IN THE SUPREME COURT OF FLORIDA

F.W. CUMMINGS-EL,

Appellant,

vs.

FSC case no. 01-1501
Lower case no. F91-33268

STATE OF FLORIDA,

Appellee.
_____/

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

# AMENDED INITIAL BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

Appellant, F.W. CUMMINGS-EL, was the defendant in the trial court below and will be referred to herein as “Appellant” or by his proper name. Appellee, the State of Florida, was the petitioner in the trial court below and will be referred to herein as “the State." Reference to the original record on appeal will be by the symbol “PL” for the single volume of separately-paginated pleadings, followed by the appropriate page number(s), and “TR" for the six volumes of sequentially-paginated transcripts, followed by the appropriate volume and

page number(s). Reference to the post-conviction record on appeal will be by the symbol "PCR" for the four volumes of pleadings, followed by the appropriate volume and page number(s), and “PCRS” for the supplemental record (eight volumes of transcripts), followed by the appropriate volume and page number(s).

## STATEMENT OF THE CASE AND FACTS

The Miami-Dade Police Department arrested Appellant, F.W. Cummings-El on September 16, 1991, for the first-degree murder of Kathy Williams Good and for the armed burglary of Daisy Adams' home, allegedly committed earlier that morning. (TR I 1). Eighteen days later, on October 4, 1991, the State charged Appellant by information with the second-degree murder of Kathy Williams Good.[1] (TR I 1-2, 3). On December 4, 1991, upon certification of conflict by the Public Defender's Office, Judge Ralph Person appointed Theodore Mastos to represent Mr. Cummings-El in this cause. (TR I 42-43). Six months after his arrest, on March 17, 1992, the State obtained a grand jury indictment against Mr. Cummings-El for the first-degree murder of Kathy Williams Good and the armed burglary of Daisy Adams' home. (TR I 4-5).

Thirteen months after has appointment, and three weeks before trial, Mr. Mastos informed the trial court, the Honorable Joseph Farina, that he had done nothing to prepare for the penalty phase of the case, and had yet to hire an investigator, because Appellant did not want anyone begging for his life.

[1] It did not charge him with the armed burglary of Daisy Adams' home, wherein Ms. Good was residing at the time of her death.

(E.H. Exh. #8 at 4-6).[2] Given his client's position, Mr. Mastos asked the court to question Appellant about his decision not to call penalty phase witnesses on his behalf. Both Mr. Mastos and the prosecutor also asked that Mr. Cummings-El undergo a psychiatric evaluation to ensure that he was competent to waive mitigation. In response to the court's questioning, Appellant indicated on two separate occasions that Mr. Mastos was welcome to contact his family members or anyone else he wanted to contact regarding mitigation, but that he (Appellant) did not want his family begging for his life because he was innocent of the charges. (E.H. Exh. #8 at 6, 13).

Also during the discussion, Appellant complained that Mr. Mastos had not scheduled an Arthur[3] hearing in his case. (E.H. Exh. #8 at 14-15). Mr. Mastos conceded that his client had requested one and that he had not scheduled one, because in his opinion "it would be a complete and total waste of time. There is absolutely no judge in the system that when given [the

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[2] As discussed in Appellant's simultaneously filed habeas petition, the transcripts of this hearing were never included in Appellant's direct appeal record. The State introduced them into evidence at Appellant's evidentiary hearing as State's Exhibit #8.

[3] State v. Arthur, 390 So. 2d 717 (Fla. 1980) (affirming trial court's discretion to grant or deny bail for person accused of offense punishable by life, or capital offense, when proof of guilt is evident or presumption great).

witnesses' depositions or sworn statements] is going to find proof not evident, nor presumption great." (E.H. Exh. #8 at 17).

Following Mr. Mastos' comments regarding the undeniable strength of the State's case, Appellant vehemently requested that the court discharge his attorney because "it don't appear to me he's working on my best interest, but working with the prosecutor." (E.H. Exh. #8 at 19). Appellant also complained that Mr. Mastos had only been to see him twice in the past year and was pressuring him to accept the State's plea offer to second-degree murder. (E.H. Exh. #8 at 20). When asked by the court to detail his efforts on Mr. Cummings-El's behalf, Mr. Mastos explained only that he had taken several depositions and had given copies of those depositions, as well as the police reports, to Appellant. (E.H. Exh. #8 at 20-21). The court made no ruling regarding Appellant's motion to dismiss counsel, but rather ordered the psychiatric evaluation to be completed by that Friday, at which point the court would decide on a trial date. (E.H. Exh. #8 at 22-23).

The very next day, Dr. Sanford Jacobson, a psychiatrist, met with Appellant and issued a report, finding that Appellant was "competent for legal proceedings and ha[d] sufficient present ability to communicate with counsel with a reasonable degree of

rational understanding. He possesse[d] both a rational and factual understanding of the charges." (PCR I 95). Dr. Jacobson concluded that Appellant "would not meet criteria for involuntary hospitalization." (PCR I 95). Regarding the reason for his evaluation of Appellant, i.e., Appellant's competence to waive mitigation, the doctor stated,

> With respect to the defendant's feelings about family members testifying in any sentencing phase if it were necessary, I can only state that the defendant's explanation does not appear to me to be irrational or bizarre. It may not be in his best interest at this time but the defendant might, if necessary, alter that opinion or view.
>
> I do not think individuals who make statements of this type, which appear to be somewhat less than in their best interest, should be viewed as necessarily impaired or dysfunctional mentally. It is not in my opinion a reflection of a major mental illness although it might reflect aspects of his personality which are not always operating to serve his best interest.

(PCR I 95-96). There were no further hearings or discussions prior to trial regarding Appellant's desire to waive mitigation.

Three weeks later, the trial commenced. After two days of testimony, the jury convicted Mr. Cummings-El on January 29, 1993, of first-degree murder and armed burglary as charged in the indictment. (TR I 55-56). This Court succinctly stated in its direct appeal opinion the pertinent facts that were elicited at trial:

> The defendant, Fred Cummings-El dated the victim, Kathy Good, for a short period and the two lived together for several months. After the relationship ended, Cummings-El harassed Good and she eventually obtained a restraining order after he assaulted her at a neighbor's house. He then made numerous verbal threats, such as: "Kathy, I'm going to kill you. Kathy, I'm going to kill you[]"; and "I love her. If I can't have her, nobody [can] have her"; and finally "If I can't have you, ain't nobody going to have you."
>
> Cummings-El broke into Good's home in the early morning hours of September 16, 1991, and stabbed her several times while she was sleeping, killing her. Several people heard Good's screams and saw Cummings-El at the scene. Good's eight year-old son, Tadarius, was asleep in bed with his mother and awoke to see Cummings-El "punching" his mother. Good's twenty year-old nephew, Michael Adams, was asleep on the floor of Good's bedroom and saw Cummings-El fleeing from the house. And Good's mother, Daisy Adams, confronted Cummings-El as he was leaving the bedroom. Cummings-El, whose face was only one or two feet from Daisy's, shoved Daisy to the ground and ran. Good then staggered from the bedroom and collapsed in her mother's arms, saying "Fred, Fred."

Cummings-El v. State, 684 So.2d 729, 730-31 (Fla. 1996).

Immediately following the jury's verdict, Mr. Mastos informed the trial court that Mr. Cummings-El was ready to proceed to the penalty phase and "[did] not wish any witnesses called." (TR VI 894). At that point, Mr. Cummings-El confirmed that he did not want to present any witnesses on his behalf,

including his sister who was in the courtroom. Concerned, however, that Mr. Cummings-El was making an emotional decision following the jury's unfavorable verdict, the trial court reset the penalty phase for the following Wednesday, five days later. (TR VI 895-901).

At the outset of that hearing, Mr. Mastos informed the court that two of Appellant's sisters and four of his children were in the courtroom, and that Appellant was allowing him to present the testimony of his two sisters. (TR VI 920-21). The State complained, however, that none of the witnesses' names had been provided in discovery, and thus it had not had an opportunity to depose them or even to speak to them. (TR VI 921). The trial court suggested that it do so over the lunch recess. (TR VI 922).

Thereafter, the State presented the testimony of Daisy and Michael Adams, the victim's mother and nephew, respectively, concerning what this Court characterized as "the duration of Good's state of consciousness after the stabbing." Cummings-El, 684 So.2d at 731; (TR VI 925-935, 935-45). The State also admitted certified copies of conviction for three violent felonies Mr. Cummings-El had previously committed. (TR VI 945-68).

Following the penalty-phase charge conference, Mr. Mastos presented the testimony of two of Mr. Cummings-El's older sisters. In an awkward and halting narrative style, Ms. Diane St. Fleur testified that she had five sisters and six brothers, three of whom had already deceased. She also testified that Mr. Cummings-El had four children of his own, who were sitting in the gallery. She indicated that she was currently caring for his four children, in addition to her own four. In Ms. St. Fleur's opinion, Appellant treated his family well, was very protective of them, and was honest and nonviolent. Although their mother couldn't be there because she had recently suffered a debilitating stroke, their family was very close, and Ms. St. Fleur asked the jury to spare Mr. Cummings-El's life. (TR VI 1004-09).

Similarly, Ms. Catherine Covington testified that Appellant was nonviolent, very nice, treated others well, and tried to be a good father to his children. She, too, wanted the jury to spare her brother's life. (TR VI 1016-21).

On cross-examination, however, the State vigorously attacked both of these witnesses' testimony. To rebut their assertions of Appellant's nonviolence, as well as his alleged financial and emotional support of his children, the State emphasized Mr. Cummings-El's convictions for violent offenses, including this

one, and his lengthy prison sentences served in North Carolina and Quincy, Florida. (TR VI 1010-14, 1021-25). It emphasized, both in cross-examination and in closing argument, that Appellant was, on the contrary, a very violent man, and that he had all but abandoned his children during their lifetime. (TR VI 1050-51).

Following closing arguments and jury instructions, the jury deliberated an hour and thirty-five minutes before returning a recommendation of death by a vote of eight to four. (TR VI 1029-54, 1054-63, 1063-71, 1071-73). At final sentencing, two weeks later, Mr. Mastos declined to present additional evidence or argument, commenting that he "[didn't] think there [was] anything that could be said or done at this time." (TR VI 1077). At that point, the trial court immediately imposed a sentence of death, having come prepared with a written sentencing order. In rendering its sentence, the court found the existence of four aggravating factors: that Mr. Cummings-El had three prior violent felony convictions, that he committed the murder during an armed burglary, that he committed the murder in a cold, calculated, and premeditated manner, and that he committed the murder in a heinous, atrocious or cruel manner. In assessing mitigation, the court rejected the proposed statutory mitigating factors of no significant history of prior

criminal activity and Appellant's age at the time of the offense. (TR VI 1076-83). As for nonstatutory mitigation, the trial court made the following comments:

> Defendant's two sisters testified that Defendant is a loving father, comes from a close family and has strong family support. Both sisters believe Defendant isn't a violent man in spite of his three prior felony convictions.
>
> However, unlike other trial witnesses, Defendant's sisters did not hear and see his three violent confrontations with Kathy Williams Good before he murdered her. In addition, unlike other trial witnesses, neither sister saw the Defendant running out of Kathy Williams Good's bedroom after he brutally stabbed her.
>
> These two women testified from their hearts. Unfortunately, their family portrait of the Defendant isn't based on fact or in reality as reflected by the evidence of this case.

(TR VI 1084).

For the appeal, the trial court appointed John Lipinski to represent Mr. Cummings-El before this Court. Mr. Lipinski, a private attorney, raised the following six issues: (1) the trial court erred in excusing jurors Kozakowski and Oshinsky for cause, (2) the trial court improperly commented before the jury on Appellant's right to remain silent, (3) the trial court erred in instructing the jury on the heinous, atrocious, or cruel aggravating factor, (4) the evidence did not support the trial court's finding of the HAC aggravating factor, (5) the evidence

did not support the trial court's finding of the cold, calculated and premeditated murder aggravating factor, and (6) Appellant's sentence of death was disproportionate to other cases resulting from a domestic dispute. Cummings-El, 684 So.2d at 731, n.2.

