was armed with a rifle on the night prior to the killing. This testimony was inadmissable hearsay for which there was no exception. Even after an objection to a similar question to Timothy Johnson had been sustained, the following exchange took place between the prosecutor and witness Mays:

> Q: Did you see a gun in the house that night?
>
> A: Yes, I did.
>
> Q: When would have been the first occasion that you saw the gun?

(T. 851). At this point a proper objection was taken and sustained as to any further mention of the victim carrying a gun.

Apparently unshaken by this ruling from the court, the prosecutor, in her closing argument to the jury at guilt phase, again brought before the jury the fact that Mrs. Spencer was armed with a rifle on the night before the alleged crime:

> MS. SEDGWICK: That when she answered- - that when Karen answered the door, that she, Krista Mays, saw the rifle. Karen came to the door with the rifle in her hand.

(T. 1040). This argument to the jury was in blatant disregard of the court's prior ruling on the particular evidence in question. This argument had the effect of tainting the jury with evidence that was otherwise inadmissable and which should have never been presented to the jury.

During her direct examination of Deputy Sandra Blume, the

prosecutor elicited improperly melodramatic, irrelevant testimony regarding the victim's dog having been removed from the crime scene. The following exchange between the prosecutor and Deputy Blume was presented to the jury:

> Q: Okay. Was anything taken out of the house before the arrival of the forensic technicians?
>
> A: Yes there was.
>
> Q: What?
>
> A: When I first arrived and looked up closely at the body, she had a little white poodle dog- -

(T. 687). At that point, an objection was taken and sustained as to any further evidence regarding the victim's dog. The prosecutor knew that the victim's dog was the only evidence removed from the crime scene before the technicians arrived. Thus, she knew what Deputy Blume's response would be and intentionally elicited it. This testimony had the effect of improperly appealing to the emotions of the jury and evoking sympathy for the victim.

During her penalty phase cross-examination of defense expert Kathleen Burch, the prosecutor improperly commented on Mr. Spencer's exercise of his Fifth Amendment right not to testify. The following exchange occurred:

> Q: When you interviewed Dusty Spencer, concerning his life history, or when you talked to Dusty Spencer about what occurred during the murder, was he under oath?
>
> A: No.

> Q: Okay. Was he cross-examined by you, or any other person, concerning what he told you versus what any of the reports indicated happened? Did you cross-examine him?
>
> A: No. I was with him alone.
>
> Q: But you did not question him, did you, about contradictions in the police reports contrary to his statement, is that correct?
>
> A: No, I had not seen any of that stuff before I saw him.
>
> Q: Okay. Would you consider the type of testimony that the jury would have received, that the jury would have heard, that being sworn testimony subject to cross-examination by the state, and defense, as to be a superior form of fact finding for factual determination than what you did, just listening to Dusty Spencer's answers?

(R. 182).

During her cross-examination of defense expert Dr. Jonathan Lipman, the prosecutor once again improperly commented on Mr. Spencer's exercise of his Fifth Amendment right. The following exchange occurred:

> Q: Dr. Lipman, you say that you base your findings based upon a diary that Dusty Spencer made for you of his alcohol pattern, is that correct?
>
> A: Yes, and upon the alcohol consumption that was recorded during the course of my interview.
>
> Q: All right. Did you place him under oath or was he placed under oath for the purposes of giving you that history?
>
> A: No.

(R. 356-57). This obviously intentional testimony and comment from the prosecutor had the effect of suggesting to the jury that Mr. Spencer should have taken the stand and subjected himself to cross-examination in order for the trial to be complete and valid or for the expert's testimony to be credible.

During her closing argument at penalty phase the prosecutor stated that Mr. Spencer told Dr. Lipman that he had stabbed the victim prior to the victim's son leaving the crime scene:

> MS. SEDGWICK: Dr. Anderson testified that she received all of those injuries while she was alive. None of them were after death. That he can medically determine that. Dusty Spencer gave statements to Dr. Lipman that he had stabbed Karen before Tim left. Now Tim was confused about that.

(R. 391). The testimony of Dr. Lipman is completely devoid of any such statement by Mr. Spencer. Rather, Dr. Lipman's testimony reveals that Mr. Spencer had no recollection whatsoever of stabbing the victim:

> DR. LIPMAN: I'll read you his words better than I can say it... 'And I started to come back from an unconsciousness or a blackout, coming out of a fog, and Tim took off and ran down the road and I left and went to the woods. I don't remember stabbing her. I just remember coming out of the fog and the knife was in my hands. They said I stabbed her, but I don't remember.'

(R. 371). This testimony from Dr. Lipman is irreconcilable with the prosecutor's characterization during her closing argument. The prosecutor's comment left the jury with the impression that Mr.

Spencer had a conscious memory of intentionally stabbing his wife when no such evidence had in fact been presented. The comment also served to persuade the jury that Timothy Johnson had actually seen Mr. Spencer stab Karen Spencer. Timothy Johnson's testimony specifically reveals that he never saw Mr. Spencer stab Mrs. Spencer. Because the prosecutor wanted to inflame the jury, she intentionally misrepresented both Dr. Lipman's and Timothy Johnson's testimony.

The prosecutor's actions and comments at Mr. Spencer's trial rendered the proceeding fundamentally unfair. The United States Supreme Court has held that improper comments and actions which reflect an "emotional reaction" to the case are "undoubtedly...improper." Darden v. Wainwright, 477 U.S. 168, 178, 106 S.Ct. 2464, 2470 (1986). The improper actions and comments in Mr. Spencer's case "so infected [his] trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. Dechristoforo, 416 U.S. 636, 642, 94 S.Ct. 1868, 1871 (1974). While singular incidents of impropriety may sometimes not result in a denial of due process, when, as in Mr. Spencer's case, a certain critical mass of misconduct is reached, due process is thwarted. The lower court fails to consider the aggregate of prosecutorial misconduct, choosing rather to consider the instances of misconduct in a singular fashion and finding that none of the particular instances rendered the trial fundamentally unfair.

The lower court further dismissed all prosecutorial misconduct claims made by Mr. Spencer as procedurally barred (PC-R. 839). However, case law of this state holds that fundamental error can be raised at anytime, including in a motion for postconviction relief. Smith v. State, 741 So.2d 576 (Fla. 1st DCA 1999); Hill v. State, 730 So.2d 322 (Fla. 1st DCA 1999); Christopher v. State, 397 So.2d 406 (Fla. 5th DCA 1981). Mr. Spencer concedes that these cases dealt with errors other than prosecutorial misconduct. However, the overarching concern of fairness and due process which exists in cases involving double jeopardy, sentencing error and jurisdiction should also be applied in a case involving prosecutorial misconduct. Further, Mr. Spencer has alleged that both his trial counsel and appellate counsel[7] were ineffective for failing to adequately object to and raise the issue of prosecutorial misconduct thereby erecting any procedural bar to this claim which may exist.

The critical mass of prosecutorial misconduct in Mr. Spencer's case included specific constitutional violations. The prosecutor improperly commented on Mr. Spencer's Fifth Amendment right not to testify and presented false evidence. It is a constitutional violation for the prosecutor to comment on a defendant's right not to testify at his or her trial. Griffin v. California, 380 U.S.

[7]Mr. Spencer has filed, simultaneously with this appeal, a State Habeas Corpus Petition.

609, 85 S.Ct. 1229, L.Ed. 2d 106 (1965). Additionally, the Constitution is breached when the State presents false evidence. Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed. 2d 690 (1967); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). The United States Supreme Court has held that "[w]hen specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial misconduct in no way impermissibly infringes them." Dechristoforo, 416 U.S. at 637. When specific constitutional violations such as those in Mr. Spencer's case are involved, the supervisory powers of reviewing courts are energized in order to correct the denial of due process that occurs. McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943); United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974 (1983).

By numerous improper comments and arguments, the prosecutor infiltrated and infected the jury in Mr. Spencer's case. Such comments, tactics and strategies rendered Mr. Spencer's trial fundamentally unfair, compromising the integrity of the judicial system in the process. Confidence in the outcome of Mr. Spencer's trial was severely undermined by the prosecutor's actions.

B. The Lower Court Erroneously Denied Appellant Relief On His Claim That He Was Denied Effective Assistance Of Counsel At The Guilt Phase Of His Trial In Violation Of The Sixth, Eighth And Fourteenth Amendments To The United States Constitution, Rendering The Outcome Of His Trial Unreliable.

In Strickland v. Washington, 466 U.S. 668 (1984), the United

States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland requires a defendant to plead and demonstrate both unreasonable attorney performance and prejudice to prevail on an ineffective assistance of counsel claim. Id. Mr. Spencer has fulfilled each requirement.

"One of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial." Magill v. Dugger, 824 F.2d 879, 886 (11th Cir. 1987); "pretrial preparation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps, the most critical stage of a lawyer's preparation." House v. Balkcom, 725 F.2d 608, 618 (11th Cir.), cert. denied, 469 U.S. 870 (1984); Weidner v. Wainwright, 708 F.2d 614, 616 (11th Cir. 1983). As stated in Strickland, an attorney has a duty to undertake reasonable investigation or "to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691.

