IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1185

STATE OF FLORIDA,

Appellant/Cross-Appellee,

v.

JIMMIE LEE CONEY,

Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, STATE OF FLORIDA

REPLY BRIEF OF THE CROSS-APPELLANT

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ARGUMENT II - CONFLICT OF INTEREST

The State asserts that "Coney again fails to identify a single adverse interest to him which affected any decision made in the case" Answer Brief at 15. The State's brief is silent as to the five areas Mr. Coney outlined in his initial cross-appeal brief outlining where trial counsel's performance was influenced to Mr. Coney's detriment: (1) his utter failure to ever investigate Mr. Coney's mental health pre-trial despite having an expert appointed by Judge Gelber in April 1991 to assist him in doing just that; (2) his resulting inability to develop and use alternate defenses based on Mr. Coney's mental status; (3) his negligent failure to meet with or to discuss the case with Mr. Coney during two significant chunks of time: from July 19, 1990-October 22, 1990 (a period framed by Mr. Coney's unsuccessful motions to discharge Casabielle on July 12, 1990 and October 12,

1990) and a second period of failing to meet with Mr. Coney from March 25, 1991-January 10, 1992 (a period inclusive of the appointment of a defense psychological expert on April 23, 1991, a May 21, 1991 letter from Mr. Coney to trial counsel asking to see trial counsel or his investigator, and the press announcement of Operation Court Broom on June 13, 1991, implicating Roy Gelber, Mr. Casabielle and others), (R. 501); (4) his waiver of Mr. Coney's appearance at the January 31, 1992 pre-trial hearing three weeks after he met with Mr. Coney for the first time in nearly ten months, a waiver that served to cover up trial counsel's misrepresentation to the court of the fact that Mr. Coney had not been examined by Dr. Castiello or any other expert pre-trial with the result that trial counsel was unprepared to proceed[1]; and (5) his failure to ever reveal to Mr. Coney the allegations concerning his corrupt relationship with Judge Roy Gelber

[1]Cover-up is the operative word in this context. Judge Smith's order found that trial counsel had not been truthful during this hearing when he represented before the court that Mr. Coney had been evaluated by a mental health professional (R. 1329). Obviously trial counsel's waiver of Mr. Coney's presence for this first hearing before Judge Smith served to conceal this lie to Mr. Coney's severe detriment. If Mr. Coney had been present, he would have been a witness to his lawyer lying about having had him evaluated as well as the lower court's lecture to trial counsel about his lack of preparation and investigation.

and Judge Harvey Shenberg, which if revealed to Mr. Coney, would certainly have resulted in Mr. Coney acquiring another lawyer.

Mr. Coney has argued that although the Court Broom allegations were a very important aspect of the underlying conflict between client and attorney, the actual impairment to Mr. Coney and his case resulted from a combination of Mr. Casabielle's failure to communicate with Mr. Coney and the violation of his duty of loyalty to Mr. Coney. Answer Brief/Cross Initial Brief at 61-62. The impairments noted in the five areas supra are the "adverse interest" that the State seems unable to grasp. One need only ask if there would be any question in this case as to the existence of a conflict if Mr. Casabielle had been indicted and convicted on kickback charges and concealed that information from Mr. Coney during the course of his representation. The State's position appears to be that since Harvey Shenberg failed to corroborate Roy Gelber's federal testimony that Shenberg was the middleman in a kickback scheme with Mr. Coney's trial counsel, Manuel Casabielle, there's no problem. Whether Casabielle was actually guilty or not, his actions

from April 1991 until Mr. Coney's trial operated to Mr. Coney's severe detriment. The record is littered with long periods without any communication between trial counsel and Mr. Coney and evidence of trial counsel's outright dishonesty and deception at both the January 31, 1992 hearing and during jury selection. Mr. Coney interests were impaired.

The State's reliance on Mickens v. Taylor, 535 U.S. ___ (2002) for the proposition that even if Mr. Coney establishes an actual conflict of interest pursuant to Cuyler v. Sullivan, 446 U.S. 335 (1980), he must additionally specifically allege and establish resulting prejudice, is not well taken. Mickins concerned the effect of a trial court's failure to inquire into a potential conflict of interest where trial counsel had previously represented the murder victim. The Mickins opinion states that it is an open question whether Sullivan's presumption of prejudice should be applied in unusual conflict of interest fact patterns, such as successive representation.

In the non-capital context, this Court should review the facts and holding in Rubin v. Gee, 292 F.3d 396 (4th

Cir. 2002). In Rubin the state court correctly utilized the Sullivan framework when addressing petitioner's conflict of interest claim, which had been premised on counsels' personal interests interfering with the duty of loyalty they owed to petitioner. However, the 4th Circuit found that the state court had unreasonably applied the adverse affect prong in denying relief where counsel had an interest in concealing their role in the post-crime events which were ethically improper and exposed them to potential criminal charges for obstruction of justice.