In affirming Appellant's convictions and sentence of death, this Court found that trial counsel had not preserved the first three issues for review and, as a result, it refused to consider the merits of those claims. Id. at 731. In addition, it found that the facts supported both the HAC and CCP aggravating factors, and that Appellant's sentence was not disproportionate. Id. at 732.

Following this Court's mandate, Mr. Cummings-El filed a petition for writ of certiorari in the United State's Supreme Court. That Court denied Appellant's petition on June 16, 1997. Cummings-El v. Florida, 520 U.S. 1277 (1997).

Pursuant to an order of this Court, CCRC-South was directed to file Mr. Cummings-El's post-conviction motion by June 16, 1998. On January 15, 1998, however, this Court tolled the time requirements for public records until June 1, 1998. By separate order, it also tolled the time requirement for filing the post-conviction motion in this case until June 1, 1998. Although this filing requirement was tolled twice more until June 25,

1998, and October 1, 1998, CCRC-South filed a "shell" motion on May 13, 1998. Thereafter, it announced a conflict of interest and, at the request of the Commission on Administration of Justice in Capital Cases, the chief judge in the circuit appointed Lee Weissenborn from the list of registry counsel to represent Mr. Cummings-El in his post-conviction proceedings.

Following counsel's appointment, Judge Farina held numerous status conferences and ordered the final amended 3.850 motion to be filed by May 24, 1999, with the State's response due by July 6, 1999. (PCR I 47-48). Mr. Weissenborn did, in fact, file the motion, raising the following eleven claims for relief: (1) trial counsel was ineffective for failing to preserve the issue of the improper exclusion of jurors for cause, and for failing to object to the State's method of death qualifying the jury, (2) trial counsel was ineffective for failing to call Daphne Roberts as a witness during both the guilt and penalty phases of trial, (3) trial counsel was ineffective for failing to request separate verdict forms for the alternate theories of premeditation and felony murder, and for failing to object to the State's argument regarding the alternate theories, (4) trial counsel was ineffective for failing to object to the trial court's improper comment before the jury regarding Appellant's right to remain silent, (5) trial counsel was ineffective for

failing to investigate and present evidence in mitigation, (6) the trial court improperly applied the felony murder and CCP aggravating factors because they were duplicative of the underlying theories of premeditation and felony murder, (7) the trial court improperly weighed the aggravators and mitigators, (8) trial counsel was ineffective for failing to request a second chair lawyer to assist him at the trial, (9) cumulative errors deprived Appellant of a fair trial, (10) the trial court improperly considered Appellant's desire to die in imposing a sentence of death, and (11) death by electrocution is unconstitutional. (PCR I 49-77).

At the Huff hearing on July 23, 1999, Mr. Weissenborn orally amended Claim V to include a factual basis, and Judge Farina granted an evidentiary hearing on that claim. As for the other ten claims, however, it found that Claims I and II were sufficiently refuted by the record, and that Claims III, IV, and VI-XI were all procedurally barred and either legally insufficient to state a claim for relief or refuted by the record. (PCR I 78-96).

On December 28, 1999, after Judge Farina had twice rescheduled the evidentiary hearing, Mr. Cummings-El expressed dissatisfaction with Mr. Weissenborn. Thereafter, the court replaced him with Tony Moss, a registry attorney, on January 4,

2000. (PCR I 104-05). Prior to the evidentiary hearing, scheduled for the week of July 18, 2000, Mr. Moss filed a Second Amended Motion to Vacate, raising the following three claims, which were numbered sequentially from the First Amended Motion: (12) trial counsel was ineffective for failing to argue that the CCP aggravating factor was not appropriate in a domestic case, (13) trial counsel was ineffective for failing to object to the cumulative testimony of Daisy and Michael Adams in the penalty phase, and (14) trial counsel was ineffective for failing to interview Appellant's mother and sister for mitigation purposes. (PCR I 112-20). Two weeks later, Mr. Moss filed a Third Amended Motion to Vacate, raising the following single claim: (15) that Tadarius Williams, the victim's son and one of the witnesses at the trial to identify Appellant as the killer, had recanted his identification post-trial in the presence of two separate witnesses. (PCR II 132-40). Finally, on July 19, 2000, Mr. Moss filed a Supplemental Argument in Support of Claim 5 of the First Amended [Motion] to Vacate, alleging the facts to support the ineffectiveness claim. (PCR II 197-204).

Following the State's responses, and a second Huff hearing on September 25, 2000, Judge Farina rejected Claim XII as procedurally barred, and Claim XIII as sufficiently refuted by the record. As requested by counsel, it considered Claim XIV as

a supplement to Claim V and included it as an issue to be raised at the evidentiary hearing. Finally, it denied Claim XV without prejudice for defense counsel to submit either a sworn affidavit or sworn testimony from Tadarius Williams himself, recanting his prior identification testimony.[4] **App. A** at 1-7.

At the evidentiary hearing, held during the week of November 29, 2000, Mr. Cummings-El presented the testimony of the following witnesses: Catherine Wooden Covington, Appellant's second oldest sister; Catherine Wooden, Appellant's niece; Moses Poole, Appellant's assistant principal at Cutler Ridge Middle School; Dr. Lynn Schram, a neuropsychologist; Dr. Merry Haber, a forensic psychologist; Deborah Dawson, Appellant's girlfriend and mother of his four children; Frederick Dawson, Appellant's son; Dr. Bruce Frumkin, a forensic psychologist; Lyndon Dawson, Appellant's son; and Eddie Webster, a neighborhood friend. In rebuttal, the State called Dr. John Spencer, a forensic psychologist; Theodore Mastos, Appellant' original trial attorney; Dr. Jane Ansley, a forensic neuropsychologist; and Tadarius Williams, the victim's son. Following this testimony, the parties submitted memoranda of law on February 28, 2001, and

[4] Inexplicably, this order does not appear in the record on appeal. For this Court's convenience, undersigned counsel has attached the order as an appendix to this brief, but has simultaneously moved to include it in the official record.

the trial court filed its written order denying Claim V on June 14, 2001. (PCR III 268-97, 304-31; IV 332-43). Appellant filed a timely notice of appeal on June 26, 2001. (PCR IV 346). This appeal follows.

## SUMMARY OF ARGUMENT

Issue I - Trial counsel, Theodore Mastos, rendered constitutionally ineffective assistance of counsel throughout Appellant's entire case. From the moment Judge Person appointed him, until he withdrew following Judge Farina's sentence of death, he did nothing to competently and effectively represent his client. Though ill-prepared to defend a capital case, he did not seek the assistance of an experienced second-chair attorney. Nor did he hire a private investigator to explore Appellant's case or psycho-social history. Rather, when Appellant, who has a borderline low-average IQ and who reads on a sixth-grade level, decided he might not want to present a penalty phase case, Mr. Mastos latched on to his client's "strategy" and did nothing to investigate or present a penalty phase case. He did not interview witnesses. He did not speak to Appellant's family, friends, or co-workers, many of whom were available and willing to testify. He did not investigate Appellant's educational, medical, psychological, or social history. In sum, he made absolutely no effort to document Mr. Cummings-El's life prior to this crime. Thus, he could not guide Appellant in his decision to waive mitigation. And when Mr. Cummings-El ultimately decided to present mitigation, Mr. Mastos was completely unprepared to do so.

Even on the first day of trial, Mr. Mastos was distracted and unprepared to select a jury. He had so many other cases to attend to that he left Appellant's confidential file elsewhere in the courthouse. Then, when jury selection began, he allowed the State to violate Mr. Cummings-El's rights by confusing and misleading the venire during the death-qualification process. Because of counsel's inattention, the trial court excused for cause jurors who otherwise met the Witt standard, thereby depriving Appellant of a fair and impartial jury.

With equal incompetence, Mastos allowed the trial court to comment to the jury on Appellant's right to remain silent. By failing to object and move to strike the panel, Mastos allowed the trial court to interject its personal opinion that Appellant should not exercise his right to remain silent, but rather should come forward with a defense of his own. Since Mr. Cummings-El had the right to stand mute throughout his trial and to demand that the State meet its burden of proof, such a comment was highly inappropriate, and Mr. Mastos was constitutionally ineffective in his failure to object.

Along with a wealth of other mitigating evidence, trial counsel failed to present Daphne Roberts as a penalty phase witness. Ms. Roberts could have established the "extreme mental or emotional disturbance" mental mitigator by testifying that

Appellant thought the victim was seeing someone else or was having a homosexual relationship with her best friend. Since the State's motive for the murder hinged on Appellant's single-minded fixation on the victim, Ms. Roberts' testimony would have established that Appellant was not the cold, calculated murderer that the State portrayed, but rather a man inflamed by passion and jealousy--a man influenced by an extreme mental or emotional disturbance.

Finally, trial counsel failed to object to the cumulative and highly prejudicial testimony of the victim's mother and nephew in the State's penalty phase case. These witnesses had already testified during the guilt phase to the victim's last moments of life. Through incompetence, Mastos allowed them to testify again-- to the same facts only in more emotional detail. As a result, he allowed the State to inflame the jury's sympathy and passion toward the victim in this case.

The cumulative effect of trial counsel's ineffectiveness was to deprive Appellant of his sixth amendment right to an attorney. In essence, Appellant had no attorney. Mastos made no objections, made no investigation of the case, presented no evidence, and did nothing otherwise to preserve Appellant's rights to a fair trial and an impartial jury. Had counsel investigated Appellant's social and psychological history, had

he presented the wealth of information that was available, and had he made proper objections and motions during the trial, there is a reasonable probability that Appellant's conviction and sentence would have been different. Therefore, this Court must reverse the trial court's order denying relief herein and remand with instructions to grant Mr. Cummings-El a new trial.

## ARGUMENT

### ISSUE I

TRIAL COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL THROUGHOUT APPELLANT'S ENTIRE CASE.

#### A. Introduction

The Sixth and Fourteenth Amendments to the United States Constitution entitle every criminal defendant to a fair trial. Embodied within the concept of a fair trial is the right to counsel. Powell v. Alabama, 287 U.S. 45 (1932), Johnson v. Zerbst, 304 U.S. 458 (1938), Gideon v. Wainwright, 372 U.S. 335 (1963). Counsel plays a crucial role in the adversarial system because accused persons unskilled in the vagaries of the law require the specialized skill and knowledge of an attorney to meet and defend the State's case. "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command." Strickland v. Washington, 466 U.S. 668, 685 (1984). Rather, a defendant is entitled to an attorney "who plays the role necessary to ensure that the trial is fair." Id. In other words, "the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

As has long been established, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. at 686. To prove such a claim, a defendant must of necessity demonstrate that counsel's performance was deficient, i.e., "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Equally incumbent, the defendant must demonstrate that his attorney's deficient performance prejudiced his defense, i.e. "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id.

In the instant case, Mr. Cummings-El alleged numerous instances of deficient conduct in his motion for post-conviction relief. For clarity and organizational purposes he raised several of those claims under separate headings and claim numbers. But he never intended for the trial court, as it did, to consider each allegation as a distinct claim, separate from the others. Rather, Appellant alleged, through various examples, a pattern of deficient conduct so pervasive that the

cumulative effect of such deficiency prejudiced his right to a fair trial and undermined confidence in the result.

Considered separately, some of the allegations did not, individually, withstand scrutiny under the Strickland v. Washington standard, and were thus denied on their face without an evidentiary hearing. But Mr. Cummings-El's case should not have been parceled and apportioned. His right to effective assistance of counsel began upon counsel's appointment and ended upon counsel's withdrawal. When the benchmark for such a claim is the reliability of the result, counsel's actions, or inaction, must be judged for its total impact, its cumulative effect, its influence on the end result. See State v. Gunsby, 670 So.2d 920 (Fla. 1996) (finding individual post-conviction claims legally insufficient, but concluding that cumulative effect of errors warranted new trial); cf. Cherry v. State, 781 So.2d 1040 (Fla. 1996) (finding potential cumulative effect of ineffectiveness claims warranted evidentiary hearing); Harvey v. Dugger, 656 So.2d 1253 (Fla. 1995) (same).