Trial counsel's representation of Mr. Spencer fell below acceptable professional standards in several respects. Each of these failures, discussed below, severely prejudiced Mr. Spencer. To prove prejudice, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine

confidence in the outcome of the proceedings. Id. Had counsel performed effectively, there is a reasonable probability that the outcome would have been different -- that is, that Mr. Spencer would have been convicted of a lesser offense, rather than first degree murder, and would not now be facing execution.

1. Failure To Present Evidence Of Lack Of Premeditation

At the evidentiary hearing, attorney Don Smallwood testified that the theory of defense in Mr. Spencer's case was lack of premeditation (PC-R. 103). The trial strategy was to attack the element of premeditation through the state witnesses (PC-R. 110, 135). Attorney Nick Kelly added that the theory was to show that the killing was frenzied and emotional, not premeditated (PC-R. 190). At the guilt phase of trial, the defense rested without putting on witnesses (T. 1012). As discussed below, there were lay and expert witnesses available to the defense who could have been called to provide evidence that the killing of Mrs. Spencer was not premeditated. Inexplicably, trial counsel failed to present such evidence.

a. Lay witnesses

At the evidentiary hearing below, Mr. Smallwood testified that there were two possible reasons why he did not call witnesses to support Mr. Spencer's defense at the guilt phase (PC-R. 108). One possible reason was that they had no witnesses (PC-R. 109). The other possible reason was to maintain an opportunity to present a

rebuttal argument in closing (Id.). Mr. Smallwood added that if he had witnesses who could have impacted the jury, he would have presented their testimony because the "sandwich argument" was not that important (Id.). Smallwood felt that his only potential witness was Ben Abrams, but he remembered his investigator talking to Curtis Zink and Andy Brachold (PC-R. 133).

Curtis Zink testified at the evidentiary hearing that he was with Mr. Spencer on the night of January 17, 1992 when Mr. Spencer spent the night at his house (PC-R. 198). He believed that the Spencers had spoken on the phone that night (Id.). Zink was with Mr. Spencer off and on during January 1992 and he remembers the Spencers speaking on several occasions (Id.). Zink testified that Mrs. Spencer came by his house after the January 4th incident to talk with Mr. Spencer (PC-R. 198-99). Zink testified further that on the night of January 17th, Mr. Spencer told him that he just wanted to go to the Spencer house and get the title to his car (PC-R. 201).

Bonnie Britton, Curtis Zink's girlfriend, also testified at the evidentiary hearing (PC-R. 205-13). She testified that she was also at the house on the day, subsequent to the January 4th incident, when Mrs. Spencer came by the Zink house (PC-R. 206). Britton stated that she heard Mrs. Spencer yelling at Mr. Spencer and asking him how it felt to be wanted for attempted murder (Id.). She testified that Mr. Spencer's response to this was to ask Mrs.

Spencer if he could please have his car title (PC-R. 207).[8] Britton further testified that she was at the Zink house on the night of January 17th and that Mr. Spencer, who was also there, stated that he "wanted his car title, a few personal things out of the house and that's it" (PC-R. 209). On cross-examination, Britton added that Mr. Spencer never said anything about killing his wife (PC-R. 212).

Witness Ben Abrams, who testified at trial, also testified at the evidentiary hearing. Abrams testified that he was an employee of the Spencers and was around them at the time of their break-up in December 1991 (PC-R. 214). During this time period, Abrams stated that he witnessed Mrs. Spencer physically strike Mr. Spencer during an argument the Spencers were having (PC-R. 214-15). Abrams further stated that he had been interviewed by Mr. Spencer's trial attorneys.

Andrew Brachold testified at the evidentiary hearing via deposition which was stipulated to by both parties (PC-R. 91-92). Brachold's deposition was entered into evidence as Defense Exhibit 7 (PC-R. 363). Brachold testified that he knew the Spencers in 1991 and 1992 and had become acquainted with them when the Spencers moored their boat at the same Port Orange dock as he did (EX. 7, pp. 4-5). Brachold stated that he eventually observed the Spencer

[8]The lower court sustained a hearsay objection to this statement over an assertion of a hearsay exception by defense counsel.

relationship deteriorating in late 1991 (EX. 7, pp. 5-6). Brachold and Mr. Spencer discussed the impending Spencer divorce (EX. 7, p. 7). Brachold stated that Mr. Spencer told him that all he wanted from the divorce were the things he brought into the relationship, including his car and personal possessions (Id.). Brachold talked to Mr. Spencer on January 17, 1992 and the two discussed the Spencer relationship and what Mr. Spencer should do (Id.). Brachold stated that on January 17th Mr. Spencer did not say anything about killing his wife and that, to the contrary, it was agreed he should just go to the house and get his belongings (EX. 7, p. 7-8). Brachold further testified that in his observation of the Spencer relationship, he felt that Mrs. Spencer was manipulative of Mr. Spencer and was quick to put him down (EX. 7, p. 17). Brachold added that Mrs. Spencer was otherwise mentally and emotionally abusive towards Mr. Spencer (Id.). Brachold testified that Mrs. Spencer was the dominant person in the relationship and "was not very nice about it either" (Id.).

Each of these witnesses could have provided testimony that would have been vital to the stated defense, lack of premeditation. Zink, Britton and Brachold could have all provided testimony relevant to Mr. Spencer's state of mind in the hours immediately preceding the killing. Specifically, that he had no intention of killing his wife and that his sole intent in going to the Spencer house on January 18th was to retrieve his car title. This testimony

would have been relevant not only to the guilt phase, but the penalty phase as well on the issue of CCP. Both Brachold and Abrams could have testified about the volatility of the Spencer relationship, including the fact that Mrs. Spencer had been mentally and emotionally abusive to Mr. Spencer, as well as physically violent, thereby allowing the defense to suggest what may have prompted the altercation which led to Mrs. Spencer's death. In fact, none of these witnesses were ever called by the defense and Abrams, when questioned on cross-examination, was not questioned about the relevant facts.

The lower court's ruling seems to be that because trial counsel cross-examined the state's witnesses, they could not possibly be ineffective for failing to present defense witnesses (PC-R. 849). This reasoning is flawed because it fails to consider the powerful nature of that evidence which was not presented. The lower court ignores the fact that trial counsel was, or should have been, aware of all of these witnesses and the nature of their testimony. The lower court is incorrect in finding that simply because trial counsel cross-examined state witnesses, a deficient performance inquiry is somehow foreclosed.

Further, the lower court's holding is strangely silent on the issue of prejudice in failing to present these witnesses. Thus, the lower court's Strickland inquiry is incomplete. Assuming that the lower court's holding contains an implicit finding of lack of

prejudice, this finding is erroneous. The above witnesses provided relevant and powerful testimony as to Mr. Spencer's state of mind in the hours preceding his wife's killing and as to the nature of his relationship with his wife. There was no strategic reason, and trial counsel asserted none, for not utilizing these witnesses. Any implicit prejudice finding by the lower court is erroneous.

Trial counsel was or should have been aware of each of these witnesses and presented their testimony to support the defense of lack of premeditation. Trial counsel's failure to present these witnesses constitutes deficient performance which prejudiced Mr. Spencer in his defense.

b. Dissociative State Evidence

At the penalty phase of trial, counsel called Dr. Kathleen Burch, a psychologist, and Dr. Jonathon Lipman, a neuropharmacologist (R. 150, 335). The experts testified as to Mr. Spencer's psychological background and personality profile, including his long-term alcohol and drug addiction (R. 150-248, 335-81). On cross-examination by the State, Dr. Lipman tangentially mentioned that during the killing of his wife, Mr. Spencer suffered a blackout, or "dissociative state" (R. 378). Neither Dr. Lipman or Dr. Burch were questioned by counsel for Mr. Spencer regarding this issue.

At the evidentiary hearing, Mr. Smallwood testified that he believed the experts were hired prior to guilt phase (PC-R. 142).

He stated that he did not use the experts at guilt phase because he did not want the State to be able to ask them about their conversations with Mr. Spencer (Id.). He did not recall what it was that he did not want the experts to be asked about (PC-R. 143). However, he could not say whether he considered using the experts to show lack of premeditation (Id.). He did not recall what the explanation was for Mr. Spencer's lack of memory during the killing but if he had evidence to support it, he would want to use it (PC-R. 144). Smallwood said he did understand that evidence presented in guilt phase could be considered in mitigation (PC-R. 145).

Nick Kelley testified that Dr. Lipman was hired as an expert on the issue of drug and alcohol addiction and that the plan was to use his testimony to show what Mr. Spencer's state of mind was at the time of the killing (PC-R. 188). Kelley stated that there were discussions about using the experts at guilt phase, but that there were damning statements made to the experts by Mr. Spencer (PC-R. 187). However, Kelley could not recall what the statements were (PC-R. 189).

