IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2866

JOEL DALE WRIGHT,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution, claims demonstrating that Mr. Wright was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in her conviction and death sentence violated fundamental constitutional guarantees.

Citations to the Record on the Direct Appeal shall be as (R. page number). All other citations shall be self-explanatory.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

REQUEST FOR ORAL ARGUMENT

Mr. Wright requests oral argument on this petition.

PROCEDURAL HISTORY

On April 22, 1983, Joel Dale Wright was charged by indictment in Putnam County with one count of first degree

murder, one count of sexual battery with great force, one count of burglary of a dwelling, and one count of grand theft of the second degree (R. 5). On April 23, 1983, Howard Pearl was appointed to represent Mr. Wright (PC-R2. 2406). The assigned prosecutor was James Dunning. Thereafter, Mr. Wright entered pleas of not guilty on all counts.

Trial commenced on August 22, 1983, before Judge Robert Perry and on September 1, 1983, the jury returned guilty verdicts on each count (R. 688). On September 2, 1983, the penalty phase proceeding began. Later that same day, the jury returned a recommendation of death. On September 23, 1983, Judge Perry imposed a sentence of death with regard to the murder count, 99 years on the sexual battery, 15 years on the burglary, and 5 years on the grand theft.

On appeal, Mr. Wright was represented by Larry Henderson, an assistant public defender. On May 3, 1984, Mr. Wright's forty-seven page Initial Brief was filed. The first argument in the brief concerned various rulings by Judge Perry limiting Howard Pearl's cross-examination of four of the witnesses called by the State. The second argument challenged Judge Perry's decision that Howard Pearl could not call Kathy Waters as a defense witness because she had been a spectator in the courtroom when she recalled seeing an individual that could have been Jody Wright on the night of the homicide walking beside the side of the road at the time that Jody Wright

testified he was walking along the road on his way to Charles Westberry's house and she recalled seeing three individuals walking in front of Ms. Smith's house at approximately the same time. The third argument challenged the judge's instruction regarding Williams' Rule evidence that was admitted against Mr. Wright. The fourth argument challenged the admission into evidence of Detective Walter Perkins' testimony regarding Mr. Wright's statement announcing he did not wish to speak to Deputy Perkins. The fifth argument challenged the corpus delicti for the grand theft in the second degree conviction. The sixth argument urged that Judge Perry had erred in restricting Howard Pearl's closing argument regarding circumstantial evidence and in refusing to instruct the jury on the law regarding circumstantial evidence. The seventh argument challenged Judge Perry's finding of the "avoiding arrest" aggravator. The eighth argument challenged Judge Perry's finding of the "cold, calculated and premeditated" aggravator and that the finding constituted an impermissible doubling of the "heinous, atrocious or cruel" aggravator. The ninth argument asserted that Sec. 921.141, Fla. Stat., as applied deprived Mr. Wright of his constitutional right to have the jury of his peers decide the facts at issue in the penalty phase proceeding. The tenth argument alleged that the Florida capital sentencing provisions were unconstitutional on their face and as applied.

On June 21, 1984, after the submission of the Initial Brief, counsel for Mr. Wright filed a motion seeking relinquishment of jurisdiction in order to permit evidentiary development regarding a statement made by a juror to deputy clerk of court. Counsel for Mr. Wright submitted an affidavit from Judith Marks, Deputy Clerk of the Circuit Court, in which Ms. Marks recounted a statement made by Sandra Wilkinson, one of the jurors at Mr. Wright's trial. According to Ms. Marks, she and Ms. Wilkinson discussed "the actions of one of the other jurors, who kept falling asleep during the trial." Ms. Wilkinson then stated "that it was not that the State proved [Mr. Wright] to be guilty, but that the defense did not prove that he was innocent." On June 28, 1984, this Court denied the motion for relinquishment.

On September 4, 1984, after all briefing had been completed, Mr. Wright's counsel filed a second motion for relinquishment. This motion was premised upon ambiguity in the transcript of Mr. Wright's trial, "in that the transcript fails to establish either Mr. Wright's presence or absence during the portion of his trial where an inquiry was conducted concerning the bias of one of his jurors (See pages 2831-2858 of the Record on Appeal." This motion was granted on September 19, 1984. Thereafter, a hearing was held in circuit court and the record on appeal was supplemented. Mr. Wright's

counsel was then permitted to file a two and one half page supplement to his briefs raising an eleventh argument that asserted Mr. Wright's absence from the bias inquiry violated his constitutional right to be present at all stages of his capital trial.

Thereafter, Mr. Wright's convictions and sentence of death were affirmed by this Court in July, 1985. This Court did not address many of the errors raised on Mr. Wright's behalf. Of the seven guilt phase issues, this Court only addressed the second and third arguments. As to the second argument, this Court found the exclusion of Kathy Waters' testimony was error, but harmless. Wright v. State, 473 So. 2d 1277 (Fla. 1985), cert. denied, 474 U.S. 1094 (1986)(Blackmun, J., joined by Brennan, and Marshall, JJ, dissenting regarding this Court's determination that the trial court's decision to preclude Ms. Waters as a defense witness was harmless error). As for the penalty phase issue, this Court struck the "cold, calculated and premeditated" aggravator. Relying on Judge Perry's finding of no mitigating circumstances, this Court refused to remand for a new sentencing proceeding.

Mr. Wright thereafter sought relief pursuant to Fla. R. Crim. P. 3.850 on February 22, 1988. An evidentiary hearing commenced before Judge Robert Perry on October 3, 1988.

On June 8, 1989, Judge Perry entered an order denying

post-conviction relief. Judge Perry's decision was premised upon a factual finding that "Mr. Freddie Williams [Howard Pearl's investigator] testified that he was aware of the statements by Brown and Luce" that implicated Henry Jackson and Clayton Strickland in the homicide of Ms. Smith. Relying upon Taylor Douglas' testimony that Jackson and Strickland were eliminated as suspects when they passed polygraph examinations, Judge Perry further stated, "Whether the statements were exculpatory in nature is highly speculative and thus, the claim is legally insufficient to support a claim under Brady."

On June 22, 1989, Mr. Wright filed a motion for rehearing and a motion to amend regarding newly discovered evidence regarding Howard Pearl's status as a special deputy sheriff. On August 21, 1989, Judge Perry denied relief on the "Pearl" issue on the basis of the decision by another judge in another case in which an evidentiary hearing had been conducted.

Thereafter, Mr. Wright appealed to this Court. This Court, quoting Judge Perry's order verbatim, stated: "We find that the trial court properly denied relief on each of the claims made in Wright's initial rule 3.850 motion." Wright v. State, 581 So.2d 882, 886 (Fla. 1991). However, this Court did reverse the denial of the claim regarding whether Howard Pearl's ability to provide effective assistance was impaired because of his status as a special deputy. The case was

"remanded for an evidentiary hearing." 581 So.2d at 887.

During the remand, the Rule 3.850 motion was amended. An evidentiary hearing was conducted in 1997. An order denying relief was entered in June of 2000. Mr. Wright appealed. His appeal is currently pending before this Court. Wright v. State, Case No. SC00-1389.[1]

CLAIM I

DURING THE DIRECT APPEAL, THE STATE OF FLORIDA FAILED TO DISCLOSE PERTINENT FACTS WHICH WERE NECESSARY TO THIS COURT'S CONSIDERATION OF THE ISSUES RAISED BY MR. WRIGHT, AND AS A RESULT, THE DIRECT APPEAL DID NOT COMPORT WITH THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

A. INTRODUCTION.

The State of Florida having given Mr. Wright a state law right to a direct appeal was obligated to afford Mr. Wright with an appeal that comported with due process and provided Mr. Wright with a fair opportunity to vindicate his constitutional rights. Hewitt v. Helms, 459 U.S. 460 (1983). As the United States Supreme Court has held: "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). Certainly, the same principle applies when the State withholds

[1] The Initial Brief in that appeal provides a much more detailed account of the proceedings in the circuit following the 1991 remand.

pertinent and exculpatory information regarding the factual circumstances underlying the issues raised in the appeal.