In the case sub judice, Appellant's trial counsel, Theodore Mastos, did nothing from beginning to end to investigate or defend Appellant's case. He was, in result, the functional equivalent of no attorney at all. It was this consistent theme of inactivity that prejudiced Appellant's rights to counsel, to

a fair trial and to a fair sentencing hearing, not any singular act of deficient conduct. Thus, the trial court erred both in refusing to conduct an evidentiary hearing on all of Mr. Cummings-El's allegations of ineffectiveness and in denying those claims outright. See Freeman v. State, 761 So.2d 1055, 1061 (Fla. 2000) ("[A] defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient."); Ventura v. State, 794 So.2d 553 (Fla. 2001) (finding trial court's summary denial of Ventura's cumulative error argument "clearly improper" where ruling made prior to evidentiary hearing).[5]

B. Counsel's failure to request a second-chair attorney--Claim VIII

Theodore Mastos' ineffective assistance began the day Judge Ralph Person appointed him to Mr. Cummings-El's case, and it continued until Mastos withdrew from the case after Judge Farina imposed a sentence of death. As related at the evidentiary hearing, Mr. Mastos had very little training or experience in

[5] Nine of Appellant's fifteen claims alleged ineffective assistance of counsel. One alleged newly discovered evidence. The trial court granted an evidentiary hearing on only one claim. Critically, it denied Appellant's cumulative error argument as procedurally barred prior to holding the evidentiary hearing. (PCR I 80).

handling capital cases. Although he had been an assistant state attorney for the first three and a half years of his legal career, he had never been assigned to a capital case. (PCRS VII 1702, 1742). As a county court judge, he was even farther removed from capital law. Unseated six months later in the general election, Mr. Mastos returned to the State Attorney's Office, where he was assigned no capital cases, and was re-appointed to the county court bench the following May. (PCRS VII 1702). Again, as a county court judge, he had no exposure to death penalty cases.

In December 1981, Mastos was elevated to the circuit court bench, but in the eight years that followed, he presided over only three capital cases that resulted in a penalty phase proceeding. In each case, this Court reversed the conviction or sentence because of grievous errors Mastos committed--some worthy of reproach.[6]

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[6] This Court reversed Burley Gilliam's conviction because Mastos refused to allow Gilliam, who was representing himself, to backstrike jurors. Gilliam v. State, 514 So.2d 1098 (Fla. 1987). After a retrial, Mastos again sentenced Gilliam to death. This Court affirmed the conviction and death sentence, but remanded for resentencing on a sexual battery charge where Mastos had imposed a more severe sentence after retrial, suggesting vindictiveness for Gilliam having successfully attacked his first conviction. Gilliam v. State, 582 So.2d 610 (Fla. 1991).

This Court also vacated Jesus Scull's two death sentences because Mastos improperly considered victim impact evidence and (continued...)

From December 1989, when the county's citizens voted Mastos out of office, to December 4, 1991, when he was appointed to represent Appellant, Theodore Mastos had tried only one capital case, but it never reached the penalty phase. (PCRS VII 1704, 1737). And in that time, he had attended only one death penalty seminar. (PCRS VII 1737-38). Yet, as a sole practitioner with

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[6] (...continued)
improperly found five of six aggravating factors as to one victim and four of six as to the other. Ultimately, this Court reversed "because we believe that the sentencing order is so replete with error, we cannot say that the sentence must be upheld." Scull v. State, 533 So.2d 1137 (Fla. 1988).

On remand, Mastos scheduled a sentencing hearing over the vehement objections of defense counsel and resentenced Scull to death before this Court had even issued its mandate. This Court reversed again: "We agree that the trial court's haste in resentencing Scull violated his due process rights." This Court also found that, "Here, the appearance of irregularity so permeates these proceedings as to justify suspicion of unfairness." Scull v. State, 569 So.2d 1251 (Fla. 1990). On remand, a different judge sentenced Jesus Scull to life imprisonment.

During his term on the bench, Mastos also received censure by the Third District Court of Appeal. E.g., Reyes v. State, 547 So.2d 347, 347-48 (Fla. 1989) (reversing conviction where Mastos "departed from his impartial role and commented on the testimony of witnesses"); Small v. State, 516 So.2d 39, 39 (Fla. 3d DCA 1987) ("On a record replete with baseball metaphors . . .the trial court neither followed the inquiry mandated by [Fla.R.Crim.P.] 3.172 nor established a factual basis for the plea. We accordingly reverse the summary denial of appellant's 3.850 motion . . . . The trial court would be well advised to remember that no matter if the league is major or minor the umpire too must follow the rules of the game."); Driessen v. State, 431 So.2d 692, 693-94 (Fla. 3d DCA 1983) (reversing conviction where "the trial judge's demeanor conveyed the impression that he was not impartial and deprived Driessen of a fair trial").

only two years of experience as a criminal defense attorney, he made no effort to seek the appointment of a second-chair attorney. Similarly, he made no effort to retain a private investigator. Nor did he have any support staff to assist him in this case. (PCRS VII 1765, 1766-67).

From this case's inception, the State had two attorneys working vigorously to obtain a conviction and sentence of death. For this, and other reasons, the American Bar Association has consistently urged the appointment of two defense attorneys in every capital case. Florida Statute § 925.035(1) (1990) authorized the trial court to appoint "one or more members of The Florida Bar" after the public defender's office alleged a conflict. See also Trease v. State, 768 So.2d 1050, 1053 (Fla. 2000) ("The appointment of multiple counsel to represent an indigent defendant is within the discretion of the trial court judge, and is based on a determination of the complexity of the case and the attorney's effectiveness therein."). But Mastos failed to recognize his inexperience and the benefits that would inure to his client were he to seek the assistance of a second attorney in this case. That Mastos failed even to make application for co-counsel is evidence of the degree of arrogance and ignorance that counsel brought to bear in

representing a man facing the ultimate penalty the State has to impose.

By itself, Mastos' arrogance and inaction in securing assistance herein might simply be dismissed as a "tactical decision" or as a legally insufficient claim for relief, see Lowe v. State, 650 So.2d 969, 974-75 (Fla. 1994) (holding that a capital defendant is not constitutionally entitled to more than one attorney). But with the profusion of other unreasonable and reckless decisions Mr. Mastos made during the course of Mr. Cummings-El's case, this initial callous disregard for Appellant's welfare simply sets in motion a persistent pattern of deficient conduct that renders him the functional equivalent of no attorney at all.

C. Counsel's failure to object to the State's method of death qualifying the jury and failure to object to the trial court's improper exclusion of Jurors Kozakowski and Oshinsky--Claim I

Mr. Mastos' ineffectiveness and indifference became conspicuous on the first day of trial. Despite the fact that Mr. Cummings-El was facing a conviction for first-degree murder, punishable by life imprisonment or death by electrocution, Mr. Mastos had "four or five other courts to cover" that morning, and had been so distracted by his other cases that he had absent-mindedly left Mr. Cummings-El's confidential case file in Judge Carney's office. (TR I 50). Then, when Judge Farina

informed the parties that the venire was on its way down and asked the parties how they wanted to conduct the voir dire, Mr. Mastos completely deferred to the State's suggestion that the court elicit a few personal facts and then jump headlong into the death-qualification process. (TR I 52-53).

While death-qualifying a jury is still constitutionally permissible, see Wainwright v. Witt, 469 U.S. 412 (1985); Lockhart v. McCree, 476 U.S. 162 (1986), the method by which it is accomplished must comport with procedural due process since the improper exclusion of even a single juror is per se reversible error, Gray v. Mississippi, 481 U.S. 648 (1987). In the case sub judice, it was incumbent upon Mr. Mastos to ensure that the method by which the State death-qualified the jury was a constitutionally permissible one. Counsel should not have allowed the State, as it did in this case, to so thoroughly confuse and mislead the venire that those jurors who were only generally opposed to the death penalty could never meet the Witt standard.

In Claim I of his First Amended [Motion] to Vacate and its attendant Memorandum of Law, Mr. Cummings-El alleged that Mr. Mastos was ineffective for failing to challenge the State's misuse of the death-qualifying process and for failing to object to the improper exclusion of jurors Kozakowski and Oshinsky.

(PCR I 51-53). In its order denying post-conviction relief, the trial court noted that death-qualification was permissible and relied upon the original trial record to establish that the two jurors were properly excluded. Consequently, it denied Appellant the opportunity to establish this claim at an evidentiary hearing. (PCR I 78).

Appellant submits that the record supports, rather than refutes, this claim. At Appellant's trial, Judge Farina elicited basic biographical information from the first panel of thirty potential jurors. Edward Kozakowski was a member of that panel. (TR I 46-80). Immediately thereafter, the trial court asked the panel if anyone had "any philosophical, moral, religious, or conscientious scruples against the infliction of a death penalty in a death case." (TR I 81). Eleven people raised their hands. Mr. Kozakowski was **not** one of them. To those eleven jurors, the court asked each one individually the following three questions: (1) Would that belief affect you in the determination of the defendant's guilt or innocence? (2) Can you think of any possible case in which you would be able to apply the death penalty? (3) Would you listen to the evidence and follow the law in each phase of the trial in rendering a verdict if you were a member of the jury? (TR I 81-88). Regardless of the answers to these questions, the trial court

did not pose follow-up questions, but rather immediately turned the panel over to the State for questioning.[7] This is where the process completely broke down.

The State began with a confusing and inarticulate "explanation" of the two-phase process, followed immediately by this question:

> If you decide he's guilty or not because if he's guilty of first degree murder and you know I've to go to step two. Step two is the second phase. Does anybody who deals that [sic] with that additional information, having that knowledge, this might color your judgment completely, make a difference [sic] but just alter you decision just a little bit? The decision of guilt or innocent on the back row?

(TR I 90) (emphasis added).

Counsel incompetently failed to object to this line of questioning. In death-qualifying a jury, the issue is not whether the possibility of a second phase would "color [their] judgment completely" or "alter [their] decision just a little bit." The question is whether their individual views about the death penalty would "prevent or substantially impair the performance of [their] duties as a juror in accordance with

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[7] At this stage, the parties were only supposed to death-qualify the jury. General questioning of the first and second panels of jurors came after nearly half of the two panels (19 of 42) were excused for cause as a result of this death-qualifying process. (PL 24-27; TR II 244-315).

[their] instructions and [their] oath." Witt, 469 U.S. at 424. While the prosecutor need not use the precise words articulated in Witt, he must use words or phrases that are synonymous with the Witt standard: Will their views prevent or substantially impair their ability to follow the law? "Color their judgment" and "alter their decision just a little bit" were not sufficiently synonymous and served to confuse and mislead the jury in their responses.

From these improper questions, the State segued into another improper question: "Do you think that on a close call, knowing that if you find the defendant guilty of first degree murder you have to go to the next step, you might find yourself looking out a little more carefully?" (TR I 91) (emphasis added). The prosecutor clarified this question by asking whether the jurors would be so careful in reaching their verdict that they would hold the State to a higher standard of proof. (TR I 91).

Again, this was not a proper line of questioning under Witt. The State was using the death-qualifying process to infuse other legal concepts into the voir dire, such as the burden of proof. Critically, neither the trial court nor the State had explained the State's burden of proof, much less defined the phrase "beyond a reasonable doubt." As a result, the State took advantage of the jurors' ignorance. It called on Mr. Kozakowski

for the first time and asked, “Would you need to be totally and irrevocably convinced?” Ignorant of the correct standard, Mr. Kozakowski responded, “Convinced, yes.” (TR I 91-92). Several other jurors followed suit, telling the prosecutor that they would require his proof to be “without any doubt” or “one hundred percent.”[8] (TR I 92-93). Only after several jurors agreed that they would hold the State to a higher burden did the prosecutor inform them that the standard was beyond a reasonable doubt.[9] (TR I 92-93). By then, however, the jurors were firm in their belief that the standard should be higher because of the seriousness of the punishment:

> [THE STATE]: What do we have to prove in your mind?
>
> MS. ROJAS: That’s it, one hundred percent, I agree. Exactly.
>
> [THE STATE]: If the judge says to you the standard is reasonable doubt, it doesn’t have to be more[?]
>
> MS. ROJAS: Yes, yes.
>
> [THE STATE]: It’s got to be more?
>
> MS. ROJAS: I feel -– yes.

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[8] Jurors Levin, Rojas, Sanchez and Hornstein all indicated that they would hold the State to a higher burden. (TR I 92-94, 96).