Dr. Kathleen Burch testified at the evidentiary hearing that she did not testify at the guilt phase of trial and does not remember the possibility being discussed (PC-R. 259). Dr. Burch stated that Mr. Spencer discussed the killing with her and stated that he went to the house on January 18th to get the title to his car (PC-R. 262). Dr. Burch added that Mr. Spencer never gave her

any other explanation for why he went there (Id.). Mr. Spencer related to her that he and his wife were involved in a struggle on the back porch and the next thing he remembers was being hit in the head (PC-R. 263). After that, the next thing he remembered was having a knife in his hand (Id.). Mr. Spencer was never able to fill in any details between being hit in the head and coming to with a knife in his hand (Id.).

Dr. Burch testified that although she initially had to be skeptical about Mr. Spencer's lack of memory, after discussing the case with Dr. Lipman and his findings regarding intoxication (PC-R. 293) and considering Mr. Spencer's personality status and personality characteristics, she felt the lack of memory was consistent with a likelihood of dissociative phenomena (PC-R. 264). Further, she stated that Mr. Spencer was under the toxic effects of alcohol at the time of the killing (PC-R. 290). Dr. Burch testified that testimony regarding dissociative amnesia would be helpful in negating the element of premeditation (PC-R. 265). Dr. Burch added that she could have given an opinion that Mr. Spencer entered into a dissociative state during the actual act of killing, but she was not asked this at trial (PC-R. 268). Dr. Burch described a dissociative state as one in which someone's actions are automatic and not actions they choose to do on a conscious level (PC-R. 269). Dr. Burch stated that people can move and speak while in such a state (Id.). Dr. Burch concluded that there is a likelihood that

Mr. Spencer was in a dissociative state at the time of the killing and that his actions while in that state were not premeditated (PC-R. 270).

Dr. Jonathon Lipman testified that he is a neuropharmacolgist whose expertise is the effect of chemicals on the brain and behavior (PC-R. 300-03). He stated that he was hired by Mr. Spencer's trial counsel to consult in that area (PC-R. 300). Dr. Lipman became involved in the case at trial because of Mr. Spencer's history of drug and alcohol abuse and possible intoxication at the time of the offense(PC-R. 306).

Dr. Lipman testified that a dissociative state is an altered state of consciousness in which the actual chemistry of the brain is effected (PC-R. 308). Further, someone in this state can act in what appears to be a goal-directed manner without a conscious awareness of what they are doing (PC-R. 310). Dr. Lipman opined that Mr. Spencer was, during the period for which he stated a lack of memory, sufficiently dissociated from his baseline consciousness and thus, his consciousness was not engaged (PC-R. 311, 336).

Dr. Lipman stated that Mr. Spencer's period of heavy alcohol use prior to the killing factored into his opinion regarding Mr. Spencer's dissociation (PC-R. 311). Mr. Spencer was on a roller coaster of increasing and decreasing blood alcohol concentration in the days preceding the killing and was never actually sober (PC-R. 313). Dr. Lipman testified that Mr. Spencer was intoxicated at the

time of the offense (PC-R. 344) and the dissociative state Mr. Spencer was in was a result of the intersection between this intoxication and Mr. Spencer's disordered personality (PC-R. 317).

Voluntary intoxication was discussed between the trial attorneys and Dr. Lipman and Dr. Lipman felt this was a viable defense (PC-R. 335). Dr. Lipman testified that he was not consulted with by the attorneys as to whether or not he would testify at the guilt phase (PC-R. 315). Further, this was quite unusual because the attorneys usually ask his opinion on this matter (Id.). Dr. Lipman would have testified as to Mr. Spencer's dissociative state at guilt phase had he been called to do so (PC-R. 317).

In Dr. Lipman's opinion, Mr. Spencer was not malingering (PC-R. 332) and it is "extremely credible" that he was dissociative (PC-R. 317).

Doctors Burch and Lipman could have provided valuable, relevant testimony on the issue of premeditation. Mr. Spencer's dissociative state and its interrelation with his level of intoxication was relevant to show that Mr. Spencer could not have formed the requisite intent to be guilty of first-degree murder. In actuality, trial counsel did not offer any reason, strategic or otherwise, as to why this evidence was not presented at trial. The dissociative state evidence was in no way incompatible with the theory of defense, lack of premeditation. In fact, this evidence

would have lent strong support to the defense.

The lower court's ruling on this claim erroneously finds that trial counsel made a "strategic decision" not to present dissociative state testimony (PC-R. 852). The lower court cites to trial counsel's speculative testimony at that they did not put the experts on at guilt phase because of damaging collateral statements made by Mr. Spencer (PC-R. 851-52). Both Smallwood and Kelley testified that they thought this was the reason the evidence was not presented. However, neither trial counsel nor the lower court identified any particular statement that would have been damaging. In fact, there is no evidence of a strategy in not presenting dissociative state evidence at trial. The lower court's ruling erroneously attempts to characterize counsel's speculation as a strategy. Further, the lower court generalizes, without any reasoning or support, that failing to present this evidence was not prejudicial (PC-R. 853). It is unclear how the court could reason that failing to present evidence that Mr. Spencer was not consciously acting when he killed his wife is not prejudicial. Mr. Spencer's conscious intent was the salient question to be answered at his trial. The lower court's ruling as to both deficient performance and prejudice is erroneous.

Trial counsel was or should have been aware of the availability of such evidence and testimony. Both Dr. Lipman and Dr. Burch mentioned Mr. Spencer's lack of memory regarding the

stabbing in their pretrial reports and depositions. Trial counsel's failure to present this evidence through the experts constitutes deficient performance which prejudiced Mr. Spencer in his defense.

2. Dr. Rose report

In his 3.850 Motion, Mr. Spencer alleged that his trial counsel was ineffective in failing to utilize the testimony of Dr. William Rose, an emergency room physician who treated Mrs. Spencer on the day of the "iron incident". At the evidentiary hearing Mr. Spencer sought to introduce a report written by Dr. Rose at the time of the incident (PC-R. 140). After the lower court sustained an objection to the introduction of the report, Mr. Spencer proffered the report into evidence (Id.).

Mr. Smallwood testified that he did not talk to any of the physicians who treated Mrs. Spencer after the "iron incident" (PC-R. 137). However, he did have a vague recollection of the Rose report (Id.). Upon examination of the report, Smallwood conceded that there was no mention of an iron (Id.). Further, he assumed he had access to the report (PC-R. 138).

The Rose report contains no mention of Mrs. Spencer being hit with an iron (Court EX. 1). Dr. Rose was a relevant witness who should have been called by the defense to rebut the state's case with the fact that Mrs. Spencer, while being treated immediately after the incident, did not mention the iron. This evidence was

crucial to challenging the attempted murder charge and to rebutting the element of premeditation that the attempted murder charge served as evidence of. Trial counsel's failure to call Dr. Rose as a witness prejudiced Mr. Spencer in his defense.

The lower court's conclusory finding on this claim is erroneous. The lower court makes a generalized finding that counsel was not ineffective for failing to present Dr. Rose, providing no reasoning for the finding (PC-R. 855). Contrary to the lower court's ruling, counsel's failure to present this evidence further prevented Mr. Spencer from challenging the attempted murder charge which arose out of the "iron incident" and allowed the State to assert the alleged attempted murder as evidence of premeditation, the essential element of the first-degree murder charge. The lower court's conclusory dismissal of the claim simply ignores the gravity of this potential testimony.

Dr. Rose's testimony and report would have disproved the exaggerated charge of attempted murder arising out of the January 4, 1992 "iron incident" and negated any implication that the subsequent death of Mrs. Spencer was premeditated. Trial counsel's failure to present this evidence was deficient performance which prejudiced Mr. Spencer.

3. Brick Evidence

The performance of Mr. Spencer's trial counsel was prejudicially deficient in that counsel failed to test the bricks

taken from the crime scene. Such testing likely would have revealed the presence of Mr. Spencer's blood, which would have indicated that Karen Spencer initially hit Mr. Spencer with a brick and that her death was thus the result of a domestic dispute, not premeditation.

At the evidentiary hearing, Mr. Spencer entered into evidence a report on the testing of the bricks (PC-R. 347, EX. 5). The report, which sought to determine whether the blood on the bricks was either male or female, found that the results were inconclusive (EX. 5). The report further found that the inconclusive finding was due to the passage of time between the 1992 killing and the testing.

The lower court's holding that trial counsel's failure to test the bricks was not ineffective is based on the report's inconclusive finding (PC-R. 855). However, the lower court's order fails to acknowledge the fact that the inconclusive finding is the result of trial counsel's not having the bricks tested at the time of trial. Thus, the trial court's order is erroneous.

Had counsel done the testing at the time of trial, it is likely that a determination could have been made as to the sex of the person from whom the blood in question emanated. This evidence would have supported Mr. Spencer's contention that Karen Spencer's death was the result of a heated domestic dispute, not premeditation. Thus, counsel's failure in this regard was

deficient and prejudicial.