The United States Supreme Court has recognized that a prosecutor is:

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935). As a result, the United States Supreme Court has forbidden "the prosecution to engage in 'a deliberate deception of court and jury.'" Gray v. Netherland, 518 U.S. 152, 165 (1996), quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935). That principle applies even on appeal. "Truth is critical in the operation of our judicial system and we find such affirmative misrepresentations by any attorney, but especially one who represents the State of Florida, to be disturbing." The Florida Bar v. Feinberg, 760 So.2d 933, 939 (Fla. 2000).

B. DIRECT APPEAL CHALLENGE TO LIMITS ON RIGHT OF CONFRONTATION.

In his first argument in his Initial Brief on direct appeal, Mr. Wright challenged a number of rulings by Judge Perry limiting his right to confront various witnesses against him. As to two of these witnesses, the State was in possession of pertinent information relevant to the proper

resolution of the issue on appeal; yet, the information was not disclosed to this Court. Thus, Mr. Wright's statutory right to an appeal was arbitrarily denigrated by the State's action in withholding this pertinent and necessary information.

1. Charles Westberry.

At trial, the State successfully sought to preclude any inquiry from the defense regarding the criminal nature of Charles Westberry's scrap metal business. In his Initial Brief before this Court on direct appeal in his first argument, Mr Wright challenged the limitations on his right to confront Charles Westberry regarding the criminal nature of his business enterprise:

> Appellant sought to establish that Westberry and Appellant had routinely stolen metals to sell for huge profit, which line of questioning was objected to by the State on the basis that the testimony was intended only to prove bad character or propensity (R 2186). Appellant disagreed, and argued that the testimony was needed to fully develop the relationship between the State's key witness and Appellant, and to show a motive existed for Westberry to try to eliminate Appellant whereby Westberry would be the sole participant in the lucrative enterprise (R 2186-88, 2191-2192). **Appellant further submits that such testimony was proper to demonstrate that Westberry's testimony was influenced by the hope that his illegal activity, known by the police and prosecutor, would not result in charges being filed if Westberry testified favorable to the State.**

Initial Brief on Direct Appeal at 14-15 (emphasis added).

In its Answer Brief, the State responded to this

contention as follows:

> The Appellant had sought in a proffer of this evidence to bring out the additional fact that they obtained the scrap metals by stealing them, which proffer was denied (R 2192). The basis of the denial was that the proffer did not demonstrate anything other than the bad character of the witness (R 2190-2191). It is well settled that although the general reputation of a witness for truth and veracity may be shown, it is improper to allow inquiries as to the general moral character of a witness and a witness may not be impeached by reference to specific acts of misconduct not resulting in a criminal conviction.

Answer Brief on Direct Appeal at 14-15.

In the State's closing argument, the prosecutor recognized that the ultimate question for the jury was whether it believed Charles Westberry beyond a reasonable doubt:

> Now, ultimately you're going to have ask yourself whether or not, Ladies and Gentlemen, if you believe Charles Westberry's testimony or whether you find it to be of sufficient believability, to put it more precisely, to convince you beyond and to the exclusion of each and every reasonable doubt that this Defendant, to the exclusion of others, committed the crimes set forth in the indictment.

(R. 2725).

The prosecutor then asked the jury to consider Westberry's possible motives in testifying against Mr. Wright:

> I ask you to ask yourself the ultimate question: Why is Charles Westberry going to submit himself to criminal prosecution so that he can also submit his friend to criminal prosecution?
>
> What's so dastardly did Jody Wright do to Charles Westberry to make him do that?
>
> What testimony have you had that there was anything so dastardly done by Jody Wright to Charles Westberry? None. Nothing.
>
> The biggest hint you got was when Paige

> Westberry testified for the Defense that her husband said that this Defendant was getting in the way of him and a friend, Doc Ryster.

(R. 2726). Because of Judge Perry's ruling precluding inquiry into the criminal nature of the business enterprise, the jury never knew that Westberry's scrap metal business was criminal in nature and that he could be criminally charged for his conduct and sent to prison for a substantial period of time.

In fact, the trial prosecutor was aware of Westberry's criminal activity. In 1988, the trial prosecutor, Jim Dunning, testified that, in one of his many daily one-on-one interviews of Charles Westberry conducted without Westberry's lawyer present, Westberry criminal activities were discussed in detail:[2]

> And I went through other matters concerning, of course, the statement by Joel Dale Wright to him. And then I inquired of him whether or not he had been involved in any prior criminal activity. Any. And he responded with the matter concerning the scrap metal.

(PC-R1. 748).[3]

Mr. Dunning testified that Charles Westberry had

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[2] When Mr. Wright's counsel tried to discuss with Westberry his criminal activity, it was during a discovery deposition at which Angus Harriet appeared as counsel for Westberry and objected when Mr. Pearl sought to learn of the scope and nature of Charles Westberry's criminal activity. Mr Harriet instructed Westberry not to answer the questions (R. 454-55).

[3] Obviously, Mr. Dunning thought it was pertinent information that he needed to know. He just apparently did not want the jury to know for fear it may reduce his star witness' credibility.

indicated "that there were [] other people besides himself and Wright involved" in the criminal enterprise, "but it seems like he didn't know their names." (PC-R1. 754). To Mr. Dunning's knowledge that Sheriff's Office never conducted any follow-up interviews of Mr. Westberry in order to investigate the criminal enterprise. As Mr. Dunning explained:

> Well, this was a limited grant of immunity. We weren't out prosecuting a burglary case at this point in time, we were prosecuting a first degree murder.

(PC-R1. 756).[4]

Charles Westberry testified in 1988 that the criminal enterprise had been going on long before the one load that was taken to Jacksonville in March of 1983. It was the cancelled check for approximately $1200 from the March, 1983, sale of scrap metal that was shown to Westberry at trial by Mr. Wright's trial counsel (R. 2188). In 1988, Westberry indicated that the criminal enterprise started in 1980 or 1981 (PC-R1. 643). According to Westberry, the March, 1983, check was for more money than had been received when the stolen scrap metal had been sold in Palatka (PC-R1. 648). Westberry indicated that prior to the Jacksonville trip in March of

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[4] This Court recently stated, "we have repeatedly emphasized that '[t]he thrust of Giglio [v. United States, 405 U.S. 150 (1972)] and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, and the prosecutor not fraudulently conceal such facts from the jury.'" Ventura v. State, 794 So.2d 553, 562 (Fla. 2001).

1983, he had sold stolen scrap metal to a business in Palatka on a weekly basis (PC-R1. 649). He estimated that he had been collecting “roughly two hundred dollars a week” (PC-R1. 651). Paige Westberry knew about the enterprise and had on occasion “dropped” Charles off so he could “collect” the scrap metal (PC-R1. 642).

In 1988, Charles Westberry testified that he was “scared of getting into trouble about this” (PC-R1. 645). He also testified that he was worried that “Paige would get in trouble” if Westberry did (PC-R1. 652). Westberry indicated that an attorney “said something about what [time] I could get out of it.” Westberry understood that he faced “a few” years in prison (PC-R1. 702).

Despite, Mr. Dunnings’ personal inquiry of Westberry regarding his criminal activity and despite Westberry’s admission to Mr. Dunning, Mr. Wright was precluded from confronting Westberry in front of the jury so that the jury could fully evaluate Westberry’s motives. Mr. Dunning, the prosecutor, suggested in his closing argument that a full evaluation of Westberry’s motives was warranted, only after he had successfully precluded the jury from knowing of the criminal nature of Westberry’s scrap metal business. Interestingly, Mr. Dunning himself has described his decision to not prosecute Westberry for the criminal enterprise as “a limited grant of immunity.”

Westberry acknowledged that on February 8, 1983, that he had told Deputy Taylor Douglas that "Jody Wright [ ] had spent the entire night at the trial, at [Westberry's] brother's trailer at Kelly's Trailer Park from 1:30 or 2:00 in the morning" (R. 2168). His story to law enforcement changed after Paige went to the police with what he told her on April 15th, although Westberry said Paige was lying when she said that Westberry had told her that Mr. Wright confessed the murder only after Westberry first indicated "Jody Wright was trying to make trouble between [Westberry] and his friends."[5]

On appeal, the State did not disclose to this Court that Judge Perry's ruling precluded the jury from knowing of the prison term Westberry was afraid that he faced but for the good graces of Mr. Dunning. The undisclosed information would have revealed to this Court that Westberry had good reason to curry favor with Mr. Dunning, and if Paige Westberry was telling the truth, reason to be afraid of what Mr. Wright had been telling people (R. 2473). Clearly, had the State disclosed the "limited grant of immunity" to this Court, a new trial would have been ordered under Davis v. Alaska, 415 U.S. 308 (1974), the case Mr. Wright relied upon in his Initial Brief. "There are few subjects, perhaps, on which [the

[5] Paige Westberry was called as a witness and testified that Charles Westberry had said that Mr. Wright had told someone that Westberry had been stealing property (R. 2473).