[9] Critically, however, it did not provide them with a definition of reasonable doubt or seek an instruction on the State’s burden of proof.

(TR I 93-94). Having led them down the primrose path, the State now had several jurors whose views on the appropriate burden of proof were at odds with the law --a law they knew nothing about. (TR I 93-94).

Sensing the confusion, the court finally intervened and read the standard instruction on reasonable doubt, but instead of clarifying the juror's understanding and attitudes, the State immediately switched to another non-Witt topic: racial bias. (TR I 98-101). Then it took questions from the panel, answering queries from how long the trial would last to whether they would be asked to forego reading the newspaper. (TR I 101-03).

Ultimately, the State segued back to the issue of the death penalty and began asking jurors' their personal opinions about it. Like most lay people ignorant of the process, they made categorical statements, unaware of what the law required or what their duties would be. (TR I 103-10). Finally, one of the jurors asked, in obvious confusion, "What determines whether you get the electric chair or life in prison?" (TR I 110). Only then did Mr. Mastos make an appearance and suggest that the court explain the concept of aggravation and mitigation. But the court had no standard instruction, so its "explanation" was, at best, inarticulate and ambiguous:

> THE COURT: Let's talk about the fact that how do you make a determination in

> phase II, what's there to guide you. What do you have to look at and as Mr. Mastos just said and I believe Mr. Honig is just going to tell you that in the Florida Statutes there are certain factors that are listed that you could consider as to whether or not you wish to vote that this be life imprisonment with twenty-five years minimum mandatory or whether the death penalty be imposed and your vote is whether or not the death penalty should be imposed.
>
> There's only sentence [sic] by law if someone is convicted of first degree murder[. A] sentence of death or the sentence of life imprisonment with a twenty-five year minimum mandatory prison sentence so, if you're on the jury, phase one is completed all twelve of you have agreed by unanimous vote guilty of first degree murder, in Phase II the same twelve of you will then weigh these factors that will be in the statute. They will be in writing. They will be given to you. The lawyers will be commenting for you, telling you why they think there are aggravating circumstances. Why they think there might be mitigating circumstances to help you with a little road map as to your decision, but it will be within the presence of the twelve of you. What's in your heart and mind with regards to the statute. And the law says that you may consider other factors, other mitigating factors not even mentioned in the statute, but that's within the province of the jury. Okay. Does that help a little bit?

(TR I 110-11). Obviously confusing, one juror immediately asked, "Can I get a definition?" But the trial court refused: "That will be done at the very end of the trial." (TR I 111). Thus, the venire was left to speculate on the meaning of these terms.

Thereafter, instead of clarifying the trial court's "explanation," the State immediately jumped back into its discussion of the death penalty and whether anyone would automatically vote for death if the jury convicted someone of first-degree murder. Of course, the prosecutor did not explain that the death penalty did not apply to every person convicted of first-degree murder. Nor did it explain that the law required the jury to weigh the aggravating and mitigating factors and to make an individualized determination as to the appropriate punishment. More importantly, Mr. Mastos did nothing to correct the confusing and misleading way in which the State was death-qualifying the jury, despite continued questions by the jurors that illustrated their bewilderment: "Sir, are we considering that there will be witnesses to this, not just conversation to this but there will be witnesses?" (TR I 115).

After providing a terse response, the State posed the following barrage of questions:

> If you find the defendant guilty of first degree murder . . . when we get to the second part, are you already going to have your mind made up? What do you think you're going to do? Are you going to be able to listen and follow the law? It's like another trial. You have to start with a clean slate. Do you think you will be able to do that?

(TR I 115). The non sequiturs that followed amply illustrate the panel's complete misunderstanding of their role as jurors. For example:

> MR. KOZAKOWSKI: I'm very skeptical of the death penalty. I'll always agree I didn't hear the evidence or it's right or this wasn't enough evidence that would linger in my mind.
>
> MR. FORT: . . . How I feel if the man has committed first degree murder, it could have been avoided, if the man could have avoided it and didn't. I would say I would go along with the first degree murder. I mean, I would go along with execution in one way or the other later down the road.

(TR I 116).

Mastos should have interjected himself in this process and not allowed the State to confuse and mislead the venire. By allowing the prosecutor to question all three panels of jurors in this manner, Mastos foreclosed his ability to rehabilitate them.[10] The State had so infused the death-qualification process with its non-death-qualifying questions and had so manipulated the jurors and the Witt standard that those people who were gullible enough to follow the prosecutor's lead had disqualified

[10] In fact, with the third panel, some of the jurors' remarks were so resolute during the State's questioning that the trial court precluded either party from questioning them any further. (TR II 389-90).

themselves long before Mastos had an opportunity to question them.

To an attorney, particularly one specializing in criminal law and capital litigation, the terms "burden of proof," "reasonable doubt," "aggravation," "mitigation," or "aggravating circumstances" and "mitigating circumstances" have meaning. But to a panel of lay persons, these terms mean nothing, especially when used in the context of a vague conceptual idea such as a "Phase I" or "Phase II" proceeding:

> [T]he average juror summoned for prospective service in a case where the State is seeking the death penalty enters the courtroom without any true insight whatsoever into the elements or factors involved in capital sentencing proceedings. They are overwhelmingly unaware of the existence of the bifurcated process by which defendants may be tried and ultimately sentenced to the death penalty. They similarly do not possess the requisite familiarity with the necessary balancing scheme whereby aggravating and mitigating factors are weighed against each other in an effort to produce a proportionate sentence.

Overton v. State, 801 So.2d 877, 893-94 (Fla. 2001). Yet these terms were bandied about by the trial court and the prosecutor as if they were common, everyday concepts. The record makes clear, however, that the venire had little or no understanding of them. See Castro v. State, 644 So.2d 987, 990 (Fla. 1994) ("Not surprisingly, the prospective jurors had no grounding in

the intricacies of capital sentencing. Some of these jurors came to court with the reasonable misunderstanding that the presumed sentence for first-degree murder was death."). Thus, it was easy for the State to identify those jurors who would require a high standard of proof, or who were generally opposed to the death penalty, and then, by providing no frame of reference, lead them down the path to disqualification. See Johnson v. State, 660 So.2d 637, 644 (Fla. 1995) ("[J]urors brought into court face a confusing array of procedures and terminology they may little understand at the point of voir dire. It may be quite easy for either the State or the defense to elicit strong responses that jurors would genuinely reconsider once they are instructed on their legal duties and the niceties of the law.").

Edward Kozakowski was a perfect example. When the State posed the leading question, "Would you need to be totally and irrevocably convinced?", Mr. Kozakowski, ignorant of the proper standard, responded, "Convinced, yes." (TR I 91-92). Based on this reply, the State moved to excuse him for cause because he "would require a much higher standard [of proof]." When Mr. Mastos asserted that Mr. Kozakowski had retreated from that position, the prosecutor added, "He said that he was leaning towards life imprisonment already. That he had, he would have

to be totally and irrevocably convinced." (TR I 168-69). But the record does not support that representation. Mr. Kozakowski responded only that he would need to be "[c]onvinced" when the State asked about the burden of proof. It was the prosecutor who had used the adverbs "totally and irrevocably," not the juror.[11]

As for the State's alternative reason for excusal, Mr. Kozakowski had, at one point, stated that he was leaning more toward life imprisonment than the death penalty (TR I 115), but during the State's questioning, he indicated on several occasions that there were cases in which he would vote for death: if a child were involved, or if the victim were a defenseless woman who was stabbed in her sleep by someone she knew. (TR I 119-20, 124, 134-35, 138). "In those cases, I'll have no objections to the death penalty. In some cases, in my mind, I might have [a] reservation for the death penalty." (TR I 119-20). But "leaning toward life imprisonment" or "having a reservation in some cases" does not equate to a substantial

[11] This basis for excusal was an obvious pretext for the cause challenge. As excerpted supra, Barbara Rojas responded that she would require the State to prove its case "one hundred percent." When asked if she would hold the State to a standard higher than reasonable doubt, she unequivocally responded that she would. Yet the State allowed her to serve on the jury, undoubtedly because she "strongly believe[d] in an eye for an eye." (TR I 93-94, 140).

impairment of his ability to follow the law. See Adams v. Texas, 448 U.S. 38 (1980) (finding jurors improperly excluded where their acknowledgment that possible imposition of death penalty might "affect" their deliberations did not demonstrate unwillingness or inability to follow law or obey oaths).

Ultimately, Mr. Kozakowski met the Witt standard, but Mr. Mastos made no effort, as he should have, to challenge the State's excusal for cause or the entire death-qualifying process. Because he did not, he failed to preserve this issue for review. As a result, he irrevocably prejudiced Mr. Cummings-El's right to a fair and impartial jury, to a fair trial, and to a fair review process. Consequently, Mr. Cummings-El is entitled to a new trial.

### D. Counsel's failure to object to the trial court's comment on Appellant's right to remain silent--Claim IV

Consistent with his pattern of ignoring his duty to advocate on Appellant's behalf, Theodore Mastos failed to object when the trial court blatantly commented to the jury on Mr. Cummings-El's right to remain silent:

> THE COURT: Folks, the only side, the only side of this case who has to go forward and prove anything is the State side. The Defense does not have to prove anything. The burden of proof of coming forward with the evidence, of coming forward with the witnesses, coming forward with the exhibits, all that.

> The Defense is not require to prove anything. They're not required to disprove anything and that burden of proof of coming forward with the evidence is beyond and to the exclusion of every reasonable doubt. So that would not be a requirement. I just want to make sure everybody understands for the defendant to prove that he had a twin, in order for the State to prove the case, they have to bring to you all the evidence.
>
> It's possible that the Defense does not utter a word through the whole trial. Although it wouldn't happen. It shouldn't happen. We need to try to get on, if we can but go ahead.

(TR 294-95) (emphasis added).

In Claim IV of his First Amended [Motion] to Vacate and its attendant Memorandum of Law, Mr. Cummings-El alleged that Mr. Mastos was ineffective for failing to object to the trial court's improper comments. (PCR I 58-59). Denying this claim, Judge Farina (who was the original trial judge) initially found the claim procedurally barred. Alternatively, citing only to his own comments excerpted above, Judge Farina concluded, without analysis, that "[t]he record refutes prejudice to the Defendant." (PCR I 79). Consequently, he denied Appellant the opportunity to establish this claim at an evidentiary hearing.

As for the procedural bar, Appellant is mindful that he raised the impropriety of Judge Farina's comments as a substantive claim on direct appeal. See Cummings-El v. State, 684 So.2d 729, 731 & n.2 (Fla. 1996). He is also aware of this

Court's admonitions that post-conviction proceedings may not be used as a second appeal. But he did not raise this claim in his post-conviction motion to re-litigate the substantive issue. Rather, he raised it as an allegation of ineffectiveness, one of many examples of trial counsel's deficient conduct. As a result, the trial court erred in finding it procedurally barred:

> Whereas the main question on direct appeal is whether the trial court erred, the main question in a Strickland claim is whether trial counsel was ineffective. Both claims may arise from the same underlying facts, but the claims themselves are distinct and--of necessity--have different remedies: A claim of trial court error generally can be raised on direct appeal but not in a rule 3.850 motion, and a claim of ineffectiveness generally can be raised in a rule 3.850 motion but not on direct appeal. A defendant thus has little choice: As a rule, he or she can only raise an ineffectiveness claim via a rule 3.850 motion, even if the same underlying facts also supported, or could have supported, a claim of error on direct appeal. Thus, the trial court erred in concluding that Bruno's claim was procedurally barred.

Bruno v. State, 807 So.2d 55, 63 (Fla. 2001) (footnotes omitted).

By failing to object, Mastos allowed the trial court to interject its personal opinion that Appellant should not exercise his right to remain silent, but rather should come forward with a defense of his own. See Love v. State, 583 So.2d 371 (Fla. 3rd DCA 1991) (reversing conviction where trial court

stated, "'I am going to tell you the defendant does not have to testify, will probably not testify, you will not hear both sides of the story,'" finding that such comment "effectively informed the jury that Love would not offer an explanation of his actions"). Since Mr. Cummings-El had the right to stand mute throughout his trial and to demand that the State meet its burden of proof, such a comment was highly inappropriate, and Mr. Mastos was constitutionally ineffective in his failure to object. See State v. Kinchen, 490 So.2d 21, 22 (Fla. 1985) ("The right to stand mute at trial is protected by both our state and federal constitutions. Commenting on a defendant's failure to testify is a serious error.").