4. Impeachment of Timothy Johnson

At the evidentiary hearing, Mr. Smallwood testified that he was at the pre-trial deposition of Timothy Johnson (PC-R. 129). He further testified that he cross-examined Johnson at trial (Id.). Smallwood conceded that at trial Johnson testified that he never saw Mr. Spencer wearing latex gloves until the morning of the killing (Id.).

Timothy Johnson's deposition transcript was entered into evidence at the evidentiary hearing (PC-R. 130, EX. 2). In his pre-trial deposition, Johnson testified as follows:

> Q (by MR. KELLEY): Anything else you can remember about what he had on?
>
> A: He had on rubber gloves.
>
> Q: What kind of rubber gloves?
>
> A: Surgical gloves.
>
> Q: Surgical gloves?
>
> A: Yeah.
>
> Q: Were they a particular color?
>
> A: No. They were clear.
>
> Q: Clear?
>
> A: Yeah.
>
> Q: Had you ever seen Dusty in a pair of gloves like that before?

A: Yeah. When he was painting.

Q: Painting?

A: Uh-Huh.

(EX. 2, pp. 26-27).

Smallwood testified that the gloves were an important issue and that "if I didn't impeach him on it in cross-examination then I flat missed it" (PC-R. 130).

The lower court's order acknowledges that trial counsel conceded his failure on this point but concludes, again without reasoning or analysis, that trial counsel's failure to impeach Johnson did not constitute ineffective assistance (PC-R. 858). The lower court ignores the fact that Johnson was the crucial witness against Mr. Spencer and that impeaching him was vitally important, something which trial counsel conceded. Johnson was an eyewitness to both the January 4th and 18th incidents, providing damaging testimony about Mr. Spencer's actions on both days. Thus, failing to cast doubt on his credibility was a prejudicial mistake.

Such testimony should have been used to impeach Johnson and cast doubt on his credibility and thus his entire testimony. Trial counsel simply failed to seize the opportunity to do so.

5. Objections to Prosecutorial Misconduct

At trial, Mr. Spencer's defense counsel failed to object to the prosecutor's statement during guilt phase opening argument that witness Krista Mays would testify that the victim was carrying a

rifle on the night prior to the alleged crime (T. 426). This evidence was otherwise inadmissable and should not have been presented to the jury in any form and an objection from counsel would have been sustained.

At the evidentiary hearing, Mr. Smallwood testified that he remembered the prosecutor's statement after having read Mr. Spencer's 3.850 motion (PC-R. 123-24). Smallwood stated that he could only speculate as to why he did not object to this statement, but he could not say for sure (PC-R. 125). He speculated that he may not have objected so that if the prosecutor was unable to present this evidence, he could point that out to the jury, thereby reducing the prosecutor's credibility (Id.).[9]

Additionally, Mr. Spencer's trial counsel failed to object during the prosecutor's opening argument when the prosecutor falsely stated that Timothy Johnson had witnessed Mr. Spencer hit his wife with an iron on January 4, 1992 (T. 422). This argument was false and improper, serving to fortify the attempted murder charge when, in fact, Timothy Johnson never saw Mr. Spencer hit Mrs. Spencer with the iron.

At the evidentiary hearing, Smallwood testified that he did not remember the prosecutor's opening statement regarding the iron,

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[9]Of note, the prosecutor did get this evidence before the jury through the testimony of Krista Mays. When defense counsel objected to the testimony, the trial court properly held it inadmissable.

but that the iron was important and they wanted to keep it out of evidence if possible (Id.). Further, Smallwood testified that he may have "just missed" this statement by the prosecutor (Id.).

Further, counsel failed to properly object to misconduct during the prosecutor's closing argument at guilt phase. During her closing argument at guilt phase, the prosecutor engaged in an emotional outburst in the presence of the jury. Trial counsel failed to object in response to the prosecutor's outrageous actions. Counsel should have immediately moved for a mistrial.

Mr. Smallwood testified that during the prosecutor's closing, he thought he heard her "sobbing" for a period of approximately 15 seconds (PC-R. 113, 123). Smallwood stated that he was writing notes at the time the incident occurred and that the prosecutor's back was facing defense counsel as she gave her closing argument (PC-R. 113). Smallwood said his intent would be to object in the middle of closing if he heard the prosecutor cry (PC-R. 123). Smallwood further stated that he thought he might have mentioned this to the judge at some point (PC-R. 113). Nick Kelly testified that he felt like the prosecutor stopped crying before an objection could be made (PC-R. 191).[10]

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[10]However, at a motions hearing before the start of the penalty phase, Kelly argued to the court:

> Your Honor, there is one other thing I would like to bring up. During the closing of Miss Sedgwick's argument in the trial, there was

(continued...)

The lower court's ruling on this issue is conclusory. The lower court's order finds that any objection would not have made a difference in the outcome of the trial, but fails to provide any analysis or explanation as to why (PC-R. 858). The prosecutor's actions in each of these instances was egregiously inappropriate. Any one of these instances likely effected the outcome of the trial. Certainly, it is reasonably probable that the prosecutor's emotional display in closing argument effected the jury's determination of guilt. To hold otherwise ignores the significance of this action.

The above-mentioned instances of failing to object to prosecutorial misconduct at guilt phase were the only ones for which a hearing was granted (PC-R. 794). The lower court denied Mr. Spencer a hearing on several other instances of ineffectiveness for failure to object to prosecutorial misconduct at guilt phase. These instances of prosecutorial misconduct are discussed in detail in Argument I, *supra*. The lower court's order erroneously suggests that Mr. Spencer was granted a hearing on each instance of failing to object alleged (PC-R. 858). This is simply not the state of

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[10](...continued)

> an emotional outburst elicited by her in front of the jury where she put on the glove and started crying. In my opinion we made a mistake by not objecting at that time approaching the bench.

(R. 57)

the record. Mr. Spencer should have been granted a hearing on each instance of failing to object to prosecutorial misconduct.

6. Concession of guilt and intent

Trial counsel conceded to the jury during guilt phase opening argument that Mr. Spencer had in fact hit the victim with an iron on January 4, 1992. Mr. Spencer's attorney told the jury:

> MR. SMALLWOOD: We expect evidence to show that Dusty came back on January 4 of that morning, and at that time, they got into a fight. A heated discussion that turned into a fight. And the evidence will show that in fact that she was struck with an iron.

(T. 439-440). This serious concession by counsel was inconsistent with both the evidence presented and the testimony ultimately induced from his cross-examination of witnesses Timothy Johnson and Dr. Clarence Bowman (Timothy Johnson testified that he never saw Mr. Spencer hit Mrs. Spencer with an iron and Dr. Bowman's testimony revealed that he simply relied on Mrs. Spencer's alleged statement that she had been hit with an iron). The concession was also inconsistent with counsel's closing argument at guilt phase.

Further, during his guilt phase closing argument, counsel inexplicably conceded to the jury that Mr. Spencer had ***intended*** to kill his wife. Counsel stated:

> MR. SMALLWOOD: He committed the act of murder. But ladies and gentlemen, you got to look at the intent. Where's the intent? What is the intent here? The intent is when he was out there and he had that brick, that he is going to hit her, and he did. And the intent

> is when he took her head and slammed it against the wall, that's exactly what he did. And when he stabbed her, that's exactly what he did. He intended to commit those acts.

(T. 1032). Whatever counsel's ultimate theory was, this concession left the jury with the belief that Mr. Spencer had formed the premeditated design and thought necessary to be convicted of first-degree murder. The concession regarding intent to stab is completely without support in the record. This concession of intent amounted to a first-degree murder plea on Mr. Spencer's behalf.

At the evidentiary hearing, Mr. Smallwood conceded that his opening argument concession regarding the iron was in contradiction to what Timothy Johnson testified to (PC-R. 131). In regard to the concession at guilt phase, Smallwood testified that his goal was to admit that the murder occurred, but that it was not premeditated (PC-R. 135).

As to the iron concession, the lower court found that counsel was not ineffective (PC-R. 859). The lower court seems to base this finding, at least in part, on the fact that Mr. Spencer told Smallwood that he had hit Mrs. Spencer with the iron (Id.). This finding is completely erroneous. The court seems to hold that Mr. Smallwood was bound to divulge to the jury everything that Mr. Spencer told him rather than requiring the state to live up to their burden of proof. This finding is in error and in complete contravention with the attorney-client privilege.

The lower court found that the concession during closing argument was likewise not ineffective (PC-R. 860). The lower court's order finds that Mr. Smallwood conceded that Mr. Spencer intended to kill his wife (PC-R. 859). However, the court erroneously relies on Mr. Smallwood's evidentiary hearing testimony that he was not intending to concede intent (PC-R. 859-60). This ignores the fact that that is exactly what Mr. Smallwood did and his explanation does not change that. Thus, the court's reliance on Mr. Smallwood's testimony is erroneous.