In footnote 3 of the Answer Brief, a long quote from what is called "[the State's] written closing argument" is offered to show that Mr. Coney failed to link up the limited aspect of the conflict claim that an evidentiary hearing was granted on to his request for admission of Roy Gelber's testimony from several federal Courtbroom trials where the former judge testified for the Federal government. Answer Brief at 16-17. The quote is actually from the State's posthearing memorandum, which was filed simultaneously with Mr. Coney's posthearing memorandum (Supp. PCR. 1107-1131). The entire section on the conflict issue from Mr. Coney's posthearing memo is

reproduced here for this Court's review:

> II. THE CONFLICT OF INTEREST
>
> Trying to uncover and reveal in the evidentiary hearing context evidence of corruption in the heart of the judicial system is not character assassination. (T. 95). Mr. Coney's life is on the line. Failure to allow witness testimony that goes to setting up the bases of prejudice should not stand. (T. 94-109). The hearing should be re-opened and Roy Gelber should be allowed to testify. The State stated on the record that was it not moving to exclude Gelber's testimony, but objected to it as inadmissible until "the defense points to some course of action taken or not taken as a result of the alleged conflict." (T. 10). Undersigned counsel believes that was done at the hearing on proffer. (T. 102-109). This memorandum will restate, perhaps more coherently, how the conflict affected Mr. Coney. The testimony of Gelber in federal court supporting that proffer was also filed in the court file after the hearing, as was promised on the record. (T. 845).
>
> Mr. Casabielle testified that although he "never received a target letter" from the state or federal government, it appeared to him from newspaper articles in June 1991 that he was "somehow" under investigation in Operation Courtbroom in 1990-91. (T. 92-94, 98). He testified that an FBI agent and an FDLE agent attempted to speak with him regarding Courtbroom, but that he refused to cooperate. (T. 94). Casabielle also testified that he **never** spoke directly with the defendant, Jimmie Lee Coney, about the fact that he

was under investigation or about Operation Courtbroom. (T. 96).

The record of Mr. Coney's trial and direct appeal reveals that Operation Courtbroom was mentioned during voir dire, but that Mr. Coney was not present at sidebar when Mr. Casabielle informed the Court that he was a target of the Courtbroom investigation. (R. 1081-85). Given the testimony of former Judge Gelber in the federal trials that resulted from the Courtbroom investigation, which have been proffered in this proceeding following the Court's refusal to allow Gelber to testify despite having been listed as a witness for the defense since June 2000, Mr. Casabielle's name "coming up" in the investigation was just the tip of the iceberg of the obvious conflict of interest that prejudiced Mr. Coney. [This conflict was never raised in the context of Strickland on direct appeal because it was impossible to do so under the laws of the State of Florida]. It was raised on direct appeal only in the very narrow context of voir dire, where the record clearly supports Mr. Casabielle's testimony at the evidentiary hearing that he never revealed his involvement in Courtbroom to Mr. Coney in the attorney/client context.

The proffered testimony of Roy Gelber from United States v. Castro, et. al. No. 91-0708 CR, United States District Court, Southern District, and the proffered testimony of Roy Gelber from United States v. Shenberg, No. 91-0708 CR, United States District Court, Southern District, support the representation by undersigned counsel that Gelber would testify that he had a

kickback arrangement with Mr. Casabielle at the time Gelber appointed him to Jimmie Coney's case. And, the opinion in United States v. Shenberg, Goodhart, et. al., 89 F3rd 1461 (1996), stands for the proposition that Roy Gelber's credibility as a witness was established in federal court.

Also proffered into evidence either as court exhibits or substantive evidence were a **Miami Herald** article establishing that Casabielle was under investigation (Defendant's Exhibit A-21 for I.D. at 95), and federal court charts and tables concerning the out of proportion number of appointment cases that Casabielle obtained from Judge Gelber as a percentage of his total court appointed business during the period 1988-1991.

Mr. Coney was prejudiced by the lack of a full and fair hearing on the conflict claim at the recently completed hearing. The Court's acquiescence to the State's eleventh hour demand after the hearing began for the defense to provide a nebulous nexus of facts in order to allow Roy Gelber to testify. The State had six months after Gelber was listed as a witness to object to his appearance, and failed to do so. They never contacted Gelber until the day before the hearing and never asked to depose him.

Mr. Coney needed Former Judge Gelber's testimony to set up the parameters of the conflict claim, one of the issues that he had been granted an evidentiary hearing on. Without Gelber, there was no other witness available to support the allegation of a conflict of interest. Gelber's testimony, if allowed, would have supported the

existence of an actual conflict of interest between Mr. Coney and Mr. Casabielle that was never revealed to Mr. Coney by Mr. Casabielle or anyone else. The goal of calling Mr. Gelber was not to assassinate the character of Mr. Casabielle, but to add credible testimony in support of the existence of that conflict by providing live testimony from the key witness supporting the conflict: the judge who appointed Mr. Casabielle to Mr. Coney's case and presided over the process of keeping Mr. Casabielle on the case as long as possible to maximize the financial advantage for both Gelber and Casabielle. For purposes of the very limited evidentiary hearing that was granted in this case, the conflict of interest is relevant as it bears on penalty phase ineffective assistance of counsel by Mr. Casabielle. Clearly Mr. Casabielle's remaining on the case in spite of Mr. Coney's repeated efforts to replace him have relevance for both the guilt phase and penalty phase investigation and performance of Mr. Casabielle. And the only expert ever appointed for Mr. Coney during the pre-trial period, Dr. Castiello, who never saw Mr. Coney or prepared a report, was appointed by Judge Gelber.

Mr. Casabielle was appointed to Mr. Coney's case on May 1, 1990. (Defendant's Exhibit A at T. 30-31). The appointment was made as the result of a quid pro quo arrangement brokered by Judge Gelber and Judge Shenberg as a middleman between Gelber and Casabielle. Casabielle agreed to kickback 25% of his final fees on all the cases he was appointed to by Judge Gelber during the period 1988-1991. The newspaper stories

and federal court records proffered at the evidentiary hearing document that a disproportionate percentage of Mr. Casabielle's court appointments during that period came from Judge Gelber.