Moreover, trial counsel failed to object to the incomplete nature of the trial court's instruction. It was critical to Mr. Cummings-El's right to remain silent that the jury be instructed not to infer guilt from his failure to testify. In Andrews v. State, 443 So.2d 78, 83 (Fla. 1983), the trial court made the following remarks to the jury: "The Defense may or may not call witnesses. The Defense is not required to call any witnesses nor is the defendant required to take the stand." This Court reversed Andrews' conviction because the trial court omitted the crucial cautionary instruction not to draw any inference of

guilt from the defendant's failure to take the stand in his own defense:

> Without the cautionary instruction, the jurors were free to infer or speculate that a defendant who does not testify must surely be guilty, otherwise he would take the stand in his own behalf. A bald judicial comment on the refusal to testify, by itself, "is a remnant of the 'inquisitorial system of criminal justice' . . . . It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." Griffin v. California, 380 U.S. 609, 614, 14 L. Ed. 2d 106, 85 S. Ct. 1229 (1965) (footnote and citations omitted). But the cautionary no-inference instruction's "very purpose is to remove from the jury's deliberations any influence of unspoken adverse inferences." Lakeside v. Oregon, 435 U.S. at 339.

Andrews, 443 So.2d at 84 (footnote omitted).

As for the trial court's finding that the record established no prejudice, Judge Farina relied solely on the excerpt of his own comments to deny this claim. The excerpt, however, supports Appellant's claim, rather than refutes it. It establishes a prima facie claim of ineffectiveness because it clearly establishes (1) that the original trial judge made improper comments on Appellant's right to remain silent, and (2) that Mastos failed to object. By the nature of the comments, prejudice is evident. See McClain v. State, 353 So.2d 1215, 1217 (Fla. 1977) ("In fact, the degree of prejudice to an

accused from such a prohibited comment is greater when it is made by the judge than when made by the prosecutor, due to the great weight which jurors tend to give any such comment when made by the judge.").

Moreover, had counsel objected in a timely fashion, he could have procured either a curative instruction or a new panel of jurors. Had the court denied such requests, counsel would have preserved the issue for appeal. Because he did nothing, this Court refused to consider the impropriety of Judge Farina's comments on direct appeal. Cummings-El, 684 So.2d at 731 & n.2. Therefore, Mastos' inaction prejudiced Appellant's rights to a fair and impartial jury, to a fair trial, and to a fair review of this claim. Together with the multitude of Mastos' other unreasonable actions in this case, his ineptitude here further evidences a consistent pattern of deficient conduct that cumulatively prejudiced Appellant's case. See State v. Gunsby, 670 So.2d 920 (Fla. 1996) (finding individual post-conviction claims legally insufficient, but concluding that cumulative effect of errors warranted new trial). As a result, this Court should reverse the trial court's denial of this claim and remand this case for a new trial before a fair and impartial jury.

### E. Counsel's failure to investigate and present evidence in mitigation--Claims V, XII, and XIV

Mastos' most egregious failures occurred in relation to the penalty phase of Mr. Cummings-El's trial, for when the jury returned to consider Appellant's fate, Mr. Mastos had done nothing to prepare a penalty phase case. He had not interviewed any witnesses. He had not spoken to Appellant's family, friends, or co-workers. He had not investigated Appellant's educational, medical, psychological, or social history. He had not even made a perfunctory attempt to document Mr. Cummings-El's life prior to this crime. Thus, when it came time to present a case for mitigation, Mr. Mastos was completely unprepared to present one.

And what he managed to present was more harmful than beneficial. In a halting, narrative style (indicative of counsel's unfamiliarity with these witnesses), two of Appellant's older sisters, Diane Wooden St. Fleur and Catherine Wooden Covington, testified on Appellant's behalf. But because Mr. Mastos asked inappropriate questions, any mitigating evidence these witnesses had to offer was completely dispelled. For example, despite the violent nature of the current offense and of Appellant's three prior violent felony convictions, Mr. Mastos asked both witnesses whether Appellant was a violent man. Both witnesses opined that he was not. (TR VI 1008, 1019). Quite naturally, the State vigorously cross-examined these two

witnesses and completely discredited their testimony. (TR VI 1012, 1023-25).

Similarly, Mr. Mastos asked both witnesses how Appellant treated his family. Both witnesses indicated that he was a good father to his children. (TR VI 1007-08, 1021). Once again, the State dismissed their testimony by emphasizing that Appellant had spent the majority of his children's lives in prison, unable to care for them, and was now facing either life imprisonment or the death penalty for a violent murder. (TR VI 1012-13, 1015-16, 1022-23).

Finally, through an obvious lack of preparation for their testimony, Mr. Mastos allowed both witnesses to antagonize the jury. When asked if she had anything to say about her brother's fate, Ms. St. Fleur acknowledged the guilty verdicts, but disputed the jury's findings: "I know the jury found him guilty, but I personally I don't believe it." (TR VI 1008). Then she asked the jury to spare her brother's life because it was a burden on her to care for his four children, and because her mother, who had just had a slight stroke, "can't take no more." (TR VI 1009-10). Likewise, Ms. Covington also disputed the jury's verdict: "Because to be truthful, I really don't feel like Fred killed the girl." (TR VI 1020). Once again, the

State completely discredited these two witnesses' testimony on cross-examination. (TR VI 1013, 1025).

Ultimately, and most importantly, because their testimony was so ineffectual, the trial court wholly rejected it in mitigation:

> Defendant's two sisters testified that Defendant is a loving father, comes from a close family and has strong family support. Both sisters believe Defendant isn't a violent man in spite of his three prior felony convictions.
>
> However, unlike other trial witnesses, Defendant's sisters did not hear and see his three violent confrontations with Kathy Williams Good before he murdered her. In addition, unlike other trial witnesses, neither sister saw the Defendant running out of Kathy Williams Good's bedroom after he brutally stabbed her.
>
> These two women testified from their hearts. Unfortunately, their family portrait of the Defendant isn't based on fact or in reality as reflected by the evidence of this case.

(TR VI 1084) (emphasis added).

Had Mr. Mastos made even a cursory attempt to investigate mitigation, he would have uncovered a profusion of evidence, both factual and reality-based, to present to the judge and jury. The record is clear, however, that he did nothing. In fact, thirteen months after Mr. Mastos had been appointed to represent Appellant, he informed the trial court that he had yet to investigate the penalty phase of Appellant's case. He had

not even hired a private investigator because he claimed he had nothing to investigate. With the trial only three weeks away, Mr. Mastos sought a psychiatric evaluation because Appellant was being uncooperative, but not because he was refusing to speak with counsel: "Judge, I know we have to make one thing clear. It's not that Mr. F.W. Cummings refuses to talk to his attorney, no, . . ." (E.H. Exh. #8 at 4). Rather, Mr. Mastos was having difficulty explaining the function and importance of mitigation. It seemed that Mr. Cummings-El did not want to present mitigation because he did not want his family "begging for his life." Obviously, Mastos did not explain to him that he could present mitigation without "begging."

During the detailed colloquy to follow, Mr. Cummings-El twice informed the trial court that Mr. Mastos could contact his family regarding mitigation:

> THE COURT: Would you have any objection if your lawyer at least were able to talk with family members to find out about you?
>
> THE DEFENDANT: As I stated to him and told you, he can talk to all my family members and who he wants to talk to.
>
> THE COURT: And if he finds something that would be [sic] have benefit for you, then I assume that he would be able to talk to you about that first, so that there may be a possibility that maybe a week from now or 10 days from now Mr. Mastos might say something to you, believe it or not, which

> may change your mind as to the second phase of the trial.
>
> I want him to at least be able to gather information so that he can say to you, Fred, look, I know your feeling, but this is what I have heard and according to the law this may be helpful for you.
>
> How about that? Will he be able to do that at least?
>
> THE DEFENDANT: Yes, sir.

(E.H. Exh. #8 at 12-13) (emphasis added). See also id. at 6 ("Now, if [he] want[s] to talk to my family members, he's welcome to.").

Three and a half weeks later, when the jury rendered its verdicts,[12] Appellant responded emotionally to their decision by offering to waive any penalty phase evidence, including the testimony of his sister who was in the courtroom. Concerned, however, that Mr. Cummings-El was making a hasty and reactive decision, the trial court reset the penalty phase for the following Wednesday, five days later.[13] (TR VI 895-901). By the

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[12] No other discussion occurred regarding Appellant's inclination to waive mitigation between this hearing on January 4 and the end of the guilt phase.

[13] At that point, given Mr. Cummings-El's obvious despondency over the jury's verdict, counsel had an even stronger duty to investigate Appellant's mental state, but he did not do so. See Blanco v. Singletary, 943 F.2d 1489 (11th Cir. 1991) ("According to [counsel], after the jury returned its guilty verdict, Blanco became further depressed and unresponsive. . . . Counsel therefore had a greater obligation to investigate and analyze available mitigation evidence."); (continued...)

time the penalty phase commenced, Appellant had reconsidered and had decided to allow the presentation of mitigating evidence. (TR VI 920-21).

Unfortunately, Theodore Mastos was grossly unprepared. In those three and a half weeks, despite Mr. Cummings-El's invitation to investigate his background, Mr. Mastos had done nothing. Appellant's sister, Catherine Covington, who testified at the trial, testified at the evidentiary hearing that neither Mr. Mastos, nor anyone else, contacted her prior to her trial testimony. Nor had Mr. Mastos contacted anyone else in her family. She met Mr. Mastos for the first time on the day of her testimony when he approached her in the hallway, while court was in recess, and asked her if she wanted to testify. He asked her and Appellant's children, who were present, a few questions, then the judge returned and she never spoke to him again. Her sister, Diane St. Fleur, who has since passed away, was angry that no one had contacted them previously. (PCRS IV 843-47).

At the evidentiary hearing, Mr. Mastos admitted that he had done nothing to investigate mitigation. In fact, he conceded that he had not even broached the subject of mitigation with

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[13] (...continued)
Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986) ("An attorney has expanded duties when representing a client whose condition prevents him from exercising proper judgment." (citation and footnote omitted)).

Appellant until the end of 1992 when a trial date was looming.[14] (PCRS VII 1750). Then he excused his idleness by blaming Mr. Cummings-El. Mastos explained at the evidentiary hearing that when he posed the subject of mitigation, Appellant was convinced of his innocence and confident that the jury would acquit him because of inconsistencies in the witnesses' deposition testimony. (PCRS VII 1713-14). Therefore, according to Mastos, Mr. Cummings-El did not want to present a case in mitigation because he did not want to "beg for his life" for a crime he did not commit. (PCRS VII 1714). However, Mastos candidly conceded that Appellant was not adamant about waiving mitigation at this point:

> Q. [BY COLLATERAL COUNSEL] Now, when you first raised the issue [of mitigation] with him, did he tell you at that point that he didn't want anyone begging for his life?
>
> A. [BY MASTOS] Well, in looking back, I don't think he was quite that strident at that early stage.

(PCRS VII 1750).

Yet, Mastos did nothing to prepare in the weeks to follow. He did nothing because he believed that he and Appellant had a good relationship. Appellant seemed to trust him, and he did not want to lose that trust. (PCRS VII 1709). He believed he

[14] Mastos was appointed on December 4, 1991. Trial was set for, and commenced on, January 25, 1993.

would do so if he "went behind his back" and interviewed Appellant's family members, despite Mr. Cummings-El's invitation to do so. (PCRS VII 1719).

On the other hand, Mastos believed that the State had a strong case against Appellant because the witnesses knew him and could identify him as the perpetrator. (PCRS VII 1705-06). Mastos further believed that Appellant's conversion to Christ had led him to accept his life and that Appellant had convinced himself of his innocence. (PCRS VII 1713, 1715). He testified that Appellant seemed to understand the concept of mitigation, but did not want to present any evidence, so Mastos did nothing to investigate or prepare for the penalty phase:

> Q. [BY THE STATE] Did he – did he appear to understand your explanation of the process?
>
> A. [BY MASTOS] I had every reason to believe that he understood. And again, being that I thought Fred was an intelligent man. I mean, his ability to think and reason, look at the depos[itions], be in full command of the facts. Again, when he said, I don't want a penalty phase, that was [it] -- I accepted it.
>
> Q. Did you go behind his back and investigate and prepare a penalty phase by contacting family members?
>
> A. No.
>
> Q. Or investigating his background or any of those things?