Counsel's concessions as to the iron incident and the killing were inexplicable. In effect, counsel entered a guilty plea for Mr. Spencer on the two crucial questions the jury had to decide. By conceding these points, counsel left the jury with nothing to decide or consider. All that was left to do was rubber stamp Mr. Spencer's convictions. Contrary to the lower court's order, counsel was ineffective on both points.

7. Voir Dire of Juror Lois Noble

Trial counsel was prejudicially deficient in the guilt phase of Mr. Spencer's trial in that counsel failed to challenge or excuse juror Lois Noble. Voir dire and a juror questionnaire indicated that Lois Noble had been involved in a tumultuous domestic dispute with her husband, who she wrote was "deadbeat" and alcoholic. She was not adequately examined regarding physical abuse. Also, she had been exposed to pretrial publicity, but was

not adequately examined as to what she had heard. She served as foreperson of the jury at Mr. Spencer's trial.

At the evidentiary hearing, Mr. Smallwood testified that after reviewing Noble's juror form it appears that she showed some hostility toward her husband (PC-R. 121). Smallwood could not say what he liked about her as a juror (Id.). Smallwood assumed that he asked her about the negative information regarding her husband (PC-R. 122).

The lower court erroneously generalizes that trial counsel was not ineffective for failing to voir dire Lois Noble regarding bias (PC-R. 863). The court finds that there was no indication of abuse in the responses Noble gave (Id.). This is erroneous because Noble was never asked about marital abuse by trial counsel. Further, the lower court fails to acknowledge that trial counsel failed to ask Noble a single question about her marital relationship. Voir dire of Noble may have revealed not only marital abuse towards her, but her feelings about domestic abuse and men in general. The lower court's order fails to recognize the breadth of trial counsel's failure to voir dire Noble.

8. Knife Evidence[11]

Don Smallwood testified that his strategy with regard to the

[11] Although Mr. Spencer was not specifically granted a hearing on the issue of whether trial counsel was ineffective for failing to put forth evidence that Mr. Spencer habitually carried a knife, evidence was presented at the hearing on the issue without objection by the state.

knife used in this crime was to place the burden on the state to demonstrate where the knife came from (PC-R. 136). He stated that he would not put on evidence of a rational explanation for the knife if it would hurt Mr. Spencer's case (Id.) Nick Kelley testified that they may have possibly wanted to introduce evidence that Mr. Spencer normally carried a knife (PC-R. 194).

Curtis Zink testified that Mr. Spencer normally carried a knife with a sheath (PC-R. 197). Andy Brachold also testified that Mr. Spencer normally carried a knife (EX. 7, p. 9).

The lower court erroneously finds that this evidence from Zink and Brachold would not have been of assistance in proving lack of premeditation (PC-R. 854). The lower court attaches significance to the fact that Tim Johnson testified at trial that he thought the knife was a steak knife (Id.) However, this ignores the fact that the prosecutor, obviously unsure of the steak knife testimony, aggressively sought to admit testimony from Johnson that Mr. Spencer did not normally carry a knife, arguing to the court:

> MS. SEDGWICK: I believe it's relevant in that it's one more piece of circumstantial evidence that he came there, armed with a weapon, for a reason. One more piece of evidence for premeditation. This was not his pocketknife that he pulled out and opened up that he carries every day of his life. One more piece of circumstantial evidence going to premeditation.

(T. 486). This argument was made to the court after a defense objection to testimony regarding whether Mr. Spencer normally

carried a knife.[12] Obviously, the prosecutor felt it was important to put forth evidence that Mr. Spencer did not normally carry a knife and, further, the trial court deemed this evidence relevant. This evidence was put on to prove that Mr. Spencer did not simply use a knife that he already had with him, but rather brought a knife that morning as part of a plan to kill his wife. However, there were witnesses, Zink and Brachold, available to defense counsel, who could have disputed the state's case on this point and testified that Mr. Spencer always carried a knife. The lower court's ruling ignores the significance of this important testimony.

C. The Lower Court Erroneously Denied Appellant Relief On His Claim That He Was Denied Effective Assistance Of Counsel At The Penalty Phase Of His Trial In Violation Of The Sixth, Eighth And Fourteenth Amendments To The United States Constitution, Rendering The Outcome Of His Trial Unreliable.

1. Dissociative State Evidence

At the penalty phase of trial, trial counsel called Dr. Kathleen Burch, a psychologist, and Dr. Jonathon Lipman, a neuropharmacologist (R. 150, 335). The experts testified as to Mr. Spencer's psychological background and personality profile, including his long-term alcohol and drug addiction (R. 150-248,

[12]The court overruled the objection, stating "The relevancy, if he did not ordinarily carry a pocketknife, one can assume or one can conclude that since he does not ordinarily arm himself with knives, that he came with a weapon that particular day, as opposed to somebody who carries a pocketknife and got angry and just happened to reach back there and find it. That's the relevancy" (T. 490).

335-81). On cross-examination by the State, Dr. Lipman tangentially mentioned that during the killing of his wife, Mr. Spencer suffered a blackout, or "dissociative state" (R. 378). Neither Dr. Lipman or Dr. Burch were questioned by trial counsel for Mr. Spencer regarding this issue.

At the evidentiary hearing, Mr. Smallwood testified that he believed the experts were hired prior to guilt phase (PC-R. 142). He did not recall what the explanation was for Mr. Spencer's lack of memory during the killing but if he had evidence to support it, he would want to use it (PC-R. 144). Smallwood stated that he knew what was in the experts reports (PC-R. 143).

Nick Kelley testified that Dr. Lipman was hired as an expert on the issue of drug and alcohol addiction and that the plan was to use his testimony to show what Mr. Spencer's state of mind was at the time of the killing (PC-R. 188). Kelly stated that the defense strategy was to show the "frenzy" or "emotion" of the killing (PC-R. 190).

Dr. Burch testified at the evidentiary hearing that Mr. Spencer discussed the killing with her and stated that he went to the house on January 18th to get the title to his car (PC-R. 262). Dr. Burch added that Mr. Spencer never gave her any other explanation for why he went there (Id.). Mr. Spencer related to her that he and his wife were involved in a struggle on the back porch and the next thing he remembers was being hit in the head

(PC-R. 263). After that, the next thing he remembered was having a knife in his hand (Id.). Mr. Spencer was never able to fill in any details between being hit in the head and coming to with a knife in his hand (Id.).

Dr. Burch testified that although she initially had to be skeptical about Mr. Spencer's lack of memory, she eventually concluded that the lack of memory was consistent with a likelihood of dissociative phenomena (PC-R. 264). Dr. Burch added that she could have given an opinion that Mr. Spencer entered into a dissociative state during the actual act of killing, but she was not asked about this at trial (PC-R. 268). Dr. Burch described a dissociative state as one in which someone's actions are automatic and not actions they choose to do on a conscious level (PC-R. 269). Dr. Burch stated that people can move and speak while in such a state (Id.). Dr. Burch concluded that there is a likelihood that Mr. Spencer was in a dissociative state at the time of the killing (PC-R. 270).

Dr. Jonathon Lipman testified that he was hired by Mr. Spencer's trial counsel to consult in the area of neuropharmacology (PC-R. 300). Dr. Lipman testified that a dissociative state is an altered state of consciousness in which the actual chemistry of the brain is effected (PC-R. 308). Further, someone in this state can act in what appears to be a goal-directed manner without a conscious awareness of what they are doing (PC-R. 310). Dr. Lipman

opined that Mr. Spencer was, during the period where he stated a lack of memory, sufficiently dissociated from his baseline consciousness (PC-R. 311). While in this state, Mr. Spencer's consciousness was not engaged (PC-R. 336).

Dr. Lipman stated that Mr. Spencer's period of heavy alcohol use prior to the killing factored into his opinion regarding Mr. Spencer's dissociation (PC-R. 311). Mr. Spencer was on a roller coaster of increasing and decreasing blood alcohol concentration in the days preceding the killing and was never actually sober (PC-R. 313). Dr. Lipman testified that Mr. Spencer was intoxicated at the time of the offense and the dissociative state Mr. Spencer was in was a result of the intersection between this intoxication and Mr. Spencer's disordered personality (PC-R. 344, 317). In Dr. Lipman's opinion, Mr. Spencer was not malingering (PC-R. 332) and it is "extremely credible" that he was dissociative (PC-R. 317).

Doctors Burch and Lipman could have provided valuable, relevant testimony as to Mr. Spencer's state of mind at the time of the killing. Trial counsel did not offer any reason, strategic or otherwise, as to why this evidence was not presented at penalty phase. Had it been presented, this evidence would have demonstrated to the jury that Mr. Spencer did not plan or intend his wife's death because he lacked the conscious ability to do so. This would have refuted the State's contention of heightened premeditation. Secondly, this testimony would have eliminated the

aggravator of heinous, atrocious or cruel. The HAC aggravator in this case stemmed primarily from evidence regarding the extensive knife wounds to Mrs. Spencer, the hitting of her head against a wall, and Mr. Spencer's lifting of her nightgown in view of Timothy Johnson. All of the actions supporting the HAC aggravator occurred after Mr. Spencer was in the dissociative state which the experts describe. Thus, all of the factual evidence supporting the HAC aggravator occurred while Mr. Spencer was in a state of unconsciousness.