In order to receive the special public defender fee for representing Mr. Coney, Mr. Casabielle had to continue to represent Mr. Coney through the trial and sentencing. The fee Casabielle was ultimately paid was nearly $16,000. (Defendant's Exhibit N at T. 68). To get his 25% kickback, it was in Judge Gelber's interest to keep Mr. Casabielle on Mr. Coney's case until Mr. Casabielle got his final fee. In other words, both Mr. Casabielle and former Judge Gelber had a <u>significant</u> <u>financial</u> <u>interest</u> in Mr. Casabielle continuing to represent Mr. Coney in spite of Coney's continuing efforts to discharge him. As Mr. Casabielle testified, this was his first capital case to go to a penalty phase (T. 28), and as special public defender cases went, it was a potentially big payday.

This kickback arrangement set up a per se conflict of interest between Mr. Coney and Mr. Casabielle. Mr. Casabielle failed to communicate to his client the nature of the corrupt financial arrangement that had lead to his appointment to Mr. Coney's case. (Rule 4-1.4 Communication). Even in his evidentiary hearing testimony, Mr. Casabielle admitted he never even told Mr. Coney that he had been targeted in Courtbroom. (T. 96). Simultaneously, Mr. Casabielle was violating his duty of loyalty to Mr. Coney. (See Rule 4-1.7 Conflict of Interest). Mr. Casabielle's independent professional judgment was compromised by the personal financial

incentives that he had based on both the appointment agreement with Judge Gelber and the financial incentive to remain on Mr. Coney's potentially lucrative case once he was appointed. His 25% of fee liability to Judge Gelber was unethical and illegal. He obviously violated his duty of loyalty to Mr. Coney when he did not explain this arrangement to Mr. Coney, making it impossible for Mr. Coney, who was already trying to fire him (Defendant's Exhibits Q and R at T. 78-80), to make an informed decision about whether to retain Mr. Casabielle's services. Comment to Rule 4-1.7 bears on precisely this problem:

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client.

On even the simplest level, Casabielle's failure to have the psychiatrist he got Gelber to appoint to examine Mr. Coney prior to the trial for guilt phase and penalty phase purposes, provides an example of what virtually any other attorney on the case would have done: have the appointed expert examine Mr. Coney and prepare a confidential report. If Casabielle had been removed from the case, that would have happened. The fact that it never did was to the extreme prejudice of Mr. Coney. Mr. Coney's situation is also the situation set up in Cuyler v. Sullivan, 446 U.S. 335 (1980). Here, as there, the actual conflict of interest set out supra

adversely affected Mr. Casabielle's performance in Mr. Coney's case. The multifaceted conflict set up by Mr. Casabielle's kickback arrangement with Judge Gelber, the judge who appointed him and who presided over the case for months, demonstrates that Mr. Coney was denied the effective assistance of counsel.

Mr. Coney's situation is not a potential conflict of interest, but an actual conflict of interest. Prejudice to Mr. Coney can and should be presumed. The testimony of former Judge Gelber is a crucial element in providing evidence of the existence of the actual conflict. Mr. Casabielle actively represented conflicting interests during the course of his appointment as a special public defender: his own corrupt financial interests and Mr. Coney's legal interests. The conflict between these interests adversely affected Mr. Casabielle's performance as counsel for Mr. Coney. See Neelley v. Noyle, 138 F.3d 917 (11 Cir. 1998).

Evidence at the hearing sets out the various points in time when Mr. Coney tried to fire Mr. Casabielle. (Defendant's Exhibits Q and R at T. 78-80). Judge Gelber was prepared to testify that his initials were on one of the rejected motions to discharge Mr. Casabielle, supporting the nexus of activities supporting the conflict claim. Just as obviously, Judge Gelber was in no position to take Casabielle off the case based on his own knowledge of the corrupt and illegal arrangement that he knew they shared and that had resulted in Mr. Casabielle's appointment to Mr. Coney's case.

(R. 1315-1321). The Answer Brief also alleges that Mr. Coney failed to proffer how the alleged conflict affected Mr. Casabielle's investigation or use of experts. This was, in fact, done at the hearing (R. 526-33). But more importantly, the testimony of Mr. Casabielle himself at the hearing records some of the areas where the investigation was impacted to Mr. Coney's detriment, most notably his failure to have Mr. Coney evaluated pre-trial and his misleading of the lower court about that negligence at a hearing where he had waived Mr. Coney's presence. The irony of the State's position now and at the evidentiary hearing is that they objected to any questioning of trial counsel about the grounds for the alleged conflict and objected to Gelber testifying at all, both objections being upheld by the lower court (R. 432-35, 522, 526, 531, 533, 686-92).

Finally, the State's brief takes the position that Mr. Coney's post-conviction motion did not make the specific allegation "that the initial trial judge [Gelber] conspired with counsel to keep Casabielle on the case and therefore denied his motion to dismiss counsel" State's Brief at 17. The point of attempting to present the

evidence connected with this issue at the evidentiary hearing was that it supported the conflict of interest claim. To the extent that this allegation should be considered as appellate ineffective assistance of counsel, Mr. Coney invites this Court to consider the issue in connection with Claim II. A. in Mr. Coney's state habeas petition that was filed simultaneously with Mr. Coney's answer/cross initial brief.

ARGUMENT III - NO ADVERSARIAL TESTING AT THE GUILT PHASE

Standard of Review

Regarding the standard of review on summary denial, the State fails to cite Gaskin v. State, 737 So. 2d 509 (Fla. 1999)("[w]hile the postconviction defendant has the burden of pleading a sufficient factual basis for relief, an evidentiary hearing is presumed necessary absent a conclusive demonstration that the defendant is entitled to no relief"). This Court also recently reiterated the proper standard of appellate review when the appellate court reviews the summary denial of a rule 3.850 claim in McLin v. State, __ So. 2d __ (Fla. 2002)("To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or

conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record").