A. No.

(PCRS VII 1716-17) (emphasis added).

Even after Appellant told the judge at the January 4 hearing that Mastos could talk to his family, Mastos admittedly did not investigate:

> Q. [BY THE STATE] Now, between January 4th and the beginning of jury selection, which would have been about January 25th, right, sometime during the last week of January?
>
> A. I believe it was – it was a relatively short period.
>
> Q. Okay.
>
> A. Three weeks, two weeks maybe.
>
> Q. All right. But you at least had two or three weeks to begin the process of contacting family members. Did you call anybody?
>
> A. I don't recall calling anybody. I did see them in the courtroom. I talked to them in the courtroom.
>
> Q. No. I mean before the trial started.
>
> A. Did I launch some independent search? No.

(PCSR VII 1764) (emphasis added). Nor did he hire a private investigator or obtain release forms from Appellant to procure confidential records. (PCRS VII 1765). He simply relied on

Appellant's protestations of innocence to dictate his action, or in this case inaction, in pursuing mitigation:

> A. [BY MASTOS] And again, you know, I know we're going in circles here, but I took the man at his word. I did not conduct any investigation. I didn't feel that that's what my client wanted. He grudgingly allowed me to talk to these people. I tried to get a few nuggets of humanity in front of the jury and that's it.
>
> Q. [BY COLLATERAL COUNSEL] Did you ever have any reason to believe that the family members would not have talked to you if you would have attempted to contact them?
>
> A. No.

(PCRS VII 1777) (emphasis added).

In fact, after the jury's verdicts, Appellant ultimately agreed to allow Mastos to present the testimony of his two sisters. (PCRS VII 1720-21). But Mastos had little to present because he had done nothing to prepare. He had spent only a few minutes with Ms. St. Fleur and Ms. Covington in the courtroom hallway. In that brief period of time, he had no ability to obtain a complete social history and no time in which to obtain additional or corroborative information. As a result, their testimony was ineffectual and ultimately rejected by the trial court.[15]

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[15] In the two weeks between the jury's recommendation on February 3, 1993, and the final sentencing hearing on February (continued...)

Had Mastos taken the time and made the effort to investigate Appellant's life, he would have discovered what one forensic psychologist described as "one of the most dysfunctional families [she has] ever heard of." (PCRS VI 1318). Having been a forensic psychologist for the past 25 years, Dr. Merry Haber routinely performed 300+ mental health evaluations per year for the Dade County Jail. In her opinion, Mr. Cummings-El's psycho-social history was "one of the worst." (PCRS VI 1318). From multiple interviews with Appellant,[16] and from independent sources,[17] Dr. Haber constructed a psycho-social history of Appellant's life. This information was corroborated and further illustrated at the evidentiary hearing by Appellant's sister,

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[15] (...continued)
19, 1993, Mastos likewise made no attempt to investigate mitigation. Nor did he submit a sentencing memorandum. Finally, at the hearing itself, Mastos made no argument on Appellant's behalf: "I don't think there is anything that could be said or done at this time." (TR VI 1077).

[16] Dr. Haber testified that she interviewed Appellant in May or June 1999 at Union Correctional Institution and again in December 1999, January 2000, and April 2000 at the Dade County Jail. (PCRS VI 1313). All told, she met with Appellant nine times. (PCRS VIII 1936).

[17] Dr. Haber testified that she reviewed school records, prison records, pre-sentence investigation reports, and Department of Corrections mental health records. (PCRS VI 1315). She also obtained information from a private investigator hired for Appellant's post-conviction proceedings, as well as from Appellant's former and current collateral defense attorneys. (PCRS VI 1314).

Catherine Covington; his niece, Catherine Wooden; his long-time girlfriend, Deborah Dawson, who was the mother of four of his children; his son, Frederick Dawson; and a neighborhood friend, Eddie Webster.

According to these witnesses, who were available and willing to testify at the time of trial, Appellant's mother, Martha Wooden, married Jule Wooden Sr. and together they had (in order of birth): Willie, Mary, Catherine, Diane, and Jule Jr. (PCRS IV 792). Martha and Jule Wooden Sr. divorced when the children were very young. According to Catherine Covington, they fought all the time. Jule would hit Martha with sticks. Martha finally left him when he beat her with a crowbar and put her in the hospital for a long period of time. (PCRS IV 806-08).

Following the birth of Jule Wooden, Jr., Martha Wooden had a brief relationship with Randolph Cummings. She gave birth shortly thereafter to Appellant, Frederick Wooden, who later changed his name to F.W. Cummings to adopt his father's surname. (PCRS IV 806, 808). Appellant was the only child of this union.[18]

Appellant's father, Randolph Cummings, was a migrant field supervisor in South Dade County. He died in 1970 when Appellant

[18] Appellant was lighter complected than his siblings. As a result, he was often called "Red Boy" by his friends and family. (PCRS VI 1322).

was in the seventh grade. Appellant believed that his father's employees killed him because he was so mean and violent. Appellant had only seen his father six or seven times and had had no relationship with him. (PCRS VI 1325).

Martha Wooden then had two children by Leon Popaul: Bruce and Chris. Though divorced from Jule Wooden Sr. at the time, Martha and Jule conceived Annie Liza Wooden shortly thereafter. Following the birth of Annie Liza, Martha Wooden had a relationship with Nathanial Adkins, and they had a child, Gladys. Then she had a relationship with Clarence Carter and together they conceived Regina, who died in infancy, and Clarence Carter, Jr. (PCRS IV 809-10). According to Catherine Covington, Appellant's second oldest sister, none of Martha's suitors were father figures to Appellant or took any interest in him. (PCRS IV 811). Appellant considered Catherine to be his mother. But Catherine had her own child when she was twelve. (PCRS VI 1320-21).

The Wooden/Cummings/Popaul/Adkins/Carter family lived in a four bedroom, one bath, house in Perrine, Florida, an impoverished community in southern Dade County. (PCRS IV 815-16; VI 1323). Often, eight to ten other children, some relatives of Martha Wooden and some not, lived at the house.

(PCRS IV 912). According to Catherine, "the house was full of people." (PCRS IV 820).

Appellant's mother, Martha Wooden, did not work much, nor did she stay home to care for her twelve children and eight to ten guests. Instead, she played cards, sometimes for days at a time, elsewhere in the neighborhood, while the children fended for themselves. (PCRS IV 802-04, 900). Catherine remembered a great deal of drugs, burglaries, and fighting in the neighborhood. (PCRS IV 816, 818). She also recalled subsisting off of welfare. (PCRS IV 804).

When Martha Wooden was at home, she would beat her children, and her guests, when she saw them "do wrong." She beat Appellant with extension cords, belts, a mop handle, the water hose, and switches. (PCRS IV 819, 916). According to Appellant's niece, who lived in the home, Martha Wooden had a very quick temper and would beat the children, including Appellant, with "whatever she could get her hands on at that time." (PCRS IV 914). She often called the children into the bedroom and beat them for ten or fifteen minutes. When she called them in, she would always say, "[G]et on your fucking knees." (PCRS IV 915-17). Appellant's niece saw her grandmother beat Appellant fifteen to twenty times over the years. Sometimes he ran, but he never fought back. (PCRS IV

921). Her grandmother's beatings often left welts, scars, and bruises on their body. Appellant's niece had scars on her own back from the beatings. (PCRS IV 973).

Appellant's sister, Catherine, recalled that on one occasion Martha Wooden told Appellant not to leave the house while she was gone. When Martha Wooden returned to find him gone, she hid behind the door. When Appellant walked in, she "let him ha[ve] it." (PCRS IV 819-22).

Of the twelve children born to Martha Wooden, eleven had been incarcerated and/or had had drug problems during their lives. Several had already deceased. For example, Willie, the oldest child, died in 1995 or 1996. (PCRS IV 795). Mary had been a prostitute. When Appellant was nine or ten years of age, he would collect $2 for the motel room and $5 for sex from Mary's customers. Mary died from injuries received in jail. (PCRS IV 796; VI 1320). Appellant's third oldest sister, Diane St. Fleur, who testified at Appellant's trial, died of AIDS in a federal penitentiary in 1996. She was a heroin abuser. (PCRS IV 797-98; VI 1321). At the time of the evidentiary hearing, Jule Jr. was serving time in a federal penitentiary. (PCRS IV 799; VI 1321). Bruce had just been released from prison and was an alcoholic. (PCRS IV 799; VI 1324). Chris was currently in jail in California. (PCRS IV 799-800; VI 1324). When Appellant

was young, he would shoplift with Annie Liza, and Jule Jr. would fence the stolen merchandise. Annie Liza suffered from an undisclosed mental illness and was hospitalized several times because of her use of PCP. She was ultimately murdered. (PCRS IV 800; VI 1323). Gladys was the only child who had never been arrested. She is still living. (PCRS VI 1324). Regina died in infancy. (PCRS IV 801). Finally, Clarence, the youngest of Martha Wooden's children, was in federal prison in Texas for drugs. (PCRS IV 801-02; VI 1324).

According to Dr. Merry Haber, Appellant's family taught him to live outside the rules of society:

> Fred was programmed. He was programmed. He clearly has an antisocial personality disorder with the features therein, including impulsiveness and irresponsibility and history of criminal behavior and disregard for the law, but <u>he was trained to be this. And that's what he is.</u>

(PCRS VI 1335,1341) (emphasis added).

His family, and others in his community, also taught him to abuse drugs. According to several witnesses, Appellant began smoking cigarettes and using drugs when he was approximately twelve years of age. He sniffed glue and transmission fluid, smoked marijuana, and drank alcohol several times per week. (PCRS IV 823; VI 1330-31; VIII 1955-56). His grades became progressively worse, dropping from C's to D's to F's by the

eighth grade. By then, he was using heroin and cocaine intravenously. (PCRS VI 1331). Appellant's sisters, Catherine and Diane, tried to talk to Appellant about his drug use when he was fifteen, but to no avail. (PCRS IV 865, 928). Appellant dropped out of school in the tenth grade with all F's. (PCRS VI 1331).

In 1977 or 1978, when Appellant was 19 or 20 years old, he met Deborah Dawson, who was then 17 or 18 years of age, and they conceived their first child, Fredricka, within three to four weeks of their meeting. (PCRS VI 1419-20). Lyndon was born the following year. Deborah was pregnant with Frederick, Jr., when Mr. Cummings-El moved to Los Angeles to deal drugs for his brother Willie. In Los Angeles, Appellant continued to use cocaine and heroin. (PCRS IV 832; VI 1331, 1421-22). Deborah followed him to California with the children, where they had a fourth child, Dedrick, and lived on welfare for approximately three and a half years. (PCRS VI 1421, 1433).

According to Deborah, she did not use drugs until they moved to California, then she and Appellant began smoking crack cocaine. (PCRS VI 1423-24). Appellant was arrested five times in California and spent nine or ten months in prison there. (PCRS VI 1441-42). When Appellant was released, he had a $2,500 per day cocaine habit. Then he and Deborah moved back to Miami

in 1982 and his drug use decreased, although Eddie Webster remembered smoking crack with Appellant during that time. (PCRS VI 1332; VIII 1957).

Back in Miami, Appellant and his family moved in with Appellant's mother, Martha Wooden, then they rented their own place. Appellant worked at a restaurant and did construction work. (PCRS VI 1426). Shortly thereafter, Appellant moved to North Carolina, at which time he and Deborah Dawson ended their long-term relationship. (PCRS VI 1431). While there, Appellant committed two armed robberies and spent seven years in state prison. (PCRS VI 1446). While in prison, Appellant had his sister, Diane (the now-deceased heroin user who died of AIDS in federal prison) obtain temporary custody of his children because their mother, Deborah Dawson, was a serious drug abuser and unfit to care for them. (PCRS IV 939). Upon his release, he returned to Miami for a short period of time. His three sons stayed with him, while his daughter stayed with his sister, Diane. (PCRS IV 836; VI 1458). Shortly thereafter, he was convicted of aggravated battery in Quincy, Florida, and sent to prison for another three years. When he was released from there, he returned to Miami and began shooting heroin again two to three times per day. (PCRS VI 1331-33). His niece also reported seeing him smoke crack cocaine. (PCRS IV 924-27).