The lower court's ruling on this issue is inaccurate and erroneous. The lower court mysteriously finds that trial counsel was not ineffective and ties this holding to its conclusion that the experts "presented extensive testimony as to Mr. Spencer's 'dissociative' state at the time of the murder" (PC-R. 870). The court seems to find that the experts' entire testimony at the trial was a description of the dissociative state. This is simply inaccurate. As both experts testified, Mr. Spencer's dissociative state is that period of the incident for which he did not have a memory and was not consciously acting. In fact, there was no testimony at all about this at trial other than Dr. Lipman's scant mention of it on cross-examination.

Further, the lower court cites to Dr. Burch's testimony that she could not state with "certainty" that Mr. Spencer was in a dissociative state (PC-R. 869). This finding by the lower court is

factually incomplete in that Dr. Burch testified that she could have given an expert opinion that there is a reasonable likelihood that Mr. Spencer was in a dissociative state at the time of the killing (PC-R. 269). Thus, Dr. Burch's opinion on the matter was much more firm than the lower court suggests.

Trial counsel was or should have been aware of the availability of such evidence and testimony. Both Dr. Lipman and Dr. Burch mentioned Mr. Spencer's lack of memory in their pretrial reports and depositions. Such evidence could and should have been used to attack the HAC and CCP aggravators at the penalty phase. Failure to refute the HAC aggravator is especially prejudicial in light of this Court's ultimate striking of the CCP aggravator. Striking the CCP aggravator left only two remaining aggravators, HAC and prior violent felony. In light of this Court's treatment of domestic cases, failure to dispute the HAC aggravator is prejudicially deficient.

2. Failure to Object to Prosecutorial False Statement

Trial counsel was ineffective at penalty phase in that counsel failed to properly object when the prosecutor falsely stated that Mr. Spencer told Dr. Lipman that he remembered stabbing Karen Spencer. Dr. Lipman's testimony was irreconcilable with the prosecutor's patently false statement. The prosecutor's statement left the jury with the impression that Mr. Spencer had a conscious memory of stabbing Karen Spencer when, in fact, he did not. Trial

counsel should have objected to this false statement by the prosecutor and moved for mistrial.

At the evidentiary hearing, Mr. Smallwood testified that he knew what was in the experts reports regarding what Mr. Spencer told them (PC-R. 143). Despite this knowledge, he did not object to Sedgwick's false statement.

The lower court erroneously holds that counsel was not ineffective because the prosecutor did not state that Mr. Spencer "remembered" the stabbing (PC-R. 872). The court's finding is in error because that is exactly what the prosecutor did. Thus, the lower court's ruling is based on an inaccurate finding of fact.

D. The Lower Court Erroneously Denied Appellant Relief On His Claim That The State Failed to Disclose Exculpatory Information In Violation Of Mr. Spencer's Rights Under The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution As Well As The Corresponding Provisions Of The Florida Constitution.

The State must disclose evidence which impeaches the State's case or which may exculpate the accused "where the evidence is material to either guilt or punishment." Brady v. Maryland, 373 U.S. 83 (1963); United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375 (1985); Kyles v. Whitley, 514 U.S. 419 (1995). Additionally, ". . . the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles, 514 U.S. at 437-38; see also Gorham v. State, 597 So. 2d 782.

Bill Anthony was an auxiliary patrolman for the Orange

County Sheriff's Office in January 1992. On January 4, 1992, Mr. Anthony was assisting Deputy Weyland when he investigated the "iron incident." This investigation involved taking statements, both at the scene and at the hospital, as well as crime scene examination. Thus, Mr. Anthony was a relevant witness to the alleged attempted murder and battery charges resulting from the "iron incident." The State was aware that Anthony was a relevant witness. Despite this knowledge by the state, Mr. Anthony's name was not on the state witness list for the guilt phase of trial.

At the evidentiary hearing, Bill Anthony testified that he assisted Deputy Weyland in his investigation of the January 4th incident, including taking a statement from Mrs. Spencer (PC-R. 219). Anthony testified that during this interview Mrs. Spencer did not say anything about being struck with an iron (PC-R. 220). Anthony agreed that the interview was done after Mrs. Spencer had been treated by the physicians (PC-R. 221). Anthony stated that no one from the state or defense ever talked with him (PC-R. 222).

The lower court holds that a Brady violation did not occur and erroneously ties its decision to the fact that Mr. Spencer's trial attorney should have known about Anthony because he was mentioned in a police report (PC-R. 876). This holding ignores this Court's decision in Way v. State, 760 So.2d 903 (Fla. 2000) where this Court wrote that "while discovery rules impose an obligation upon defendants to obtain exculpatory materials through the exercise of

due diligence, the 'ultimate test in determining if a Brady violation occurred is whether confidence in the outcome of the trial is undermined to the extent that there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different'" Way, (quoting Young v. State, 739 So.2d 553, 559 (Fla. 1999). See also, Maharaj v. State, 2000 WL 1752209 (Fla.).

Because of the State's failure to disclose the name of a relevant witness who would have provided exculpatory information, a Brady violation occurred. Mr. Spencer was prejudiced because the jury did not consider material and exculpatory evidence

ARGUMENT II

THE LOWER COURT ERRED IN SUMMARILY DENYING MERITORIOUS CLAIMS WITHOUT THE BENEFIT OF AN EVIDENTIARY HEARING.

Although the lower court granted an evidentiary hearing on some claims, the court summarily denied the others. The court erred. A Rule 3.850 litigant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986).

The court below summarily denied Mr. Spencer relief on Claims I, VI, XII, and XIV (PC-R.832-89). The Court partially summarily denied Claims III and IV (PC-R. 832-89). Each of these claims, on

which Mr. Spencer is entitled to an evidentiary hearing, is addressed below.

A. Mr. Spencer Was Denied His Fundamental Right To Due Process And A Fair Trial In Violation Of The Fourth, Fifth, Sixth, Eighth And Fourteenth Amendments To The U. S. Constitution And Of The Corresponding Provisions Of The Florida Constitution, When Biased Jurors Were Impaneled And Further Infected By Improper Contact With The State And Protestors And The Trial Was Conducted In A Prejudicial Atmosphere Created By Pretrial Publicity, The Ineffectiveness Of Trial Counsel, In Failing To Competently Move For A Change Of Venue, And Otherwise Protect Mr. Spencer's Right To An Unbiased Jury, The Failure Of The Court To Enforce Even The Inadequate Sequestration Order Entered, The States' Acquiescence To And Inflammation Of Protestors Packing The Courtroom, And The Improper Behavior Of The Protestors And Jurors.

In his 3.850 Motion, Mr. Spencer alleged that the death of Karen Spencer on January 18, 1992, created a firestorm of media coverage with public attacks on the justice system and judges and cries for the head of her husband, Dusty Ray Spencer. On January 19, 1992, NOW, the National Organization for Women, organized a candle-light "vigil" for Karen Spencer at the Courthouse. This event was calculated to bring political pressure on the court to convict and condemn Mr. Spencer to death and to publicize the case. At the same time, the protestors and reporters were condemning the courts and police for releasing Mr. Spencer from custody. Thus, from day one and continuing through the trial and sentencings, Mr. Spencer was tried and convicted as a symbol of spouse abuse in a justice system that was seeking to appease the media-fed public rage and to minimize its own implication of

complicity in the death of Mrs. Spencer.

Mr. Spencer alleged in his 3.850 Motion that the *Orlando Sentinel* published articles throughout 1992, leading up to Mr. Spencer's trial, which criticized the court system and law enforcement generally for its treatment of the Spencer case.

Mr. Spencer further alleged that the protestors and reporters continued to exert pressure on the State and to create a biased public from the time of Mrs. Spencer's death through trial and two sentencings. In fact, during the trial, they packed the courtroom, spoke to jurors and State Attorneys, and, despite a Court Order, displayed symbols of their solidarity and their cause. Twenty of Fifty jurors in the venire had heard of the Spencer case. At least a third of the jury ultimately impaneled admitted to previously having heard, or possibly having heard, about the case in the media. Unfortunately, the voir dire by the court was inadequate and that permitted or performed by trial counsel was constitutionally deficient. Further, restrictions were either not placed on or not enforced against the press and the protestors, so the initial infection of the jury continued through trial due to the failures of the court and trial counsel and to the inflammatory conduct of the State. Jurors, protestors, and reporters mingled during breaks despite an inadequately enforced "sequestration order", forbidding jurors from "the halls."

Mr. Spencer further alleged that at the October 23, 1992 pre-

trial hearing, the court and State both made statements acknowledging in a wink-of-the-eye fashion that the jurors probably did watch TV coverage at night, thus making a mockery and reducing to meaningless incantation the court's customary admonition to jurors to avoid media coverage about the case.