B. Dying declarations

In citing a portion of Mr. Coney's 3.850 claim, the Answer Brief criticizes the possibility that a "far fetched" speculative theory concerning AIDS should have resulted in an evidentiary hearing. Answer Brief at 26. The brief excerpt quoted by the State in footnote 6 omits a significant portion of the claim:

> [t]he deposition of Chris Rusaw suggests a vast homosexual underground at DCI that offered a universe of possible persons with different motives to kill Patrick Southworth. The relevance of the victim's HIV status could only be established if the covers could be blown off the interracial homosexual and bisexual network operating within the prison, with the full knowledge of Inspector Callahan, whose most dependable informants were part of the network

(R. 61). The relevant testimony and evidence could, of course, only be presented at a postconviction evidentiary hearing. Elsewhere in Mr. Coney's 3.850 motion, a wealth of relevant and material supporting evidence for the claim

was cited, including information about members of this alleged network. They included among many others: Santerfeit's lover Samuel Sapp who had a key to Southworth's cell and who was transferred from DCI a week after the death of Southworth; Sharod Dexter Tarver, Hason Jones's former roommate before Jimmie Coney, who Santerfeit claimed was dealing drugs with Jones and an Officer, and who he feared had set him up to be burned; Chris Rusaw, a homosexual who said he worked as an informer for Inspector Callahan; and Adam Trushin who Rusaw described as HIV positive and knowledgeable about the entire Coney situation but who was never interviewed by trial counsel (R. 73-84).

The State's Answer Brief criticizes Mr. Coney for his alleged failure to plead the name of an expert to testify as to Southworth's mental state at the time he was burned. The pleading requirement for Rule 3.850 motions pursuant to Gaskin certainly did not compel such action. Even so, Mr. Coney's 3.850 motion did state "Southworth was suffering from pain and shock from the burn injuries to his body, perhaps even post-traumatic shock, and he was suffering from these physiological injuries in conjunction

with his existing mental health problems and medication" (R. 61).[2] The motion also alleged, based on a review by postconviction counsel of Southworth's prison records, which trial counsel failed to obtain, that Southworth had been transferred to Dade Correctional for psychiatric care (R. 62).

If Mr. Coney had been granted a hearing on this claim, he would have attempted to have the prison and psychiatric records of Southworth introduced; he would have called as witnesses the relevant prison officials, medical personnel, and inmates; and would have presented a defense expert to educate the court about the likely impact of post-traumatic stress on victim Southworth in combination with his injuries, psychological and psychiatric status, HIV status and prescribed medications. As Mr. Coney's motion plead, "records concerning Southworth's prior crimes, convictions and course of incarceration should have been available to defense counsel **for use as impeachment of Southworth** (R. 61) (emphasis added).

[2]Southworth's roommate, Lawton Byrel Santerfeit, noted in an interview with Inspector Callahan 45 minutes after Southworth had been set afire that both he and Southworth were taking psychotropic medications (PCR. 62).

Southworth's prison records and disciplinary record would have been presented or proffered at an evidentiary hearing if a hearing had been allowed on the dying declaration claim.

The State's Answer Brief serves only to underscore the necessity for a hearing on this claim. As Mr. Coney's motion noted, any number of witnesses should and could have been called to impeach Southworth, and by implication, could have been called by trial counsel at an evidentiary hearing. These included but were not limited to: Southworth's roommate Byrel Santerfeit, Snaterfeit's lover Daries Barnes, snitch Chris Rusaw, and DOC Inspector Callahan (R. 61). The "compelling, indeed overwhelming evidence of Coney's guilt" cited by the State finally comes down to the dying declarations. Answer Brief at 28. There was ample evidence that could have been presented to support an alternative theory of Southworth's murder. And although trial counsel failed to adequately investigate and support an alternative theory of the crime, his failure to impeach the dying declarations of Southworth doomed Mr. Coney's guilt phase case.

C. Failure to obtain a pre-trial mental health exam

The State claims there is no prejudice to Mr. Coney in trial counsel's failure to obtain a mental health examination of Mr. Coney prior to the trial. The State's Answer Brief also contends that Mr. Coney's motion failed to allege that an expert was available to testify to the existence of a mental status defense. Answer Brief at 29. Neither of these allegations are true.

As Mr. Coney's motion claimed and the evidence presented at the evidentiary hearing showed, trial counsel Casabielle was in fact on notice from the time he got involved in the case that Mr. Coney's competence and mental health were at issue pursuant to Devier v. Zant, 3 F.3d 1445, 1451 (11th Cir. 1993). One of the significant bases of concern about Mr. Coney's mental status for Mr. Casabielle should have been the record of his prior offenses, particularly his 1976 offense.

Evidence and testimony presented at the evidentiary hearing indicated that trial counsel Casabielle had failed to consult with 1976 trial or appellate counsel, failed to review the 1977 appellate opinion of Mr. Coney's 1976 prior violent felony conviction, failed to review the postconviction record of the 1976 case, and failed to

review a 1976 motion for psychiatric evaluation that had been filed by trial counsel in the 1976 case (R. 469-80). Casabielle admitted in his testimony that if he had reviewed these documents, he would have been on notice that there were psychiatric and psychological concerns involving Mr. Coney's case (R. 480). The record reflects that the appellate opinion and the other documents introduced into evidence at the hearing indicated that there were significant potential mental health and competency issues memorialized in the record of Mr. Coney's 1976 conviction.