According to Appellant's sister (Catherine), his niece (Catherine), and his son (Frederick), Appellant was a good father to his children when he was not in prison. He took them to the park and other places and spent a lot of time with them. (PCRS IV 837, 934-38; VI 1463). He tried to teach his children to do better than he had done. (PCRS IV 840). He encouraged them to stay out of prison, to go to school, and to be good people. (PCRS VI 1429-30, 1459). Although he disciplined them with a belt, he never did so to injure them. Afterwards, he would talk to them about what they had done wrong. (PCRS VI 1460-61).

Appellant's sister, Catherine Covington, who testified at Appellant's trial, was obviously available to provide all of this information to Mr. Mastos. But Mastos never contacted her and spent only a few minutes with her in the hallway during a court recess. (PCRS IV 843-47). Similarly, Appellant's sister, Diane St. Fleur, though now deceased, was available to, and did, testify at Appellant's trial. But because of Mastos' ineffectiveness, we will never know what mitigating evidence she could have presented. Likewise, Appellant's niece, Catherine Wooden, was available, but was never called as a witness. She testified at the evidentiary hearing that she met Mastos for the first time on the day of the verdict. He did not question her,

but asked her to remain nearby in case he wanted to call her as a witness. He never did. (PCRS IV 959-60). Finally, Appellant's son, Frederick Dawson, was introduced to the jury during the penalty phase as he sat in the gallery. (TR VI 1006-07). Though only thirteen at the time, he could have related an abundance of information to the jury about his father. But he was not asked to do so.

Admittedly, Mastos did nothing to prepare for the penalty phase because he thought his client wanted to waive mitigation. Yet, when he broached the subject near the end of 1992, Mr. Cummings-El was not, in Mastos' own words, "that strident" about doing so. Then, at the hearing on January 4, 1993, Mr. Cummings-El twice told the court that Mastos could interview his family and anyone else he wanted to contact. He also agreed to discuss the evidence with Mr. Mastos before making a decision. Mr. Cummings-El then told Dr. Jacobson, as will be discussed infra, that he might reconsider his desire to waive mitigation, a fact Dr. Jacobson made known in his report. Finally, and most importantly, Mr. Cummings-El ultimately did allow Mastos to present mitigation at the penalty phase, but because Mastos had done nothing to investigate, he had little to present.

Theodore Mastos likewise failed to discover and present a wealth of mental mitigating evidence that would have explained

Appellant's actions throughout his life, as well as his actions relating to this event. Because he did nothing, the jury was left to recommend a sentence for a brutal murder, unaware that Appellant suffered from brain damage, mental illness, and a low average IQ. See Stevens v. State, 552 So.2d 1082, 1087 (Fla. 1989) ("[W]hen counsel fails to develop a case in mitigation, the weighing process is necessarily skewed in favor of the aggravating factors argued by the state. . . . Moreover, if the trial judge views the case as one without any mitigating circumstances when in fact those circumstances exist, then confidence in the trial judge's decision . . . is undermined."). In combination with the social history detailed above, there is every reasonable probability that the jury's recommendation would have been different had counsel investigated and presented such evidence. Only two more jurors needed to vote for a life sentence for Appellant to be spared execution. But Theodore Mastos completely failed in his duty to investigate and present mitigation on Mr. Cummings-El's behalf. As a result, counsel's ineffectiveness gravely prejudiced Appellant's right to a fair sentencing proceeding. See Rose v. State, 675 So.2d 567 (Fla. 1996) (finding trial counsel ineffective in penalty phase where "there was no investigation of options or meaningful choice"; rather, counsel latched onto admittedly ill-conceived

"accidental death" theory proposed by colleague); Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995) (finding trial counsel ineffective where "counsel's sentencing investigation was woefully inadequate"); Phillips v. State, 608 So.2d 778 (Fla. 1992) (finding trial counsel ineffective where counsel "did virtually no preparation for the penalty phase"); State v. Lara, 581 So.2d 1288 (Fla. 1991) (finding trial counsel ineffective where counsel "virtually ignored the penalty phase of the trial"); Stevens, 552 So.2d at 1085-89 (finding counsel's failure to investigate and present mitigation highly prejudicial in jury override case).

In preparation for trial, Mr. Mastos, who has no apparent expertise in mental health, made a layman's assessment that Appellant suffered neither brain damage nor mental illness. (PCRS VII 1714, 1716). As a result, he made no effort to have Mr. Cummings-El evaluated for same. Rather, when Appellant began to resist his efforts to present evidence in mitigation, Mr. Mastos asked the trial court three weeks before trial to appoint Dr. Sanford Jacobson to determine solely whether Mr. Cummings-El was competent to waive mitigation. See Blanco v. Singletary, 943 F.2d 1477, 1503 (11th Cir. 1991) (finding a "great difference" between evidence sufficient to establish incompetency and mental health mitigating evidence: "One can be

competent to stand trial and yet suffer from mental health problems that the sentencing jury and judge should have had an opportunity to consider.").

The next morning, Dr. Jacobson evaluated Mr. Cummings-El and opined, without any psychological testing or background materials, that Mr. Cummings-El was competent to proceed to trial. Regarding Appellant's attitude toward mitigation, Dr. Jacobson stated that it was neither "irrational [n]or bizarre." Critically, the doctor concluded that "[i]t might not be in his best interest at this time but the defendant might, if necessary, alter that opinion or view." (PCR I 93-96). Thus, Mastos was put on notice that his client was not steadfast, as he had believed, in waiving mitigation. Yet counsel did nothing to prepare for that eventuality, which later became a reality.

Had counsel acted reasonably in preparing this case for trial, he could have retained Dr. Merry Haber to evaluate Mr. Cummings-El for mitigation purposes. After all, Dr. Haber has worked as a forensic psychologist in the Dade County Jail for 25 years. (PCRS VI 1342). Had he done so, Mastos not only would have discovered Mr. Cummings-El's horrendously dysfunctional family history, but he also would have established two statutory mental mitigators.

Dr. Haber testified at the evidentiary hearing that she performed a mental status examination, conducted a clinical interview, and administered the MMPI II, the Millan Clinical Multiaxial III, and the Wide Range Achievement Test. (PCRS VI 1315). Based on Appellant's report of two head injuries and a history of ingesting transmission fluid, she suggested a neuropsychological evaluation, which was performed by Dr. Schram and corroborated by Dr. Frumkin, a forensic psychologist. (PCRS VI 1316-17). From her evaluation, Dr. Haber opined that Mr. Cummings-El's ability to conform his conduct to the requirements of law was substantially impaired, and had been since childhood:

> He's never been able to conform his conduct to the requirements of the law. He was taught from an early age not to. . . . He was affirmatively taught that completely in his family. That was how he was brought up. Those were the rules and regulations in the family tradition. . . . Very different from that of mainstream society, but clearly he is the -- he is the product of his upbringing and has been for forty-one years.

(PCRS VI 1334-35) (emphasis added). Further, she opined that Mr. Cummings-El was under the influence of an extreme mental or emotional disturbance at the time of the murder:

> I believe he's been under [an] extreme mental or emotional disturbance almost all of his life. He has had to fight to survive, to defend himself to live, to exist in his neighborhood, in his community. I think this has always been emotionally distressful and extremely so. This is an

> extreme example of someone who has had a failure to adapt to society and who is stressed because of that because he's always on the outskirts of society.

(PCRS VI 1335-36) (emphasis added).

Dr. Haber also noticed that Appellant had a tendency to focus on a certain issue and be unwilling or unable to change that focus. (PCRS VI 1337). In fact, in her opinion, Appellant's actions in this case suggested obsessive/compulsive personality features. After Kathy Good ended her relationship with Mr. Cummings-El, he became obsessed with her. He stalked her, beat her, then threatened her. He could not let her go. (PCRS VI 1340-41).

Dr. Haber found him equally obsessed with obtaining a new trial. The Millan Clinical Multiaxial III, a personality inventory that correlates its diagnosis with the DSM-IV, confirmed that Appellant had obsessive/compulsive traits, and the neuropsychological tests further corroborated that finding. (PCRS VI 1338).

Dr. Lynn Schram, a clinical neuropsychologist on staff at Mt. Sinai Medical Center, performed a battery of neuropsychological tests on Mr. Cummings-El after reviewing his medical history, school records, and drug use history. (PCRS V 1118, 1138-40). Dr. Schram discovered a lengthy history of gasoline huffing, as well as a scar on his scull caused by

trauma. (PCRS V 1140). He tested Appellant's IQ, which revealed a full-scale score of 82, an IQ on the borderline between average and low-average. (PCRS V 1141). He also discovered that Appellant read at the fifth- to sixth-grade level. (PCRS V 1200).

Other tests Dr. Schram administered included the California Verbal Learning Test, designed to test memory, on which Appellant scored in the low normal range; the Stroop Color Word Test, designed to test cognitive mental flexibility, on which Appellant scored in the severely impaired range; the Speech, Sounds, Perception Test, designed to test attention and concentration, on which Appellant scored in the borderline low normal range, but which suggested organicity; the Seashore Rhythms Test, a more sensitive test for attention and concentration, on which Appellant scored in the moderate impairment range; the Grooved Peg Board Test, designed to test manual dexterity, on which Appellant scored in the normal range; the Weschler Memory Scale Revised, on which Appellant scored in the normal range; the Trails A & B Test, designed to test simple visual scanning, sustained attention, and psychomotor speed, on which Appellant scored in the normal range for both parts; the Hooper Visual Organizing Test, designed to test visual synthesis, on which Appellant scored in the normal range; the

Judgment of Line Orientation Test, designed to test visual space perception, on which Appellant scored in the low normal range; the Digit Span Test, designed to test sustained attention, on which Appellant scored in the low normal range on the digits forward and in the severely impaired range on the digits backward, which was indicative of brain damage; a verbal fluency test, on which Appellant scored in the normal range; and the Boston Diagnostic Aphasia Exam, on which Appellant scored in the normal range. (PCRS V 1148-77).

According to Dr. Schram, the pattern of tests and results showed a probability of brain damage: "The pattern is indicative of an attention/concentration problem." (PCRS V 1179-80, 1210). It showed an impairment in Appellant's mental flexibility, i.e., the ability to hold one thought in his mind while doing something else. (PCRS V 1180). Dr. Schram noted Appellant's history of drug use as a likely cause of such impairment. Appellant reported huffing gasoline three to four times per week from his preteens to his midteens or older. That such drug use occurred during puberty was critical to the doctor's findings because of the intensity of brain development during those years. (PCRS V 1183-84). Appellant also reported using cocaine and heroin from his midteens to the time of his incarceration. (PCRS V 1190).

Dr. Bruce Frumkin, a clinical and forensic psychologist further detailed Mr. Cummings-El's history of drug use. Appellant reported huffing gasoline at the age of ten or eleven, then transmission fluid daily through the eleventh grade. Appellant reported smoking marijuana at the age of twelve. At fifteen or sixteen, he started intravenously injecting "speed balls," a combination of cocaine and heroin. (PCRS VII 1473-77). By his late teens or early twenties, Appellant was using crack cocaine, PCP, and Quaaludes. He began drinking alcohol at nine or ten, ingesting one to two pints, plus a six-pack daily by his teens. (PCRS VII 1477). Because Appellant was hesitant to provide the information regarding his substance abuse, Dr. Frumkin believed that Mr. Cummings-El was more likely under-representing, rather than exaggerating, his drug use. (PCRS VII 1509).

Dr. Donati, an assistant to Dr. Frumkin, administered a taped version (because of Appellant's poor reading skills) of the MMPI II and two sub-tests of the Wide Range Achievement Test. (PCRS VII 1475). According to Dr. Frumkin, the test results were consistent with Dr. Schram's results, in that Appellant scored high for depression and showed antisocial personality features. (PCRS VII 1481-87). Ultimately, Dr. Frumkin diagnosed Appellant with depressive disorder,

polysubstance abuse, and organic brain deficit on Axis I, and Antisocial Personality Disorder on Axis II. (PCRS VII 1492).