Supreme] Court and other courts have been more nearly unanimous than in their expression of belief that the right of confrontation is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 404-05 (1965). Accord Douglas v. Alabama, 380 U.S. 415, 418-19 (1965). The State by its conduct deprived Mr. Wright of a full and fair appeal.

2. Walter Perkins.[6]

At trial, the State successfully objected to a number of defense counsel's questions of Deputy Perkins on cross-examination. In his Initial Brief before this Court on direct appeal in his first argument, Mr. Wright challenged the limitations placed upon his right to confront Deputy Perkins:

> Deputy Perkins, an eight year veteran of the Putnam County Sheriff's Office, participated in the arrest and interrogation of Appellant (R 2349, 2357, 2361). It was this officer's practice not to make any contemporaneous record of an interrogation of a suspect and it this officer to whom Appellant allegedly state, "If I confess to this, I will die in the electric chair. If I don't talk I stand a chance of living" (R 2351, 2363). The officer's memory as to the content of the unrecorded interrogation had decreased drastically, in that the above statement was the only part of the interrogation recalled at trial by the deputy (Cf. R 547-48). On cross-examination, Appellant asked the deputy whether "the ends that you seek to gain justify whatever means you have to employ; is that correct?" (R 2357). A State objection was immediately sustained (R 2237). The deputy was

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[6] Interestingly, Charles Westberry testified in 1988 that he knew Walter Perkins very well, they had been next door neighbors (PC-R1. 655).

> similarly asked if any proof existed whereby the context of Appellant's statement could be determined, an objection to which was sustained (R 2370). Appellant submits that these questions of a trained police officer who deliberately does not record the interrogation of a first degree murder suspect were proper and should have been allowed, in that the questions go straight to the officer's credibility. Appellant had the right to have the jury observe the officer's demeanor in answering questions that ask if the officer was lying or being "selective" in his recall (R 2359), especially where the record shows that police previously lied under oath about whether a plan existed to arrest Appellant (Cf. R 507, 528, 541-42, 549-550).

Initial Brief on Direct Appeal at 12-13.

In its Answer Brief, the State responded to this contention as follows:

> The Appellant does not have the right to have the jury observe the officer's demeanor in answering questions such as this, because it is, in essence, an editorial loosely clothed in the form of a question and whether the witness answers or not the message is conveyed to the jury that this is a police officer who will do anything to achieve his goals. The function of cross-examination are to elicit testimony concerning the facts of the case and to test the credibility of the witness. A police officer's philosophical tenets tend neither to prove nor disprove any material fact in issue and are therefore totally irrelevant. Such questions can lead to no admissible testimony and serve the singular and improper purpose of making mini-closing arguments in mid-trial, as well as at the trial's conclusion.

Answer Brief on Direct Appeal at 8-9.

In the State's closing argument, the prosecutor relied on Deputy Perkins' testimony as establishing that Mr. Wright had confessed the murder to Deputy Perkins:

> You may recall down there the third person at

> the Sheriff's Office who talked with this Defendant was Walter Perkins, and at that time the Defendant told him: If I confess to this, I'll die in the electric chair. If I don't talk, I stand a chance of living.
>
> I suggest to you, Ladies and Gentlemen, **that was paramount to a confession by this Defendant** that he committed the crime of murder in the first degree of one Lima Paige Smith when viewed with the other statements that he'd already made to the officers about having been in the house, not in over five years, and then this stuff.

(R. 2737)(emphasis added).

When this Court affirmed Mr. Wright's conviction and sentence of death despite this Mr. Wright's claim of error, the State was in possession of significant information impeaching Deputy Perkins' credibility. In 1980, a woman named Dell Gillman, who had sought help from the Sheriff's Department regarding spousal abuse, claimed that Deputy Perkins' report regarding his response to her call for help was not truthful and "did in fact falsify the actual report." Ms. Gillman charged that his conduct raised the question of whether he would engage in similar behavior in other cases. See Initial Brief in Wright v. State, Case No. SC00-1389, at 33-34. Further in January of 1986, Deputy Perkins was fired by the Putnam County Sheriff because Deputy Perkins was found to be untrustworthy.

The State kept this Court in the dark regarding Deputy Perkins when it was considering Mr. Wright's claim on direct appeal that Mr. Wright had been deprived of his right to

confront Deputy Perkins before the jury so that the jury could observe his demeanor and fairly evaluate his credibility.[7]

C. DIRECT APPEAL CHALLENGE TO THE INTRODUCTION OF MR. WRIGHT'S INVOCATION OF SILENCE.

In his fourth argument in his Initial Brief on direct appeal, Mr. Wright challenged the introduction of Deputy Perkins' testimony that Mr. Wright stated to him "If I confess to this I'll die in the electric chair. If I don't talk I stand some chance of living." (R 2351).[8] Specifically, Mr.

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[7] Of course, the detrimental impact to Mr. Wright was further compounded by Mr. Wright's trial counsel's unreasonable failure to present evidence regarding the threats Deputy Perkins had made to Mr. Wright's mother to "make [her] sorry she ever had them two boys." (PC-R2. 2587-88). See Argument I(C)(2), Brief of Appellant, Wright v. State, Case No. SC00-1389.

[8] In a discovery deposition of Deputy Perkins conducted on July 21, 1983, Deputy Perkins testified that Mr. Wright said "if I confess to this I will die in the electric chair. If I don't talk I stand a chance of living" (R. 137). Thereupon, Deputy Perkins testified, "I asked him, I said, well, do you want to tell me about it, and this is when he replied he wanted to talk to his lawyer, and at this time I asked him no further questions, the interview was terminated once he requested to talk to with an attorney" (R. 137).

According to Deputy Perkins' testimony, Mr. Wright initially answered Deputy Perkins' inquiries by indicating that "he had no knowledge of who might have been responsible for [the murder]." (R. 135). Deputy Perkins subsequently testified, in response to a question seeking to find out what precise statement had elicited the "I will die in the electric chair" comment, that he "could not tell you exactly what was said up until these points." (R. 558).

At trial, Deputy Perkins memory had deteriorated and he was unable to recall Mr. Wright making any other statements other than the one at issue: "If I confess to this I'll die in the electric chair. If I don't talk I stand some chance of living." (R 2368). Thus, the jury did not get to hear that Mr. Wright had indicated to Deputy Perkins that "he had no

Wright argued:

> Appellant respectfully submits that the above statement constituted a comment upon Appellant's right to remain silent, notwithstanding Judge Perry's ruling "[a]s a matter of law" to the contrary (R 141).

Initial Brief on Direct Appeal at 27.

As to this issue, Judge Perry had entered an order denying Mr. Wright's motion to suppress in which he stated:

> the Court finding that the alleged statement of the Defendant that "if I confess to this I will die in the electric chair, if I don't talk I stand a chance of living" **does not, as a matter of law, constitute an election by the Defendant to exercise his constitutional right to remain silent**.

(R. 141)(emphasis added).

In responding to Mr. Wright's argument on appeal, the State asserted:

> No objection was made at trial to the testimony of this witness, reflecting Appellant's statement, and thus the issue was not preserved for appeal.
>
> * * *
>
> More importantly, Appellant's conclusion that the statement was obtained in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments is one that should have been advanced below in the form of an objection to the introduction of this testimony. The issue is now waived.

Answer Brief on Direct Appeal at 26, 28-29. The State's assertion was patently false.