Another significant reason that trial counsel should have obtained a pre-trial evaluation of Mr. Coney was the rich social, psychiatric and medical history revealed by his prison records. The content of the prison records relevant to Mr. Coney's mental status was covered in great detail at the evidentiary hearing during the testimony of Drs. Eisenstein and Hyde. (R. 699-781, 835-1157). The prison records are replete with a detailed history of psychological and psychiatric treatment in the corrections system since 1965. Testimony by trial counsel at the evidentiary hearing about obtaining Mr. Coney's prison

records prior to trial in 1992 indicated a very limited recollection by Casabielle as to what records he had at trial, from where he got them or when he got them (R. 557-59, 561-66). The State failed to rebut the testimony and evidence presented that Mr. Casabielle obtained only 61 pages of Mr. Coney's voluminous then twenty-seven (27) year Florida prison record (R. 561-64). Evidence and testimony heard at the evidentiary hearing indicated that the bill to Mr. Casabielle from Florida Department of Corrections for these 61 pages of prison records was dated only three weeks prior to the trial (R. 563).

A final basis why trial counsel should have obtained a pre-trial evaluation was Mr. Coney's several attempts to fire him during the course of representation. This area of concern was also explored with trial counsel at the evidentiary hearing (R. 502-11). Of course, if Casabielle recognized that he was doing a substandard and deficient job, perhaps Mr. Coney's desire for new counsel would not be reason for trial counsel to doubt the mental faculties of Mr. Coney. Trial counsel himself testified that he filed a motion for funds to hire a psychological or psychiatric expert on April 1, 1991 (R. 487-88). The

motion notes that "[p]reparation of an adequate defense to the accusations made against the defendant by the State will require a psychological examination of the defendant" (R. 488).

As for the State's position that postconviction counsel never claimed any availability of potential mental health defenses at the guilt phase, Mr. Coney plead in Claim IV of his 3.850 motion:

> [t]his expert in neuropsychology will testify at an evidentiary hearing that his review of copies [of] background material along with neuropsychological testing and clinical interviews of Mr. Coney have revealed evidence of significant brain damage in the right hemisphere of Mr. Coney's brain along with evidence of generalized right brain abnormality. This expert **was** practicing in Florida in 1992 and would have been available to evaluate Mr. Coney in Dade County and to then testify at his trial. The tests and instruments he used for his evaluation were widely known and available to experts in the field of neuropsychology in 1992

(R. 95). Claim IV concerned both guilt phase and penalty phase ineffective assistance and was so titled (R. 89).

Thus the comment in the State's Answer Brief that "Coney's own experts who testified during the evidentiary

hearing would not support an insanity defense" is completely irrelevant to the claims made by Mr. Coney in his 3.850 motion as to guilt phase ineffective assistance and violations of Ake v. Oklahoma.[3] Mr. Coney has never claimed that trial counsel should have presented an insanity defense. Counsel in Mr. Coney's case negligently failed to investigate his client's mental status prior to the trial and unreasonably failed to properly present Mr. Coney's mental condition to the jury to negate the specific intent element of premeditated first-degree murder to Mr. Coney's substantial prejudice. See Bunney v. State, 603 So. 2d 1270 (Fla. 1992).

D. Failure to challenge the State's case at trial

The State's Answer Brief quotes from the State's response to Mr. Coney's 3.850 motion to explain their position that the summary denial of the claim concerning inmate Donald Smith was proper. Answer Brief at 30-31. Although this issue was discussed in more detail at the Huff[4] hearing on January 31, 2000, with a focus on what was important or different in Smith's account, to date the

[3]Ake v. Oklahoma, 470 U.S. 68 (1985)

[4]Huff v. State, 622 So. 2d 982 (Fla. 1993)

transcript of that hearing has never been made a part of this record because the court reporter who was present has remained unidentified and unlocatable. Undersigned counsel was present at that hearing and also participated in a second Huff hearing in February 2000 which also has never been made a part of the record for the same reason.

Mr. Coney's 3.850 motion stated as follows:

> Defense counsel also unreasonably failed to call as a witness inmate Donald Smith, who witnesse[d] the events on the morning of the fire at DCI. Had defense counsel reasonably investigated, he would have discovered that inmate Smith saw a puff of smoke from Southworth's cell and a white man who he identified as Southworth's roommate coming out of the cell and **closing the door** behind him with Southworth afire. He did not see Jimmie Coney near the cell area. This evidence is clearly exculpatory and consistent with the defense case.

(R. 85) (emphasis added). The account by inmate Smith related in the claim does not, as the State's Answer Brief states, fit in with the evidence heard at trial. What is of vital importance is that Smith's account has inmate Santerfeit, Southworth's roommate, **closing the door**. In other words, Santerfeit locks the burning Southworth into the cell without any way to escape. The clear implication

of the claim is that Smith would testify that Southworth's roommate Santerfeit took an active role in the crime. This more than a "suggestion" since the claim notes that this account of the crime exculpates Mr. Coney. The State's case at trial involved evidence that the cell door would rebound into a locked position, thus requiring no intent to shut it on the part of the panicking and fleeing Santerfeit. Santerfeit's testimony at trial on cross-examination was not that he closed the door:

> Q Does the door stay open or closed?
>
> A It was like the room was unsteady or something. The door, if it was opened up and set against the wall, it would stay. If you closed it just before it would latch and let it sit there, then it would stay. But if it came back and even the slightest momentum, the slightest bump against the wall, would send the door right back to close again. It would have enough momentum, because of the unlevelness, it slammed shut.
>
> Q And the harder it would bounce off the wall, the quicker it comes back and closes?
>
> A Right.
>
> Q Did you pay attention to whether or not you throw the door against the wall?