Despite this rabid atmosphere in Orange County, which demanded a spouse abuse sacrifice on the altar of public opinion, Mr. Spencer's trial counsel played a shell game with the Motion To Change Venue. A State Attorney memorandum indicates that, at a hearing in May, shortly after trial counsel's appointment in March, trial counsel for Mr. Spencer indicated to the court that, as a "CYA", they would probably file a Motion For Change Of Venue. At the same time, the court indicated that it probably would not grant the Motion - this while no motion had been investigated, prepared, or was pending and while the media was attacking both Mr. Spencer and the court. The Motion For Change Of Venue that was ultimately filed on October 30, 1992, a few days before trial, was never argued or pursued by trial counsel, and was, in fact, a template, or boilerplate form, containing black letter law and false allegations of a "confession" that never occurred in Mr. Spencer's case. The Motion presented no specifics or facts supporting a change of venue, other than attaching copies of a few newspaper clippings. The Memorandum Of Law accompanying the Motion is, likewise, boilerplate. Finally, the Motion and Memorandum contain

no affidavits and fail to conform to the requirements of the Rules of Criminal Procedure for a Motion to Change Venue.

Mr. Spencer alleged in his Rule 3.850 Motion that witnesses would be presented at an evidentiary hearing to show the quality and quantity of pre-trial media coverage and of the activities of protestors, including improper contact with the jury. Further, Mr. Spencer alleged that he would present video and press reports showing the nature of the atmosphere at his trial. Mr. Spencer also alleged ineffective assistance of counsel in failing to adequately argue for change of venue and to control the prejudicial atmosphere that existed at the trial.

The lower court erroneously denied Mr. Spencer the opportunity to present this evidence at an evidentiary hearing, citing the fact that Mr. Spencer did not provide the names of witnesses (PC-R. 836). This holding is erroneous and in contradiction of this Court's holdings in Gaskin v. State, 737 So.2d 509 (Fla. 1999)(defendant not required to allege the names of witnesses in postconviction motion) and Valle v. State, 705 So.2d 1331 (Fla. 1997)(defendant not required to attach supporting affidavits of witnesses). As this Court held in Gaskin, it is at an evidentiary hearing that a defendant must come forward with witnesses to substantiate the allegations made in the 3.850 Motion. Gaskin at 513. Thus, the lower court's denial of an evidentiary hearing because "Mr. Spencer did not allege what parties had contact with

jurors" is erroneous (PC-R. 836).

The lower court only partially addresses Mr. Spencer's claim of ineffective assistance of counsel as it relates to prejudicial atmosphere. The lower court seems to hold that counsel was not ineffective in failing to protect Mr. Spencer's rights as they relate to prejudicial atmosphere because trial counsel filed a boilerplate and partially inaccurate venue motion (PC-R. 838). This ignores Mr. Spencer's claim that counsel was ineffective during the trial for failing to properly object to the presence of protestors and the resulting prejudicial atmosphere that prevailed. The lower court's order simply fails to address this claim.

As in Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991), the pre-trial publicity and the Courtroom protestors pressuring the Court and all the participants created an atmosphere of inherent prejudice in which there was an unacceptable risk that impermissible factors came into play in the deliberative process, warranting relief. As in Woods, the protestors in Mr. Spencer's case were there for one reason: to show solidarity for the deceased and communicate a clear message to the jury that they wanted a conviction followed by a death sentence. Woods at 1459-60. Mr. Spencer should have been granted a hearing to demonstrate both the prejudicial atmosphere that existed and trial counsel's ineffectiveness in failing to control it.

B. Mr. Spencer Was Denied Effective Assistance Of Counsel At The Guilt Phase Of Trial In Violation Of The Sixth, Eighth And Fourteenth Amendments To The United States Constitution, Rendering The Outcome Of His Trial Unreliable.

1. Failure to Voir Dire Jurors Regarding Bias

Trial counsel was prejudicially deficient at guilt phase in that counsel failed to challenge or excuse jurors Albert Sampey and Linda Wolfe.

Voir dire and a juror questionnaire indicate that Sampey was a C.P.A. who had numerous law enforcement clients and personally employed a reserve Orange County deputy that worked for him. Additionally, Sampey's wife was a volunteer for the Orlando Police Department Neighborhood Watch. Sampey also implied that he may have heard about the case from the media, but he was not adequately examined on this point.

Voir dire and a juror questionnaire indicated that Linda Wolfe had a family member who was beaten up by a group of people and "hit in the head with a brick."

Both jurors presented obvious reasons for bias against Mr. Spencer, and effective counsel would have moved to dismiss them for cause or dismissed them with peremptory challenges. At a minimum counsel should have questioned these jurors during voir dire about possible bias.

2. Failure to Voir Dire Jurors Regarding Contact With the State

The performance of Mr. Spencer's trial counsel was

prejudicially deficient in the guilt phase of his trial in that counsel failed to voir dire jurors who had contact with prosecutors and victims' advocates, in violation of the court's jury contamination order. There were four separate ***reported*** instances of improper contact between jurors and state actors. On November 4, 1992, Prosecutor Sedgwick informed the trial court that one of the jurors in Mr. Spencer's case had a conversation with victim's advocate Greta Smitkin (T. 353). At the same time, Sedgwick informed the court that a juror had contacted Sedgwick herself (T. 353). Subsequently, on November 5, 1992, Assistant State Attorney Gretchen Gawad notified the trial court that a juror had sought her out and engaged her in a conversation wherein the juror indicated a bias in favor of the prosecution, specifically that the juror liked the way she dressed (T.564). Finally, on November 6, 1992, the court was informed by the prosecution that a juror had walked into the State's witness room and once again made contact and engaged in conversation with ASA Gawad (T. 841).

Despite the opportunity and obvious necessity of doing so, Mr. Spencer's trial counsel failed to voir dire either the jurors or the state actors involved. Voir dire would have revealed an infection of the juror's impartiality and/or impermissible bias on the part of the jurors, resulting in either disqualification of the juror in question or a mistrial.

Based upon these ***reported*** violations of the court's jury

contamination order, Mr. Spencer's trial counsel were prejudicially ineffective in failing to voir dire the jurors regarding their contact with, in addition to state actors, the numerous protestors present at the trial. It became clear that the jury was mingling among those in the gallery, including protestors who were obviously biased against Mr. Spencer. Mr. Spencer's counsel should have moved to voir dire both the jurors and protestors to find out the true nature of the contamination order violation. See Argument II, sub-argument A, *supra.*

C. Mr. Spencer Was Denied Effective Assistance Of Counsel At The Penalty Phase Of Trial In Violation Of The Sixth, Eighth And Fourteenth Amendments To The United States Constitution, Rendering The Outcome Of His Trial Unreliable.

1. Failure to Object to Improper Prosecutorial Questions

Trial counsel was ineffective at penalty phase in that counsel failed to object to the prosecutor's repeated attempts to question lay mitigation witnesses as to whether or not Mr. Spencer suffers from any psychological difficulties.

Ms. Sedgwick questioned Raymond Spencer, Mr. Spencer's father, on cross-examination:

> Q: Okay. During that time, during your visit with him, did you notice any behavior of his, anything he said, anything he did, that made you think that he was suffering from any kind of emotional illness, or psychological illness?
>
> A: No.
>
> Q: Okay. Up to that time, had anyone in the family ever discussed with you that they

believed he was suffering from any kind of emotional illness or psychological illness?

A: No, none to my knowledge.

(R. 291). Sedgwick later questioned John Marancek, a childhood friend of Mr. Spencer's:

Q: Did you ever believe that–did you ever think that Dusty was emotionally or psychologically disturbed during that time that you knew him and was around him?

A: I'm not sure. We were all nuts. It's hard to say.

Q: Okay. Back at that time, did you ever think Dusty was emotionally or psychologically disturbed?

A: I couldn't draw that conclusion.

(R. 296). Later, the prosecutor questioned Mr. Spencer's childhood and military friend, Ted Kafalas:

Q: During the time that you knew him, growing up, and during the same time that you lived with him, did you ever see any behavior that made you think he was emotionally or psychologically ill?

A: That's kind of hard to answer, because, you know, I grew up with him and basically we were intoxicated, either intoxicated or we were straight. At times, he did tell me he was forgetting things. When we were in here, moved to Orlando, or when I was living with him in Hoffner Road, he said he would like to slow down smoking pot because he would forget were [sic] he put things, or forget somebody's name, or whatever.

Q: Okay. Did he ever–did you ever see anything that made you think that he had any

> confusion about his sexuality, sexual orientation?
>
> A: What do you mean? If he was a man or a woman?

(R. 308-09).

These questions, posed to lay mitigation witnesses, were an improper attempt to cast doubt as to whether Mr. Spencer suffers from any psychological illness. These questions sought a medical opinion from lay witnesses and should have been posed to qualified mental health experts. Lay witness answers to these questions left the jury with the mistaken impression that Mr. Spencer does not suffer from any psychological illness and was improper impeachment of qualified medical opinions adduced from expert witnesses..