Mr. Wright filed a motion to suppress which was heard and

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idea who was responsible for [the murder]." (R. 135).

argued at a pretrial hearing. Judge Perry specifically ruled that Mr. Wright's purported statement was not an invocation of silence (R. 141). When Deputy Perkins was called before the jury and testified to the alleged statement by Mr. Wright, the following occurred after a lunch recess:

> MR. PEARL: May it please the Court? Through a lapse of memory, at the close of the State's case I failed to make a motion I had intended to make, and I ask leave of the Court now to make it.
>
> THE COURT: Yes, sir.
>
> MR. PEARL: Prior to trial I filed a Motion in Limine asking that the testimony given by Detective Walter Perkins concerning the alleged statement made by the Defendant be suppressed and not used during the trial.
>
> The Court ruled and entered an order stating that the statement was not inadmissible. So, therefore, Detective Perkins at the trial testified to that statement.
>
> And I know wish to make a motion to strike the same, and to give the jury a cautionary instruction to disregard it, upon the ground – - upon the grounds stated in my Motion in Limine and heretofore ruled upon.
>
> THE COURT: All right, sir. Any argument?
>
> MR. DUNNING: The State's argument's the same as that which was presented at the hearing on the Motion in Limine, Your Honor.
>
> THE COURT: All right, sir. The motion to strike is denied, sir.
>
> MR. PEARL: Yes, Your Honor. Thank you.
>
> And thereupon the Defendant moves for a mistrial, upon the ground that the introduction of that statement, constituting as it did an election to remain silent, and therefore improperly published

> to the jury, has denied the Defendant a fair and impartial trial guaranteed him by the Sixth Amendment to the United States Constitution, made applicable to the State by the Fourteenth. And it also denied him due process of law and equal protection under the law, as guaranteed him by the Constitution of the United States of America and the State of Florida.
>
> THE COURT: Arguments?
>
> MR. PEARL: None.
>
> MR. DUNNING: The State's argument's still the same, Your Honor.
>
> THE COURT: All right, sir. The motion for mistrial is denied.

(R. 2415-16).

Contrary to the State's misrepresentations to this Court in the Answer Brief on Direct Appeal, Mr. Wright did raise his challenge to Deputy Perkins' testimony during the trial. At the time, the State made no contention that Mr. Wright had waived the issue by waiting until after the lunch recess to ask to strike Deputy Perkins' testimony which was heard before the lunch recess. Mr. Pearl asked for leave of court to make the objection. Without objection, leave of court was granted and the motion to strike the testimony was denied.

Subsequently, the motion was again renewed after the defense rested (R. 2578). The motion was again renewed after the State rested following its case in rebuttal (R. 2607). At no time was their any contention that Mr. Wright's motions were untimely or not considered and denied on the merits.

This Court has stated, "Truth is critical in the operation of our judicial system and we find such affirmative misrepresentations by any attorney, but especially one who represents the State of Florida, to be disturbing." The Florida Bar v. Feinberg, 760 So.2d 933, 939 (Fla. 2000). Here, the State affirmatively misrepresented the record. As a result, this Court was led to believe that the issue was not preserved for appeal, when in fact, that was not the case.

This Court has recognized that this Court's independent review of the record in a capital appeal cannot be considered a cure to counsel's failure to perform their duties in preparing briefs and arguing before this Court. Wilson v. Wainwright, 474 So.2d 1162, 1165 (Fla. 1985)("However, we will be the first to agree that our judicially neutral of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate.").[9]

As for the merits of Mr. Wright's claim, the law was quite clear, as this Court explained in 1987:

> Since Edwards, however, we have not accepted this view and have characterized similar statements as equivocal which permit an investigating official to continue questioning for sole purpose of clarifying the equivocal request. In so holding, we made clear

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[9] To the extent that Mr. Wright's appellate counsel failed to address the State's misrepresentation in his Reply Brief, Mr. Wright asserts that counsel's performance was deficient and that Mr. Wright was prejudiced.

> that, until clarified, this is the limited permitted inquiry.

Long v. State, 517 So.2d 664, 667 (Fla. 1987). See Waterhouse v. State, 429 So.2d 301, 305 (Fla. 1983).[10] Here, Deputy Perkins testified that after Mr. Wright said "if I confess to this I will die in the electric chair. If I don't talk I stand a chance of living" (R. 137), Deputy Perkins "asked him, I said, well, do you want to tell me about it, and this is when he replied he wanted to talk to his lawyer, and at this time I asked him no further questions, the interview was terminated once he requested to talk to with an attorney" (R. 137). As result, the statement was clearly not admissible.

The introduction of the statement was not harmless error. As Justice Kennedy explained in Arizona v. Fulminante, 499 U.S. 279, 309 (1991)(Kennedy, J., concurring in the judgment):

> If the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case. Apart, perhaps, from a videotape of the crime, one would have difficulty finding evidence more damaging to a criminal defendant's plea of innocence.

Here, the prosecutor argued to the jury that the alleged statement to Deputy Perkins was "paramount to a confession" to a police officer (R. 2737). In these circumstances, the erroneous introduction of this evidence was not harmless

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[10] The decision in Waterhouse issued on February 17, 1983, two months before Deputy Perkins' interrogation of Mr. Wright.

beyond a reasonable doubt.

D. CONCLUSION.

As a result of the State's deception of this Court regarding the issues raised by Mr. Wright in his direct appeal, he was deprived of due process. Had this Court been made aware of the facts withheld by the State, Mr. Wright's conviction and sentence of death would have been reversed and a new trial ordered.

CLAIM II

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL NUMEROUS MERITORIOUS ISSUES WHICH WARRANT REVERSAL OF HIS CONVICTION AND SENTENCE OF DEATH.

A. INTRODUCTION.

Mr. Wright had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to this Court. Strickland v. Washington, 466 U.S. 668 (1984). "A first appeal as of right [] is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). The Strickland test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. See Orazio v. Dugger, 876 F.2d 1508 (11th Cir. 1989).

In his direct appeal, numerous constitutional deprivations were not raised nor adequately briefed. Because

the constitutional violations which occurred during Ms. Wright's trial were "obvious on the record" and "leaped out upon even a casual reading of transcript," it cannot be said that the "adversarial testing process worked in [Mr. Wright's] direct appeal." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Wright's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985). Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Wright involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). Individually and "cumulatively," Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165 (emphasis in original). In light of the serious reversible error that appellate counsel never raised, there is more than a reasonable probability that the outcome of the appeal would have been different, and a new direct appeal must be ordered.

B. FAILURE TO RAISE ON APPEAL THE PROSECUTOR'S KNOWING PRESENTATION OF FALSE ARGUMENT TO MR. WRIGHT'S JURY.

1. Introduction.

The United States Supreme Court has recognized that a prosecutor is:

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935). As a result, the Court "forbade the prosecution to engage in 'a deliberate deception of court and jury.'" Gray v. Netherland, 518 U.S. 152, 165 (1996), quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935). If the prosecutor intentionally or knowing presents false or misleading evidence or argument in order to obtain a conviction or sentence of death, due process is violated and the conviction and/or death sentence must be set aside unless the error is harmless beyond a reasonable doubt. Kyles v. Whitley, 514 U.S. 419, 433 n.7 (1995). The prosecution not only has the constitutional duty to fully disclose any deals it may make with its witnesses, United States v. Bagley, 473 U.S. 667 (1985); Giglio v. United States, 405 U.S. 150 (1972), but also has a duty to alert the defense when a State's witness gives false testimony, Napue v. Illinois, 360 U.S. 264 (1959); and, to refrain from deception of either the court or the jury. Mooney v. Holohan. A prosecutor must not knowingly rely on false impressions to obtain a conviction. Alcorta v. Texas, 355 U.S. 28 (1957). Where, as here, the

State uses false or misleading argument to deliberately deceive the jury, due process is violated.

In cases "involving knowing use of false evidence the defendant's conviction must be set aside if the falsity could in any reasonable likelihood have affected the jury's verdict." United States v. Bagley, 473 U.S. at 678, quoting United States v. Agurs, 427 U.S. at 102. Thus, if there is "any reasonable likelihood" that uncorrected false and/or misleading argument affected the sentencing, Mr. Wright is entitled to relief. See United States v. Alzate, 47 F.3d 1103, 1110 (11th Cir. 1995).

2. The Glass Jar.

During the trial, the prosecutor received a tip that two individuals (Charlotte Martinez and her sister, Cynthia Kurkendall)[11] were in possession of a glass money jar that they had obtained from Mr. Wright after Ms. Smith's death and which they believed was the glass money jar described by Westberry as taken from Ms. Smith's home (PC-R1. 771-73). Before the State introduced the evidence, Mr. Pearl was given a brief opportunity to investigate the evidence. Witnesses were located who identified the glass jar as a decanter that was a Wright family heirloom, and one witness even possessed the

[11] As it turned out, one of the individuals who came forward with this evidence was Cynthia Kurkendall who the prosecutor was dating and subsequently married (PC-R1. 773).

matching glasses to prove it (PC-R1. 815-23). The prosecutor, Mr. Dunning, realized at that point that the glass jar could not be used by the State to corroborate Westberry's testimony. Accordingly, Mr. Dunning decided that he would not even attempt to introduce the glass jar, and he did not call Charlotte Martinez as a witness.