A I knew I did. I was pretty much of a hurry to get out of there at that time.

Q Did you hear it clank against the wall?

A (The witness shakes his head in the negative.)

THE COURT: Could you answer out loud.

A No, ma'am. No, sir.

Q Why not?

A I was focusing only on one thing at a time. "Roommate on fire. Get help." That's it. That was the only thing blasting through my mind.

(DAR. 2339-40). Donald Smith's account would have supported Department of Corrections Inspector Callahan's suspicions about Santerfeit's truthfulness as to whether he was involved in the crime that were plead in Mr. Coney's 3.850 (R. 69-71). In fact trial counsel Casabielle attempted to impeach Santerfeit's testimony about the door on re-direct:

Q Now, we talked a little bit about the door, the door that you indicated was open when you left, closed by the time the guard got there. Was it uneven? Was that what you said?

A The door has always been off

balance. It's like the room is off balance.

Q Now, by saying that, do you mean that the door would never remain open?

A It could, yes, if he held it up against the wall and just steadied it.

***

Mr. CASABIELLE: Mr. Santerfeit, I want to show you what has already been introduced as 35, State's 35. I'll point to this door, this room. Does that look familiar?

A Looks like my room. It is my room.

Q Is the door open?

A It's open.

Q Is anybody holding it?

A No.

MR. CASABIELLE: May I publish it to the jury very briefly?

THE COURT: Yes. He never pointed to it. Do you want to have him point to it?

MR. CASABIELLE: Do you still feel that the door closed by itself, Mr. Santerfeit?

A Sure.

MR. CASABIELLE: N o f u r t h e r

questions.

(DAR. 2248-49). No verbatim copy of inmate Donald Smith's statement to the CCRC investigator was attached to the 3.850 motion. Pursuant to Gaskin no affidavit or written statement was required. No testimony from inmate Donald Smith was heard at an evidentiary hearing because a hearing was not granted on this claim. Not a single witness at trial had testified to seeing Santerfeit or anyone else actually exiting the cell. There was simply no requirement that Mr. Coney plead more than he did in order to obtain a hearing on this claim. The State's reliance on Freeman v. State, 761 So. 2d 1055, 1069 (Fla 2000) for the proposition that Mr. Coney's claim was insufficiently plead can be disregarded by this Court. Freeman involves harmless error analysis in state habeas where allegations of appellate ineffective assistance of counsel have been made. Id at 1069. In this and the other guilt phase claims that were denied without an evidentiary hearing this Court "must accept the factual allegations made by the defendant to the extent that they are not refuted by the record" and "must examine each claim to determine if it is legally sufficient, and, if

so, determine whether or not the claim is refuted by the record." Id. at 1061.

The State's brief responds to Mr. Coney's Brady[5] claim in a conclusory and perfunctory manner. This Court has outlined the four steps involved in proving up the prima facie Brady case: "(1) the State possessed favorable evidence, including impeachment evidence; (2) the evidence was suppressed; (3) the defendant did not possess the favorable evidence and could not have obtained the evidence with the exercise of due diligence; and (4) there is a reasonable probability that, had the evidence been disclosed, the outcome would have been different." Freeman at 1061-62.

Several handwritten notes from Major John Richard Thompson that were drafted after his interview with Patrick Southworth in the treatment room at DCI indicate that Southworth told him that his roommate, Byrel Santerfeit, had to have been involved in opening the door to the cell when he was burned. A second note with more details indicated Santerfeit's involvement. However, the final typewritten report failed to mention Santerfeit, and

[5]Brady v. Maryland, 373 U.S. 83 (1963)

names Coney as the guilty party (R. 86). In the context of the four requirements noted above, these two notes could obviously have been used by trial counsel in his effort to impeach the testimony of Santerfeit, as the cites from the record **supra** indicate he attempted to do even without knowledge of the notes. The notes exonerate Mr. Coney to the extent they deflect guilt onto Santerfeit. The State has never contended that these notes were supplied to trial counsel or that they were contained in the copy of the trial files that was provided to them prior to the evidentiary hearing. Therefore, the notes must have been suppressed until they were provided to postconviction counsel during the public records discovery process. As to whether trial counsel could have obtained these notes from Florida Department of Corrections through the exercise of due diligence, the records and files of the case are inconclusive as to that matter, which is all the more reason for an evidentiary hearing. Finally, was there is a reasonable probability that, had the notes been disclosed, the outcome would have been different? This case was a circumstantial evidence and snitch evidence case that was supported by a dying

declaration. There was no fingerprint evidence or DNA evidence. The defense case was that somebody else, possibly Mr. Southworth's roommate Santerfeit, killed Mr. Southworth.[6] The Brady evidence must be considered cumulatively and not simply standing alone. See Kyles v. Whitley, 514 U.S. 419 (1995); State v. Gunsby, 670 So. 2d 920 (Fla. 1994). Thus, the outcome determinative question should be posed in light of the never before heard testimonies of Donald Smith, Inspector Callahan and Inspector Paul French; the impeachment of Southworth's dying declaration described **supra**; and the potential use of the Brady material to impeach the testimony of Byrel Santerfeit.[7]

With a massive record, pleading in detail the rationale for the importance of a hearing on claims

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[6]Trial counsel also proffered an alternative theory during the testimony of Byrel Santerfeit that claimed the attack on Southworth was actually a case of mistaken identity with Santerfeit as the intended victim. Santerfeit testified on proffer that he believed he was the target of the fire because he had snitched on a drug conspiracy that included Mr. Coney's roommate Hason Jones, Jones's prior roommate Trevor Sherad, and Corrections Officer Jenkins. The jury only heard Santerfeit's answer to one question, about whether he believed he was a target of whoever set Southworth on fire, and after a State objection, the trial court advised the jury to disregard the answer (R. 74)(DAR. 2205-13).