These questions should have been objected to by counsel. Counsel's failure to object to these improper questions was deficient performance which prejudiced Mr. Spencer's case.

2. Failure to Seek New Penalty Phase Upon Remand

Trial counsel was ineffective at the penalty phase of trial in that counsel failed to motion the trial court, upon remand from this Court for "reconsideration", to impanel a new jury for resentencing.

At the original penalty phase, evidence was presented, argument was made, and the jury was instructed on the statutory aggravating factor of cold, calculated, and premeditated ("CCP"). This aggravator was stricken on direct appeal by this Court after

it found the CCP aggravator to be unsupported by the evidence. The jury's verdict, tainted by the CCP aggravator, was unreliable.

This Court's remand for "reconsideration" arguably allowed for the impaneling of a new jury and, had counsel moved the trial court to impanel a new jury, Mr. Spencer's case would have been heard by an impartial, untainted co-sentencer and there is a reasonable probability that, without the CCP aggravator, the 7-5 vote would become a life recommendation.

D. Mr. Spencer Was Denied His Rights To Due Process Under The Fourteenth Amendment To The United States Constitution As Well As His Rights Under The Fifth, Sixth, And Eighth Amendments Because The State Either Knowingly Presented Or Failed To Correct Material False Testimony.

The United States Supreme Court has held that a constitutional violation occurs when the State either knowingly presents or fails to correct material false statements. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). This Court has held such actions similarly offensive under Florida law. Routly v. State, 590 So.2d 397 (Fla. 1991). To establish a violation under Giglio and its progeny, a petitioner must establish: (1) that the testimony is false; (2) that the prosecutor knew the testimony was false; and (3) that the statement was material. Craig v. State, 685 So.2d 1224 (Fla. 1996). Under Giglio, "the prosecutor has a duty to correct testimony he or she knows is false." Routly, 590 So.2d at 400. This Court has further held that if a reasonable probability exists that the presentation of false evidence has

tainted the jury's verdict, a new trial is required. Id. Thus the critical standard is whether there is any reasonable likelihood that the false testimony could have effected the judgement of the jury.

During her opening argument at guilt phase, Ms. Sedgwick stated that Timothy Johnson witnessed Mr. Spencer beating Karen Spencer with an iron:

> MS. SEDGWICK: We will, through the testimony of witnesses, prove beyond and to the exclusion of every reasonable doubt that on January 4, 1992, Dusty Ray Spencer tried to kill Karen Spencer, beating her in the head repeatedly with a household iron, that that was witnessed by her son, Timothy Johnson.

(T. 422). The prosecutor's argument on this point was inconsistent with the actual evidence. During both his pre-trial deposition and trial testimony, Timothy Johnson never indicated that he had witnessed Mr. Spencer hitting Karen Spencer with an iron. The prosecutor's statement during opening argument was simply false. The prosecutor's statement was intended to fortify the attempted murder charge by presenting the court and the jury with a false witness. In reality, the only evidence of Karen Spencer being hit with an iron was an alleged hearsay statement from the victim, brought in through Dr. Bowman (T. 648).

The prosecutor knew that her statement during opening argument was false. This materially false statement, which likely influenced the jury, particularly as to the attempted murder

charge, but also on the issue of premeditation and in sentencing, was constitutionally improper.

During her closing argument at penalty phase, the prosecutor stated that Mr. Spencer told Dr. Lipman that he had stabbed the victim prior to Timothy Johnson leaving the crime scene:

> MS. SEDGWICK: Dr. Anderson testified that she received all of those injuries while she was alive. None of them were after death. That he can medically determine that. Dusty Spencer gave statements to Dr. Lipman that he had stabbed Karen before Tim left. Now Tim was confused about that.

(R. 391). The testimony of Dr. Lipman is completely devoid of any such statement by Mr. Spencer. Rather, Dr. Lipman's testimony reveals that Mr. Spencer had no recollection whatsoever of stabbing the victim:

> DR. LIPMAN: I'll read you his words better than I can say it... 'And I started to come back from an unconsciousness or a blackout, coming out of a fog, and Tim took off and ran down the road and I left and went to the woods. I don't remember stabbing her. I just remember coming out of the fog and the knife was in my hands. They said I stabbed her, but I don't remember.'

(R. 371). This testimony from Dr. Lipman is irreconcilable with the prosecutor's characterization during her closing argument, revealing that the prosecutor's statement was patently false. The prosecutor's comment left the jury with the impression that there was evidence that Mr. Spencer had a conscious memory of intentionally stabbing his wife, when no evidence had in fact been

presented on this point. The comment also served to persuade the jury that Timothy Johnson had actually seen Mr. Spencer stab his wife. Timothy Johnson's testimony specifically reveals that he never saw Mr. Spencer stab Mrs. Spencer. The prosecutor intentionally misrepresented both Dr. Lipman's and Timothy Johnson's testimony on this crucial issue.

These actions on the part of the State sabotaged the reliability of the jury's verdict by infecting it with false evidence. Under Giglio, this intentional taint of the jury's verdict requires a new trial.

E. The Rules Prohibiting Mr. Spencer's Lawyers From Interviewing Jurors To Determine If Constitutional Error Was Present Violates Equal Protection Principles, The First, Sixth, Eighth And Fourteenth Amendments To The United States Constitution And The Corresponding Provisions Of The Florida Constitution And Denies Mr. Spencer Adequate Assistance Of Counsel In Pursuing His Post-Conviction Remedies.

The Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 21 of the Florida Constitution, require that Mr. Spencer receive a fair trial. However, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar[13] prevents Mr.

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[13]The rule expressly prohibits counsel from directly or indirectly communicating with jurors. The rule states that

> A lawyer shall not . . . after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict is subject to legal challenge; provided, a lawyer may not

(continued...)

Spencer from determining whether he received a fair trial. Mr. Spencer can only discover juror misconduct through juror interviews. To the extent it precludes undersigned counsel from investigating and presenting jury bias and misconduct that can only be discovered through interviews with jurors, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar is unconstitutional. Because the circuit court denied Mr. Spencer this opportunity to investigate and present a claim of juror misconduct, the court denied his rights to due process and access to the courts; the reliability and integrity of Mr. Spencer's capital sentence is questionable. The circuit court erred in denying this claim without an evidentiary hearing.

F. Mr. Spencer's Trial Court Proceedings Were Fraught With Procedural And Substantive Errors Which Cannot Be Harmless When Viewed As A Whole Since The Combination Of Errors Deprived Him Of The Fundamentally Fair Trial Guaranteed Under The Sixth, Eighth, And Fourteenth Amendments.

Mr. Spencer did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Ellis v. State, No. 75,813 (Fla. July 1, 1993); Ray v. State, 403 So.2d 956 (Fla. 1981); Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991).

(...continued)

> interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist.

Rule 4-3.5(d)(4), R. Regulating Fla. Bar.

In Jones v. State, 569 So.2d 1234 (Fla. 1990), this Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." Id. at 1235 (emphasis added). In Nowitzke v. State, 572 So.2d 1346 (Fla. 1990) cumulative prosecutorial misconduct was the basis for a new trial. When cumulative errors exist the proper concern is whether:

> even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.
>
> Seaboard Air Line R.R. Co. v. Ford, 92 So.2d 160, 165 (Fla. 1956) (on rehearing); see also,e.g., Alvord v. Dugger, 541 So.2d 598, 601 (Fla. 1989) (harmless error analysis reviewing the errors "both individually and collectively"), cert. denied, ____ U.S. ____, 110 S. Ct. 1834, 108 L.Ed.2d 963 (1990); Jackson v. State, 498 So.2d 906, 910 (Fla. 1986) ("the combined prejudicial effect of these errors effectively denied appellant his constitutionally guaranteed right to a fair trial").

Jackson v. State, 575 So.2d 181, 189 (Fla. 1991). See also Ellis v. State (new trial ordered because of prejudice resulting from cumulative error).

The Supreme Court has consistently emphasized the uniqueness of death as a criminal punishment. Death is "an unusually severe

punishment, unusual in its pain, in its finality, and in its enormity." Furman, 408 U.S. at 287 (Brennan, J., concurring). It differs from lesser sentences "not in degree but in kind. It is unique in its total irrevocability." Id. at 306 (Stewart, J., concurring). The severity of the sentence "mandates careful scrutiny in the review of any colorable claim of error." Zant v. Stephens, 462 U.S. 862, 885 (1983). Accordingly, the cumulative effects of error must be carefully scrutinized in capital cases.

A series of errors may accumulate a very real, prejudicial effect. The burden remains on the state to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Spencer's rule 3.850 relief. This Court should order that his convictions and sentences be vacated and remand the case for a new trial, an evidentiary hearing, or for such relief as the Court deems proper.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **Initial Brief of Appellant, which has been typed Courier New, Font Size 12,** has been furnished by United States mail to all counsel of record on this ***14th day of December, 2000.***

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