On the other hand, Mr. Pearl decided to present the fact that Mr. Wright possessed a glass jar full of money to demonstrate that Mr. Wright had no need to rummage through Ms. Smith's house looking for money, the motive asserted by Westberry. Mr. Pearl called Charlotte Martinez and presented her testimony that Mr. Wright had been in possession of this glass jar full of money in February of 1983. He then forgot to present the testimony establishing that the jar was a decanter with matching glasses that had been in the Wright family for years (PC-R1. 815-23).

Mr. Dunning used Mr. Pearl's error against Mr. Wright in his closing, suggesting that jury could find that this glass jar full of money was the one Westberry said was taken from Ms. Smith's residence at the time of the homicide (R. 2742):

> Then we heard from Mrs. Charlotte Martinez about this jar.
>
> The State's the first to admit that the jar can either be attached to the residence of Lima Paige Smith or it can be unattached from the residence of Lima Paige Smith.
>
> You've not had any competent testimony as to who the owner of that jar was or where that jar was originally obtained.

> But it was a jar of coins, it was a jar of change, and it was used and in the possession of Joel Dale Wright around the middle of February of this year.
>
> View that in terms of what we heard from Charles Westberry about the Defendant saying not only did I take this folding money but there was a jar of coins that I took and hid behind the house.
>
> Add that to the testimony of Charlotte when she was asked, where did Jody get that from? Well, I don't really know. Inside the house, I guess, but he could have got it from somewhere else. I don't know.

(R. 2742).

The prosecutor knew that this jar was Wright family heirloom and not stolen from Ms. Smith's house. Yet, he suggested to the jury that jar may be corroboration of Charles Westberry's testimony that Mr. Wright stole a jar full of money from Ms. Smith's home when he murdered her.[12] This was false and misleading argument deliberately designed to deceive the jury. The prosecutor's conduct violated due process and was reversible error. Appellant counsel's performance was deficient in that he failed to raise this winning issue in Mr. Wright's direct appeal.

3. The Time of Death.

The medical examiner, Dr. William Latimer, testified at trial regarding the autopsy he performed on Ms. Smith's

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[12] Clearly, Mr. Dunning was desperate to argue corroboration of Westberry's weak credibility, just as he had been desperate to keep the jury from knowing of "the limited grant of immunity" regarding Westberry's criminal liability for his scrap metal business. However, a prosecutor is supposed to be concerned with more than just winning.

body. Based upon his expertise and examination of Ms. Smith's body, in direct examination by Mr. Dunning Dr. Latimer was asked what his conclusion was regarding the time of her death. Dr. Latimer responded, "It looked to me on the basis of these two things that maybe she was killed the night before we found her, before she had had a chance to go to bed, and maybe even as early as before she had eaten her dinner" (R. 1826).[13] Despite Mr. Dunnings, reference to additional information that had been provided to Dr. Latimer regarding Ms. Smith's eating and sleeping habits,[14] "it suggests that she was very unusual and out of the ordinary, but that's all I can say" (R. 1830). Subsequently in cross-examination, Dr. Latimer expressed his ultimate conclusion to a reasonable degree of medical probability regarding the time of Ms. Smith's death:

> Q So isn't it still, in spite of all, the best estimate, the best you can do by way of reasonable medical probability to say that Miss Smith died after 5:00 p.m. and no later than, say, 8:00 or 9:00 p.m. on Saturday night; isn't that - - isn't that the best you can do and all you have together at this time?
>
> A Unless additional information was forthcoming, I would have to agree with you.

---

[13] The two things he was referring to was the fact that her stomach was devoid of any food and the fact that she was not wearing bedclothing.

[14] Mr. Pearl's objected to the use of this information as unproven hearsay that had not been submitted to the crucible of an adversarial testing (R. 1824-25). This objection was overruled.

(R. 1853).[15] After Dr. Latimer gave this answer, no one had any further questions, and Dr. Latimer was excused.

Jim Dunning in his closing argument addressed Dr. Latimer's testimony saying:

> We believe on examination of Dr. Latimer, together with subsequent testimony that you heard from other of her relatives as to what they found in the house, you may be able to conclude in your own mind that she did not follow those type of norms. And if she did not, then we basically go back to the initial statement by the doctor that her death, based upon the condition of her body, would have been anywhere from twelve to twenty-four hours prior to the autopsy.
>
> **Gives you quite a broad range to deal with, I suggest. We're talking about something in the neighborhood of nine or ten o'clock on Saturday night onto nine or ten o'clock Sunday morning as being the time range based on physical evidence on the body**, and forgetting about normal eating habits, which we don't know what hers were, and forgetting about normal retiring or sleeping habits, which we don't know what hers were either for that.

(R. 2700)(emphasis added).

Of course, Mr. Dunning needed to mislead the jury regarding the testimony of Dr. Latimer because Mr. Wright's

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[15] This had been in fact Dr. Latimer's original estimation of the time of death. After Mr. Wright was arrested, information was provided to Dr. Latimer regarding Ms. Smith's odd life style to convince him to issue a new report altering the estimated time of death to include a time period for which Mr. Wright did not have an alibi. This new information focused on Ms. Smith's poor eating habits and unknown sleep habits because Ms. Smith's stomach was devoid of food and she was not wearing bedclothing. At trial, Dr. Latimer never actually embraced the times set forth in his revised report. In fact after extensive questioning regarding the time of death, Dr. Latimer opined that his original estimation of the time of death as between 5:00 p.m. and 9:00 p.m. was still his best estimate to a reasonable degree of medical certainty.

whereabouts were accounted for until approximately 1:00 a.m. (R. 1866, 1882). According to Dr. Latimer's opinion as to the time of death, Mr. Wright could not have committed the murder. Mr. Dunning intentionally misrepresented Dr. Latimer's testimony in his closing argument and deliberately sought to deceive the jury. This was false and misleading argument that violated due process and constituted was reversible error. Appellant counsel's performance was deficient in that he failed to raise this in Mr. Wright's direct appeal.

4. Right-handed Assailant.

The medical examiner, Dr. Latimer, also testified that from his examination of Ms. Smith's body that the assailant was right-handed. He explained his conclusions in the re-direct examination conducted by Mr. Dunning as follows:

> Q Okay. All right, sir. Can you tell me with what degree of medical certainty you can state that the person who stabbed her was in front of her?
>
> A When I look at the wounds they are fairly shallow, but I reasonably certain that the wounds came from a person in front. Had they been from behind, I think they would have had a different angle.
>
> Q All right, sir. Can you tell use with what degree of medical certainty you can make that statement?
>
> A Hard to answer. Reasonably certain.
>
> Q Okay. But not absolute?
>
> A No.
>
> Q Also upon questioning you indicated you had

a, and if I recall your words, a feeling that the person who inflicted the wound was right-handed.

A Correct.

Q With what degree of medical certainty can you make such a finding?

A The same degree, reasonable.

(R. 1848-49).[16]

In his closing argument, Mr. Dunning was also forced to misrepresent the very testimony he elicited from Dr. Latimer:

> Then we got into yet another issue. Was the assailant left-handed or was the assailant right-handed.
>
> You've seen during the course of this trial this Defendant writing over there at that desk left-handed.
>
> You have heard testimony subsequently from his relatives saying he was in fact left-handed. But you have also heard, Ladies and Gentlemen, testimony that he's perfectly capable of using either his left or his right hand.
>
> You may also keep in mind as to how the doctor was able to arrive at that conclusion, **how he could say it was a left-handed person attacking from the front as opposed**, for example, to a left-handed individual holding her from the rear and stabbing her in this type of fashion.
>
> Again, left-handed, right-handed, is that ultimately the basis upon which this case is going

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[16] Dr. Latimer testified that there were twelve stab wounds to the left side of Ms. Smith's face and neck (R. 1818). "[T]he deepest wound we could measure was was about an inch-and-a-half" (R. 1819). One wound, Dr. Latimer found to "best reflect[] the knife. It is about half an inch across, and an eighth of inch in width" (R. 1819). No major arteries nor veins were cut. "[T]here were a large number of smaller vessels that were cut, and there was bleeding into the mouth and into the lungs" (R. 1819). According to Dr. Latimer, death was caused "as a direct result of multiple stab wounds which produced a state of shock and caused bleeding into the lungs and resulted in her death" (R. 1821).