[7]The State's brief says that no basis for ineffective assistance of counsel was articulated regarding failure to call Callahan and French.

summarily denied below is difficult. In his 3.850 motion Mr. Coney plead that Inspector Marvin Callahan was deeply involved in the initial investigation of the fire at DCI, and although he was deposed, **he was never called as a witness**. He was deposed on July 16, 1990. In his deposition he admitted to concern about discrepancies in the statement he took from Southworth's roommate, Byrel Santerfeit, and the evidence he found:

> Q Are there any discrepancies between the statement that Santerfeit gave you and what your investigation revealed?
>
> A There is none that I could prove.
>
> Q How about ones that you believe exist?
>
> A Here you're talking speculation.
>
> Q It's discoverable. I don't want you to speculate on what might happen a thousand years from now, but you at some point felt that something was wrong or inconsistent and I need to know what that is.
>
> A Santerfeit, by his statement, was in a room that was completely engulfed in flame and yet he had no burnt hairs on his body, no smoke inhalation. All he had was a sprained ankle that he suffered jumping out of

the bed after the flames woke him up.

Q Why is that inconsistent with what he told you? Do you feel he was outside of the room?

A **I don't know -- it just didn't ring true**.

Q Any other inconsistencies?

A No. sir.

Q Was Santerfeit ever a suspect? I mean he is the only one in this room potentially --

A That survived it,

Q --that survived it?
A No.

Q Now, Santerfeit is a convicted murderer, isn't he?

A I'd have to look at his -- you have got a flyer on him?

Q Is that '78?

A Yeah, second degree murder robbery, yeah.

Q So he is a convicted murderer, so it wouldn't be totally inconsistent with his character --

A No, it wouldn't.

Q --to take a life? And he was never a suspect?

A No. And the reason for that

> was that initially what seemed odd or out of place in him having no burns and so forth, when looking at the room and so forth looking at the bottom of the bunk and the way that the fire came up and came around, the fire actually never came around and burnt the top of his bunk. It did extinguish burning underneath the bottom bedding and his bedding. It's odd and it's something that can't be proved as to why he had no smoke inhalation, so forth. And yet he said that the burns and the flames and so forth, the smoke woke him up but --
>
> Q Which leads you to believe, perhaps, that he was awake when the fire started?
>
> A Or out of the room. But that never could have been proven, nobody saw him out of the room before the fire.
>
> Q Did you ever hear anything pertaining to Mr. Santerfeit and the victim not getting along?
>
> A **Santerfeit stated that they had had a quarrel, if you will, due to all the homosexual activities and so forth. Santerfeit had asked to be moved out of the room several times and had even asked the day before the burning to be moved**.

(Deposition of Marvin Callahan, July 16, 1990, Pgs. 17-20)(emphasis added)(R. 69-71).

Inspector Callahan's concern about Santerfeit's condition should be noted in light of the testimony at

trial by Officer Steven Barney who "sustained injuries during this incident, and was treated in the Dade Correctional Institution Main Unit medical department[8]" (Inspector French's Special Investigation Report, June 19, 1990, Pg. 3)(R. 71). In an interview with Officer Barney by Detective Odio and Callahan at 9:45 a.m. on April 6, 1990, that is also included in the June 19, 1990 report, Officer Barney himself explained that even almost five hours after assisting in extracting the burning Southworth from the cell he "was more or less choking cause I still haven't had my physical. I've swallowed quite a bit of that smoke. Because I stayed down there with that inmate getting him out." Defense counsel did not inquire about the injuries suffered by Officer Barney during his examination (R. 71). This was so even though Santerfeit testified that the only injury he suffered during the fire was an injury to an ankle sustained in jumping down from his top bunk (DAR. 2194). He also commented that he

[8]Officer Barney's testimony can be found at DAT 1664-1714. Barney was not asked about any medical impact of the fire on him. He did testify that when he first looked over the railing he saw black smoke pouring out of room B-120 through the open door but that by the time he got to the cell the door was locked and he could see the victim crouched down in flames (DAR. 1672-74).

singed his hair (DAR. 2236).

Inspector Callahan had good reason to suspect that Santerfeit was involved in the death of his roommate. According to Santerfeit's DOC records he was interviewed on April 6, 1990 by R. Roberts and "placed into administrative confinement pending an investigation per Inspector Callahan. Inmate SANTERFEIT stated that he understood why he was being placed into Administrative Confinement and offered no further (sic.) comment." Six months earlier Santerfeit had been placed in Administrative Confinement at the same institution. A review of Santerfeit's DOC records by Inspector Callahan on April 6, 1990, would have revealed a report dated October 5, 1989, in which the supervising officer on duty at Dade Correctional stated the following:

> Inmate Santerfeit, Byrel DC#814338 was interviewed by the undersigned and informed he was being placed in Administrative Confinement pending the results of an investigation filed against him this date for the violation of 2-2 INCITING OR ATTEMPTING TO INCITE RIOTS, STRIKES, MUTINOUS ACTS OR DISTURBANCES. Inmate Santerfeit wrote a letter to which I received inferring a riot would occur in B-Dorm. Inmate Santerfeit is under investigation and will remain in confinement pending

> conclusion of the investigation. During the above interview inmate Santerfeit stated he understood why he was being placed in Administrative Confinement and offered no further comment.