> to be decided? The State would hope not, but that is a matter for your consideration.

(R. 2700-01)(emphasis added).[17]

According to Dr. Latimer's opinion, a left-handed Mr. Wright was probably not the one who committed the murder. Mr. Dunning intentionally misrepresented Dr. Latimer's testimony and deceived the jury. This was reversible error. Appellant counsel's performance was deficient in that he failed to raise this in Mr. Wright's direct appeal.

5. Latent Prints.

David Latent, an analyst with FDLE, was called by the State to testify regarding his analysis of latent prints lifted from Ms. Smith's house. According to Mr. Latent, he received "eleven latent lift cards" from the crime scene and was asked to compare those prints to known prints from a number of individuals (R. 2051). The known prints submitted for comparison, besides Lima Paige Smith (R. 2031), included a number of law enforcement officers who had been in the house following the discovery of Ms. Smith's body and Ms. Smith's brother who found her body. These individuals included "David R. Stout, Robert Jenkins, Clifford Miller, Gary Poole, Joseph Cobb, Evan Sikes, Earl Smith, George Winch, and Taylor Douglas." (R. 2038). Mr. Latent also received known prints

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[17] In fact, Dr. Latimer did not say that the assailant was left-handed; his opinion to reasonable degree of medical certainty was that the assailant was right-handed.

from Joel Dale Wright and Charles Westberry. Additionally, Mr Latent received known prints from "James and Bobby Hackney, a George Bowen, a Paul House, and a Jackie Lee Bennet." (R. 2048). He also received known prints from Asrial Lewis (R. 2049). After making the comparisons between the latent prints from Ms. Smith's house and the knowns provided to him, Mr. Latent matched one of the latent prints to Taylor Douglas and another of the latent prints to Joel Dale Wright (R. 2050).[18] No other matches were made.

In his closing argument, Mr. Dunning asserted:

> Then we heard the testimony of David Latent. David Latent was the only laboratory technician that could give you any positive, corroborative evidence, **hard evidence, if you will, as to the identity of the person that committed these crimes set forth in the Indictment.**
>
> He was able to tell you about the latent prints that were submitted to him for comparison purposes.
>
> He was able to tell you about the numerous cards which have been introduced into evidence, the fingerprint - - inked fingerprint cards of the Defendant, of Charles Westberry, many of the detectives with the Sheriff's Office, some of their personnel, Asrial Lewis, a list of persons that were all submitted for what is referred to as elimination purposes; in other words, for comparison with the latent prints found there on the scene, to be able to say, well, none these prints belong to the person who's named on this inked fingerprint card.
>
> All such persons, including Lima Paige Smith, were in fact eliminated. **There were only two people that were not eliminated** and, as a matter of fact, positively identified as having their prints there.

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[18] Mr. Latent identified Mr. Wright's fingerprint on the basis of five matching points between the known print and the latent print (R. 2045-47).

(R. 2711-12)(emphasis added).

This was a gross mischaracterization and misuse of Mr. Latent's testimony. There were many people whose fingerprints were not compared. There were numerous latent prints found that were not matched. Thus, there were in fact many more than two people not eliminated. Given the fact that people known to be in the house did not leave latent prints behind, a finding that the known did not match a latent print from inside the house could not eliminate as a suspect in the murder anyone whose known prints had been submitted and not matched. Thus, no one was eliminated as a suspect by Mr. Latent's testing. Individuals known to have been in Ms. Smith's house, including Ms. Smith herself, did not leave fingerprints that were discovered by the crime scene technicians. Mr. Dunning intentionally misrepresented Dr. Latimer's testimony and in order to deceive the jury. This was reversible error. Appellant counsel's performance was deficient in that he failed to raise this in Mr. Wright's direct appeal.

6. Foreign Head and Pubic Hairs.

Patricia Lasko, a former employee of FDLE, testified as a microanalyst who had conducted microscopic examination of hair evidence found on Ms. Smith's body and on her clothing. Ms. Lasko had been provided known hair samples from Ms. Smith for comparison purposes. Her examination revealed:

> In my initial examination of the personal clothing of Smith, in comparing it with her hair standards from State's Exhibit for Identification Triple K, a maroon dress, **there were two caucasian hairs present that were different from the hairs of and head hair standards of Smith.**
>
> * * *
>
> In examining the pubic combings that was suubmitted from Smith, there were several hairs present that were characteristic of caucasian pubic hair that did not appear to be different from the hairs in her pubic hair standard. **And there was one brown hair present which demonstrated some characteristics of caucasian pubic hair, but the hair was different from the hairs in the pubic hair standard from Smith.**

(R. 2079-80)(emphasis added).[19]

Subsequently, Ms. Lasko received known hair samples from Charles Westberry and Joel Dale Wright. She then compared those known samples to the foreign hairs found on Ms. Smith's body and clothing. Ms. Lasko concluded:

> A Of the two brown hairs from the maroon dress - -
>
> Q That would be Triple K.
>
> A - - in State's Exhibit Triple K for Identification, **those two brown hairs were different from the hairs and head hair standard of Wright** and Westberry.
>
> Q Okay.
>
> A Of the hair that was in the pubic hair combing, upon examination of the characteristics that were present in that hair and in examining the pubic hair standards submitted from Wright and

[19] Obviously, the foreign pubic hair found in the pubic hair combing was suitable for comparison to Ms. Smith's pubic hair because the comparison was made and it was determined that the pubic hair was different from Ms. Smith's known pubic hairs.

> Westberry, it was decided that that hair did not demonstrate sufficient characteristics to be suitable for comparison with the hairs in any of those standards, in that the hair was not a typical caucasian pubic hair, and it was not suitable for comparison.

(R. 2082)(emphasis added).

On cross-examination, Ms. Lasko testified as follows:

> Q Now, and the bottom line that we have here is that whatever that pubic hair was or whose ever it might have been, in the pubic hair found in the pubic hair of Miss Smith, you could not match it with Jody Wright.
>
> A That's correct.

(R. 2095).

In his closing argument, Mr. Dunning misrepresented Ms. Lasko's testimony:

> We had Patricia Lasko and Larry Smith. Miss Lasko was involved with hair samples in trying to compare hair samples with submissions of hair samples from the Defendant and Charles Westberry.
>
> I ask you to remember most importantly, she indicated to you that hair sample analysis is not exacting, that the most she would be able to find in any given case was that the fibers present would be consistent with or of like type with the known samples submitted to her.
>
> She could never say that was in fact the same person, that is John Doe's hair, from making such a comparison.
>
> That hair sampling is done for the purpose of eliminating persons because she would be able to come up with a reasonable degree of scientific probability and say the hair found on the scene does not belong to and is not consistent with these that I've had submitted to me.
>
> And she indicated to you that so far as the hair samples that were submitted to her from the scene, that initially she concluded that there were only some that were of some value to her, and she wasn't sure if they were going to be of sufficient value

> enough until she got a further submission.
>
> She then got a further submission, and at that point in time she said, well, the hair samples that I had from the house, they weren't - - there was not enough. It was insufficient, insufficient characteristics for comparison purposes.

(R. 2714-15).

Mr. Dunning misrepresented Ms. Lasko's testimony, completely omitting her conclusion that the two head hairs found on Ms. Smith's dress which were different from Ms. Smith's known hairs were also different from Mr. Wright's known hairs. In his closing argument, Mr. Dunning deliberately sought to deceive the jury regarding her finding that head hairs were found on Ms. Smith's dress which did not originate from either Ms. Smith or Mr. Wright. This was false and misleading argument that violated due process and constituted reversible error. Mr. Dunning intentionally misrepresented Ms. Lasko's testimony in order to deceived the jury. This was reversible error. Appellant counsel's performance was deficient in that he failed to raise this in Mr. Wright's direct appeal. Alone and in conjunction with the other errors presented in this claim, a new trial and/or a resentencing are warranted.

C. FAILURE TO RAISE ON APPEAL MR. WRIGHT'S ABSENCE FROM PROCEEDING TO CONSIDER JURY'S REQUEST FOR A READ BACK.

1. Introduction.

Rule 3.410 of the Florida Rules of Criminal Procedure governs the procedure to be employed when a jury

having retired to deliberate requests a "any testimony read back" to it. Considerable discretion is afforded to the presiding judge, but he is required to notify counsel. However, the discretion afforded the presiding judge is not unbounded. Where the judge refused a read back "without the presence of the defendant or his attorney and an opportunity for the defendant to be heard," reversible error was found. McNichols v. State, 296 So.2d 530 (Fla. 3rd DCA 1974). In Penton v. State, 106 So.2d 577, 580 (Fla. 2nd DCA 1958), an abuse of discretion was found where the presiding judge refused a request for a read back of specific portions of pertinent testimony regarding the defendant's alibi. An abuse of discretion was also found in Rodriguez v. State, 559 So.2d 678 (Fla. 3rd DCA 1990).

2. The Jury's Request.

After retiring to deliberate the jury sent the presiding judge a note asking, "We the jury request the testimony of witness that ran the test on the hair found on Mrs. Smith." (R. 687). The judge responded, "Members of the Jury: Can you you be more specific about what area of this witness' testimony you are interested in? If so please specify further." (R. 687). After sending this response, the judge convened counsel together with the court reporter. Mr. Wright was not present. Judge Perry stated:

I have discussed that matter with Counsel out of

> the presence of the jury, and have checked the tape and the Court Reporter's notes concerning that testimony, and am inclined not to have the entire testimony read back, because I do not wish to set a precedent for doing that in this case.

(R. 2900).

Judge Perry then received a reply from the jury saying, "The testimony of Mrs. Lasko + Dr. Latimer." (R. 687). Dr. Latimer's name was underscored. Judge Perry indicated that he would either respond requesting more information regarding what part of the testimony the jury was interested, or in the alternative he would tell them just to rely on their collective memory (R. 2901). Mr. Dunning indicated that he believed that the jury should be told to rely on its collective memory (R. 2902). Mr. Pearl indicated his preference was to seek more information. Accordingly, Judge Perry sent the jury a note asking for more details regarding the jury's request. The jury replied, "May we see the testimony of Mrs. Lasko re: combings of pubic hair from Miss Smith, please." (R. 686). Mr. Dunning immediately requested that the jury be instructed to rely on its collective memory (R. 2903). Mr. Pearl indicated:

> Perhaps they are entitled to know it. However, without having reviewed the testimony of Miss Lasko, either by cassette tape of by having Court Reporter read back her Stenotyping notes, I do not remember precisely what was said by Miss Lasko.
>
> Should we review that testimony to see if there is a short, relatively short number of words that would tell them what they want to know?

(R. 2903).

Thereupon, Judge Perry recited his recollection of Ms. Lasko's testimony. At the end of which, he stated:

> I am convinced that there is no way to pull out that testimony without having the Court Reporter transcribe it, without - - we either read it back for them in its entirety, or we have the Court Reporter transcribe it, we edit it down, and read the edited transcript to them; or, we let them rely on their own memories.
>
> Those are the only three alternatives that I see. And I am inclined toward the latter alternative.

(R. 2905).

Thereupon, Mr. Dunning renewed his position that the jury should not be provided a read-back, "Let them rely on their memories." (R. 2906). Without consulting with Mr. Wright, Mr. Pearl indicated "we have no choice except, in my opinion, either read them all of it or let them rely on their memory." (R. 2906). Judge Perry indicated that he wanted to instruct the jury to rely on its memory because:

> One of the reasons I am inclined this way is that is the very thing in the first response that they made which indicated that someone there may have wanted the testimony of another witness, Dr. Latimer.

(R. 2907). Without consulting with Mr. Wright, Mr. Pearl registered no objection to Judge Perry's decision to preclude any read back for fear that a request would be made to hear Dr. Latimer's testimony. Thereupon, the jury and Mr. Wright were brought into the courtroom to hear Judge Perry deny the request for a any read-back of any testimony (R. 2908-09).

Mr. Wright was excluded from the hearing on whether the jury's request to have testimony read back to them would be permitted. This was a critical stage in the trial. The testimony that the jury wished to hear was evidence that was exculpatory to him and which had been misrepresented by the prosecutor in his closing argument. This was reversible error. Appellant counsel's performance was deficient in that he failed to raise this in Mr. Wright's direct appeal. Alone and in conjunction with the other errors presented in this petition, a new trial and/or a resentencing are warranted.

D. FAILURE TO RAISE ON APPEAL MR. WRIGHT'S OBJECTION TO THE STATE'S QUESTIONING OF MS. LASKO REGARDING HER ABILITY TO MAKE SUCCESSFUL HAIR COMPARISONS IN OTHER CASES.

During Ms. Lasko's testimony, the State was permitted over a relevance objection to ask "With what frequency are you able to make successfully, for lack of a better word, make comparisons between a known hair standard and debris such as you have before you that's submitted to you?" (R. 2085). Ms. Lasko answered "it would be probably about ninety-nine percent of the hairs I have examined and compared" (R. 2085). Immediately, Mr. Pearl repeated his relevance objection which Judge Perry overruled. Ms. Lasko was then permitted to testify "whenever I am able to make a comparison in which the characteristics are the same, I'm able to make a match (R. 2086).

Ms. Lasko's boasting of her ability to match ninety-nine

percent of the hair submitted to her for comparison was self-serving vouching that was entirely irrelevant to Mr. Wright's case. The obvious implication was that her failure to match the foreign pubic hair to Mr. Wright stemmed from the inadequacy of the hair and not from Mr. Wright's innocence. "In order for evidence to be relevant it must have some logical tendency to prove or disprove a fact which is of consequence to the outcome of the case. See Charles w. Ehrhardt, Florida Evidence Sect. 401 (1999)." Stephens v. State, 787 So.2d 747, 759 (Fla. 2001)).

This was reversible error. Appellant counsel's performance was deficient in that he failed to raise this in Mr. Wright's direct appeal. Alone and in conjunction with the other errors presented in this petition, a new trial and/or a resentencing are warranted.

E. COUNSEL'S FAILURE TO CONTEST IN HIS REPLY BRIEF THE STATE'S ASSERTION THAT MR. WRIGHT HAD NOT OBJECTED TO DEPUTY PERKINS' TESTIMONY AT TRIAL.

As set forth in Claim I(C), Deputy Perkins' testimony regarding Mr. Wright's statement was not admissible into evidence. After raising a challenge to the trial court's ruling admitted the testimony, Mr. Wright's appellate counsel failed to respond in the reply brief to the State's false contention that the issue had not been preserved at trial. This was reversible error. Appellant counsel's performance was deficient in that he failed to include in the reply any

challenge to the State's erroneous position.

F. COUNSEL'S FAILURE TO CHALLENGE MR. WRIGHT'S ABSENCE FROM THE INITIAL INQUIRY OF JUROR'S REGARDING THEIR QUALIFICATIONS.

Mr. Wright's trial began with Judge Perry conducting the jury qualification outside the presence of both the defendant and his attorney (R. 847-59). Jurors were questioned by Judge Perry regarding their general qualifications. Hardship questions were also asked regarding scheduling difficulties in sitting as jurors at Mr. Wright's trial due to its anticipated length (R. 856-58). Judge Perry directed the clerk to pull certain Juror Numbers, thereby excusing them from sitting as prospective jurors at Mr. Wright's trial (R. 857-58). Judge Perry then offered to consider additional requests for hardship excusals at an off-the-record bench conference. After an off-the-record proceeding of an unknown duration involving an unknown number of jurors, another juror was excused (R. 859).

While it is true that this Court has held that general jury qualification is not a critical stage of the proceedings requiring presence of the defendant,[20] that holding is not dispositive here due to the unique circumstances here. Neither Mr. Wright nor his attorney was present during the proceeding; and no transcript of the off-the-record proceeding

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[20] Wright v. State, 688 So. 2d 298 (Fla. 1996); Bates v. State, 750 So.2d 6 (Fla. 1999).

exists from which it can be ascertained whether Mr. Wright was prejudiced in anyway.