(R. 72).

All this material was cited at length in Mr. Coney's 3.850 motion in support of the proposition that Casabielle's failure to call Callahan, French, Torres and others was deficient performance that resulted in substantial prejudice to Mr. Coney's guilt phase case. And although it could not have been presented at trial, further evidence of the necessity for an evidentiary hearing on these matters was a May 6, 1993 prison record of Mr. Santerfeit, obtained by postconviction counsel and cited in Mr. Coney's 3.850 motion, in which Santerfeit requested protective custody based on "loan sharking and drug trafficking, which was tied in with the Coney case" (R. 75).

E. Absence from critical stages

The State's brief simply fails to respond to Mr. Coney's arguments concerning his absence from critical stages of the proceedings in light of the revelations concerning trial counsel during the postconviction

proceedings. Far from being without merit, it is by now clear that Mr. Coney's absence from the initial hearing before the newly appointed Judge Smith is in many ways a linchpin to understanding the depth and breadth of the prejudice he ultimately suffered.

Trial counsel misrepresented to the lower court at a hearing on January 31, 1992 that Mr. Coney had already been examined by a mental health professional. (R. 484-87). This hearing occurred only 15 days before Mr. Coney's capital murder trial began. Mr. Coney was not present solely because Mr. Casabielle, for self-serving reasons, had waived his presence.[9] Mr. Coney was being deliberately kept in the dark as to trial counsel's failure to investigate and failure to prepare a guilt phase and penalty phase case using mental health experts, even at this late date. During the same hearing Casabielle complained to the court about Mr. Coney being a recalcitrant client. He failed to advise the lower court as to what he admitted at the evidentiary hearing:

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[9]Recall that the lower court's post evidentiary hearing order granting penalty phase relief found that at this hearing "Mr. Casabielle affirmatively stated that a psychological evaluation of the defendant had been conducted. It appears that this statement was not true" (R. 1329).

that prior to the hearing where he waived Mr. Coney's presence he had seen his client for the first time since March 25, 1991 only three weeks before on January 10, 1992 (R. 501).

During that period of ten months there was a material breakdown in representation. Trial counsel filed a motion on April 1, 1991 for the pre-trial appointment of an expert psychologist that was granted by Judge Gelber on April 23, 1991, yet no pre-trial evaluation was ever completed (R. 488-90, 1329). Mr. Coney complained in writing to trial counsel about his case preparation in May 1991 but trial counsel did not see him for nine months.[10] Casabielle and Gelber were both implicated in Operation Courtbroom in June 1991 but trial counsel never revealed this information to Mr. Coney even when the subject came up during a sidebar out of Mr. Coney's presence during jury selection (R. 516-22).[11] Casabielle also failed to obtain Mr. Coney's prison records until three weeks before

[10]This letter was introduced as Defendant's Exhibit T at the evidentiary hearing.

[11]A more complete explanation of the juror Schopperle bench conference situation can be found in Mr. Coney's Answer/Cross Initial Brief at pages 64-66 in regards to the conflict of interest claim.

the trial (R. 558-65, 599-600).

The Answer Brief questions what difference Mr. Coney's input would have had on the trial below. Mr. Coney would have caught his trial counsel in a lie about having been evaluated and then insisted on unconflicted and honest counsel; or, Mr. Coney would have been evaluated pre-trial (along with proper discovery of prison mental health records and other background material provided to the expert that was appointed) with the result that the expert would have made findings similar to those of Dr. Eisenstein and Dr. Hyde, findings that could have been used to develop a guilt phase defense. Mr. Coney likely would have obtained a continuance if trial counsel was removed from the case. As noted elsewhere, if Mr. Coney had learned about his trial counsel's involvement in Court Broom during jury selection, he almost certainly would have requested new counsel in light of the events of the preceding year. Mr. Coney reiterates his request for de novo review of the presence issue particularly as it applies to the January 31, 1992 hearing and jury selection.

ARGUMENT IV - PUBLIC RECORDS

Mr. Coney advises this Court that the order below sustaining the objections to production of the documents withheld by the Dade County State Attorney was entered after the lower court found that there was good cause for the State's failure to respond within sixty (60) days to Mr. Coney's public records request as was required pursuant to Fla. R. Crim. P. 3.852(e) (Supp. R. 768-69).

Mr. Coney also advises this Court that footnote 15 of his Answer/Cross-Initial brief is moot, in that the referenced motion concerning the missing letter of October 2, 1998 detailing the State Attorney documents withheld was never filed. Counsel discovered that the missing letter from the Office of the State Attorney was included in another volume of the supplemental record on appeal, attached to a notice of filing (Supp. R. 539-41).

Otherwise, Mr. Coney will rely on the argument regarding public records in his Answer/Cross Initial brief.

OTHER ARGUMENTS

Mr. Coney relies on his Answer/Cross-Initial Brief as rebuttal to the remaining arguments advanced by the State.

CONCLUSION

Mr. Coney submits that relief is warranted in the form of a new trial. To the extent that relief was not granted below on any issue on which the lower court ruled without an evidentiary hearing, Mr. Coney requests that the case be remanded so that he is able to undertake evidentiary development and so that full consideration can be given to all his claims.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of the Cross-Appellant has been furnished by United States Mail, first class postage prepaid, to Scott A. Browne, Assistant Attorney General, Westwood Center, Suite 700, 2002 North Lois Ave., Tampa, Florida 33607-2366, on September 25, 2002.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this reply brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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