In every case in which this Court has held that the defendant's presence is not required during general jury qualification, the defendant's attorney was present to safeguard his client's rights and/or a transcript was made. In the most recent case on point, this Court found it noteworthy that the defendant's attorney was present during the proceeding and made no objection. Bates v. State, 750 So.2d 6, 14 (Fla. 1999). In Wright v. State, 688 So. 2d 298, 300 (Fla. 1996), this Court noted that defense counsel was present. In Robinson v. State, 520 So. 2d 1, 3 (Fla. 1988), this Court quoted the transcript of the general jury qualification proceeding showing that defense counsel was present. And in Remeta v. State, 522 So. 2d 825, 828 (Fla. 1988), defense counsel was present and he had obtained a waiver of his client's presence.

In the present case, Mr. Wright's attorney was not present during the proceeding, nor was the proceeding fully recorded. The prospective jurors were questioned by Judge Perry outside the presence of Mr. Wright and his counsel. Prospective jurors were excused from Mr. Wright's trial. Judge Perry had unbridled latitude as to whom to excuse altogether or merely from Mr. Wright's trial.

This was reversible error. Appellant counsel's

performance was deficient in that he failed to raise this in Mr. Wright's direct appeal.

G. COUNSEL'S FAILURE TO RAISE AS ERROR JUDGE PERRY'S STATEMENT TO THE VENIRE THAT SENTENCING DECISIONS "ARE UP TO ME, AND TO ME ALONE."

During the voir dire process, the following exchange between Judge Perry and a prospective jury occurred in front the entire venire:

> THE COURT: It has to be made right here, right now. You have to say whether you are opposed to the death penalty, and you have to say whether or not you can return a verdict of guilty despite that opposition.
>
> A VENIRE MAN: Well, you know, when the penalty is death, and that's what I said, it's hard.
>
> THE COURT: Let me - - let me make this observation to you, ma'am, and these instructions will come to you later in the case in more detail. **The penalty to be imposed in any criminal case under the laws of the State of Florida, is strictly up to this Judge.**
>
> A VENIRE MAN: I know.
>
> THE COURT: The law mandates certain penalties upon convictions, but **the actual penalty to be imposed** within a certain range of penalties, and you'll have those explained to you, **are up to me, and to me alone**. Nevertheless, since one of the possible penalties is the death penalty, both sides have the right to know whether or not you are opposed or in favor of the death penalty.
>
> MR. PEARL: Your Honor, you understand that I am obliged to keep one eye and one ear on the record.
>
> THE COURT: Yes, sir.
>
> MR. PEARL: And I most respectfully except to the instruction given to Mrs. Torres with respect to who decides the death penalty.

> THE COURT: All right, sir. Your exception is noted.

(R. 981-82)(emphasis added).

Shortly thereafter, Mr. Dunning reiterated Judge Perry's statement that only judges decide the sentence, "regardless of your recommendation the final decision rests with the Judge as to the penalty to be imposed. He imposes the sentence, juries don't." (R. 990).

In Caldwell v. Mississippi, 472 U.S. 320 (1985), the United States Supreme Court held "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29. The intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of Florida law. The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). Mr. Wright's jury, however, was erroneous led to believe that "the responsibility for determining the appropriateness of the defendant's death

rest[ed] elsewhere." Caldwell, 472 U.S. at 329. Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc).

The United States Supreme Court has explained under the decision in Pait v. State, 112 So.2d 380 (Fla. 1959), comments or instructions "misinforming the jury of its role constitutes reversible error." Dugger v. Adams, 489 U.S. 401, 408 (1989). Trial counsel properly object and preserve the issue for appellate review.

Appellate counsel's failure to raise this issue on appeal was prejudicially deficient performance. Wilson v. Wainwright, 474 So.2d at 1165. Alone and in conjunction with the other errors presented in this petition, a new trial and/or a resentencing are warranted.

H. CONCLUSION.

It is clear that numerous meritorious arguments were available to be raised on direct appeal, yet appellate counsel unreasonably failed to assert them. These errors, singularly or cumulatively, demonstrate that Mr. Wright was denied the effective assistance of his appellate counsel

CLAIM III

THE CONSTITUTIONALITY OF THE REQUIREMENT THAT THE PRESIDING JUDGE MAKE THE FACTFINDINGS NECESSARY TO SUPPORT A SENTENCE OF DEATH MUST BE REVISITED IN LIGHT OF APPRENDI V. NEW JERSEY.

On direct appeal, Mr. Wright challenged in Point IX of his Initial Brief the constitutionality of Florida's provision

that the existence of aggravating and mitigating circumstances, as questions of fact, are found by the trial judge as opposed to a jury of the defendant's peers. This Court rejected Mr. Wright's argument saying, "We have previously considered and expressly rejected the latter two arguments [Points IX and X]." Wright v. State, 473 So.2d at 1281-82.

This Court's rejection of this argument should be revisited in light of Apprendi v. New Jersey, 120 S.Ct. 2348 (2000). In Apprendi, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 2362-63. Under Florida law, a death sentence may not be imposed unless "sufficient aggravating circumstances exist." Sec. 921.141(3)(a), Fla. Stat. 2000.

The constitutional underpinnings of Apprendi are the Sixth Amendment right to trial by jury, as well as the Fourteenth Amendment right to due process. Id. at 2355 ("At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,' Amdt. 14, and the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

impartial jury,' Amdt. 6"). "Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" Id. (quotation omitted).

Mr. Wright submits that this Court's rejection of his Point IX on direct appeal is ripe for reconsideration in light of the rule discussed in Apprendi. If the Sixth and Fourteenth Amendments are violated under the New Jersey scheme in Apprendi, then Florida's failure to require the jury to return a verdict as to whether the State has proven the presence of sufficient aggravating circumstances to warrant imposition of a death sentence suffers from a similar constitutional flaw. Thus, this issue should be revisited at this time and relief granted.

CLAIM IV

THIS COURT FAILED TO COMPLY WITH THE REQUIREMENTS OF SOCHOR V. FLORIDA WHEN IT AFFIRMED MR. WRIGHT'S SENTENCE OF DEATH ON DIRECT APPEAL.

In the course of Mr. Wright's direct appeal, this Court determined that one of the four aggravating factors found by the sentencing judge had been found erroneously. Specifically, this Court struck the finding of the "cold, calculated and premeditated" aggravator saying, "heightened premeditation was not proved beyond a reasonable doubt in this

case." Wright v. State, 473 So.2d at 1282. After striking an aggravating circumstance, this Court merely stated, "Because the court properly found there were no mitigating and three aggravating circumstances, we conclude the imposition of the death penalty was correct." Wright v. State, 473 So.2d at 1280.

However in fact, the prosecutor had conceded in proceedings before the jury to the presence of at least one mitigating factor:

> Another factor that you might want to consider as a mitigating circumstance is his age, twenty-five years of age. Certainly he's young. Certainly that is a factor that has been established by the evidence.

(R. 2982). In addition, testimony was presented from Susan Wright, Mr. Wright's wife of five years who was the mother of Mr. Wright's three young children (R. 2948). She expressed her love for Mr. Wright and described him as "a good father." Two of Mr. Wright's sisters testified. Diane Hughes testified to her love for Mr. Wright and his good character (R. 2953). Debbie June testified that Mr. Wright was a "[v]ery gentle person. I mean, he's watched my kids many of times" (R. 2958). Mr. Wright's mother died before Mr. Wright's trial. Mitigation was presented and argued by defense counsel.

This Court's ruling on direct appeal was erroneous as this Court struck and an aggravating factor on direct appeal and failed to conduct the proper harmless error analysis as

required by Sochor v. Florida, 504 U.S. 527 (1992). In that case, this Court employed virtually the identical language used here:

> Even after removing the aggravating factor of cold, calculated, and premeditated there still remain three aggravating factors to be weighed against no mitigating circumstances. Striking one aggravating factor when there are no mitigating factors does not necessarily require resentencing.

Sochor v. State, 580 So.2d 595, 604 (Fla. 1991). Under the decision reversing this Court in Sochor v. Florida, this Court must reconsider Mr. Wright's direct appeal and grant a resentencing.

CONCLUSION

For all of the reasons discussed herein, Mr. Wright respectfully urges the Court to grant habeas corpus relief.

I HEREBY CERTIFY that a true copy of the foregoing Petition for Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to all counsel of record on December 31, 2001.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this petition is typed using Courier 12 font.

MARTIN J. MCCLAIN