To contradict these findings, the State presented the testimony of Dr. John Spencer, a forensic psychologist, who evaluated Appellant in June 2000. (PCRS VII 1541, 1547). Dr. Spencer's findings, however, were more corroborative than contradictory. For instance, Dr. Spencer concluded that Appellant's IQ was on the borderline between low average and average, just as Dr. Schram had found. He also made an Axis II diagnosis of Antisocial Personality Disorder, just as Drs. Haber and Frumkin had done. (PCRS VII 1543). And he agreed with Dr. Haber that persons with APD often "burn out" with age and tend to conform more to social and environmental structure, as it exists in prison. (PCRS VI 1345-46; VII 1566).

What Dr. Spencer disputed was Dr. Schram's finding of organic brain damage. In his three-hour and forty-minute evaluation, which consisted solely of a clinical interview and the oral administration of the MMPI II (a personality inventory, not a neuropsychological test), Dr. Spencer (a psychologist, not a neuropsychologist like Dr. Schram) "didn't see any clinical evidence of any significant brain damage." He "saw nothing to indicate any gross cognitive impairments." (PCRS VII 1544) (emphasis added). He then used examples in Dr. Haber's report

and in his own taped interview session with Appellant to show that Mr. Cummings-El had no impairment in his "cognitive flexibility," i.e., his ability to change his focus to solve problems. (PCRS VII 1568-88).

On cross-examination, however, Dr. Spencer admitted that Appellant's score on the L scale of the MMPI II, which is a scale to assess malingering, was high enough to question the validity of Dr. Spencer's test. (PCRS VII 1633). In fact, the K scale on the MMPI II indicated that Appellant was "attempting to present himself in a more positive light." (PCRS VII 1632). And the narrative report that Dr. Spencer obtained when he submitted the raw data for scoring indicated that Appellant was being "unrealistically virtuous." (PCRS VII 1632).

Given the elevated malingering scales, Appellant submits that Dr. Spencer's MMPI test results were invalid and, along with Dr. Spencer's lack of qualifications as a neuropsychologist, completely undermined his conclusions that Appellant had no organic brain damage. Moreover, the elevated scales serve to dispel any claim by the State that Appellant was malingering "bad," i.e., grossly exaggerating his psycho-social history in order to establish mitigation, mental or otherwise. Mr. Cummings-El had an indisputably horrendous childhood, adolescence, and adult life. As Dr. Haber opined, he was taught

to live outside the law. Coupled with his low IQ and his undisputed obsessive/compulsive traits, his social and psychological history established significant mitigating evidence--evidence the jury never heard.[19]

To further rebut Dr. Schram's finding of organic brain damage, the State presented the testimony of Dr. Jane Ansley, a forensic neuropsychologist, who was the last of five mental health experts to interview Appellant. Once again, the majority of Dr. Ansley's findings supported, rather than contradicted, those of Drs. Haber, Schram, and Frumkin. For example, Dr. Ansley testified that Appellant performed in the low average range of intelligence. (PCRS VIII 1838). After reviewing the other experts' test results, she too concluded that Appellant met the criteria for Antisocial Personality Disorder. (PCRS VIII 1838-39). She merely contested Dr. Schram's finding of organic brain damage, specifically his finding of impairment in Appellant's "executive functioning," i.e., Appellant's ability to think and adapt to changing situations. (PCRS VIII 1879, 1887). Because she found no organic impairment, she concluded that neither of the statutory mental mitigators were present,

[19] Significantly, Dr. Spencer did not dispute Dr. Haber's findings that Appellant's ability to conform his conduct to the requirements of law was significantly impaired or that Appellant committed the murder under the influence of an extreme mental or emotional disturbance.

despite Appellant's horrific childhood and an APD classification that suggests he is an "impulsive and nonreflective person who may have a history of serious legal offenses" likely resulting from "a hedonistic form of lifestyle and [an] inability to delay gratification." (PCRS VIII 1856, 1905-06).

As is often the case, the trial court was faced with conflicting opinions among several mental health experts, at least with regard to the issue of organicity. "However, as [is] the case with the childhood mitigation, the fact that [Appellant's mental mitigation evidence] may be rebutted by State evidence or argument does not change the fact that it should have been considered by the jury. It is impossible to tell at this point which experts the jury would have believed." Phillips, 608 So.2d at 783.

Critically, all of the other diagnoses and conclusions remained consistent among the five experts. Moreover, neither the State, nor its experts, disputed Appellant's horrific social history. And contrary to the trial court's finding, the testimony of Appellant's sister, niece, son, girlfriend, and childhood friend was not "essentially the same non-statutory mitigation evidence as that presented at trial by the Defendant's two sisters." (PCR IV 337). These witnesses' testimony was not even close to the meager, and ultimately

fatal, testimony Mastos presented at the trial. See Hildwin, 654 So.2d at 110 & n.7 (finding counsel's sentencing investigation "woefully inadequate" despite calling defendant's father, two guardians, defendant's friend, and defendant himself: "The testimony of these witnesses was quite limited."). Thus, the trial court abused its discretion in completely rejecting Appellant's evidence in mitigation.

Likewise, the trial court's assessment of Appellant's mental mitigation is not supported by the record. In fact, the trial court missed the point completely. It repeatedly condemned such evidence for the negative effect it would have had on the jury, and it focused on Mastos' "strategy" of presenting only positive character traits, i.e., putting a "human spin" on the case. (PCS IV 337, 338). But the evidence Appellant presented at the evidentiary hearing painted a larger, more complete picture. It would have provided the jury tremendous insight into the life and mind of the person the State was seeking to condemn to death--a frame of reference for their recommendation. It would have explained to a great degree the "who" behind this murder and the "why"--something beyond the State's "if I can't have you no one else will" theory.

The trial court spent the majority of its written order comparing the credentials of the expert witnesses (PCR IV 338-

41), but its analysis and conclusions were clearly erroneous. For instance, it dismissed Dr. Haber's conclusions because she was not a neuropsychologist. (PCR IV 339-40). Then it briefly related the findings of Dr. Frumkin, a forensic psychologist, but gave no reason for dismissing them. (PCR IV 339). Finally, it rejected the findings of Dr. Schram, who was a neuropsychologist, because his "background [did] not include extensive experience in forensics nor familiarity with the legal standards of incapacity." (PCR IV 339).

Critically, the trial court failed to consider the purpose of each witnesses' testimony. Dr. Haber was a forensic psychologist with extensive experience in evaluating persons accused of a crime and serving time in jail. She saw Appellant nine times and spent many hours with him over several days to obtain an exhaustive psycho-social history. In addition, she administered three psychological examinations. When she discovered evidence of chronic drug abuse and head trauma, she referred Appellant to a neuropsychologist. She did not herself test for, diagnose, or testify regarding brain damage or any other neurologic condition. Thus, contrary to the trial court's conclusion, her lack of expertise as a neuropsychologist was irrelevant and immaterial.

Dr. Schram was retained specifically to perform neuropsychological testing upon Appellant. Prior to becoming a neuropsychologist, Dr. Schram had been a clinical psychologist for seventeen years, and during that time had trained under a forensic neuropsychologist. As a neuropsychologist himself for the past nine years, Dr. Schram defined his job as the investigation, diagnosis, and treatment of brain injury. (PCRS V 1117-18). He was retained solely to perform neuropsychological testing in this case and that was all he did. He did not make any "forensic" findings or conclusions, nor was he asked to relate his findings to the "legal standard of capacity." He administered neuropsycho-logical tests and then formed a diagnosis relating to Appellant's probable neurologic injury. Thus, the fact that he was not a forensic neuropsychologist was of no significance and should not have rendered his conclusions invalid.

Finally, the defense retained Dr. Frumkin, a forensic psychologist, to perform his own psychological assessment and to relate his conclusions to the specific facts of this case. In doing so, he concluded that a combination of factors, including the organic brain damage diagnosed by Dr. Schram, led Appellant to fixate on Ms. Good with a kind of tunnel vision from which he was unable to divert himself. Although Dr. Frumkin admitted, as

the trial court noted, that Appellant's cognitive inflexibility might be the result of something other than brain damage, he further testified on cross-examination that even without Dr. Schram's findings he "would have had a high degree of suspicion that there might have been some neuropsychological impairment based upon . . . Mr. Cummings' history and [the doctor's own] test results." (PCRS VII 1504). Thus, both Dr. Frumkin and Dr. Haber suspected neurologic impairment independent of Dr. Schram's diagnosis.

In rejecting Appellant's mental mitigation, the trial court relied heavily on Dr. Spencer's conclusion that he could find "no clinical evidence of significant brain damage." (PCR IV 339). As noted previously, however, Dr. Spencer is a psychologist, not a neuropsychologist. Therefore, any conclusion he reached regarding a neurologic condition such as brain damage lacked credibility because the doctor was testifying outside the field of his expertise. Virtually his entire testimony was devoted to contradicting Dr. Schram's finding of organic brain damage. Yet he was not qualified to do so.

Similarly, the trial court relied extensively on Dr. Ansley's findings, noting her experience as a forensic neuropsychologist. As the last of five experts to interview and

test Appellant, Dr. Ansley opted to review the raw data and test results from the other experts, rather than administer her own neuropsychological tests. (PCRS VIII 1840-43). After reviewing that information, she administered a few additional tests to examine Appellant's "executive functioning" and concluded that Appellant did not have organic brain damage. (PCRS VIII 1859-69, 1879-87).

On cross-examination, however, Dr. Ansley agreed with Dr. Haber that Appellant had obsessive/compulsive personality features. (PCRS VIII 1908). More importantly, Dr. Ansley conceded that Appellant's fixation upon the victim in the weeks preceding the murder and his ultimate choice, among several options, of battering her and then killing her could be attributed to his inability to "switch sets," i.e., switch between alternative courses of action, which would constitute an impairment of his "executive functioning." (PCRS VIII 1911-12). Thus, despite Dr. Ansley's conclusion that Appellant suffered no brain damage, she corroborated the defense experts' conclusions that Appellant's impaired executive functioning contributed to his actions in this case.

Even assuming for argument's sake, however, that the record does not support Dr. Schram's finding of organicity, such a conclusion does not warrant the rejection of Appellant's entire

social history and psychological deficiencies as mitigating evidence. Even without evidence of brain damage, Appellant had an extensive history of drug and alcohol abuse and was indisputably diagnosed by all five experts with either obsessive/compulsive or antisocial personality traits, or a combination of both. Moreover, all five experts agreed that Appellant functioned in the borderline low average range of intelligence. These factors, both social and psychological, combined to produce a depressive, compulsive, impulsive person of limited intelligence with an impaired ability, whether caused by brain damage or not, to change his focus once he became fixated on a result, a conclusion borne out by the facts of this case.

As for the diagnosis of Antisocial Personality Disorder, the trial court found that this mental disorder was "not a mitigating factor." (PCR IV 338). Again, the trial court missed the point. Even Dr. Spencer, the State's expert, testified that personality disorders do not cause behavior; they merely describe it. In other words, APD is a label that the mental health community uses to describe someone who has a pervasive, rather fixed pattern of antisocial behavior. (PCRS VII 1554-56). The State, of course, uses it to describe someone who persistently breaks the law. But for the defense, it is

merely a label that describes the culmination of Appellant's life. As Dr. Haber explained, Mr. Cummings-El was raised by his family to disregard the laws and rules of society. He grew up "fighting to survive." He grew up in a lawless, drug abusing, dysfunctional family. He never had the social structure or the pressure of community mores to teach him to conform his conduct to the requirements of law. As a result, he has grown up to be a lawless, drug abusing, dysfunctional person. But all of this information serves to explain who he is and how he came to be charged with and convicted of murdering Kathy Good. Ultimately, even the State's experts testified that, despite this disorder, Appellant could function well in a structured prison environment. Thus, his APD does not compel his execution and eradication as a living human being.

The trial court, however, dismissed all of this evidence. In completely rejecting this claim, it initially determined that Theodore Mastos performed his investigative duties competently, because neither "the defendant nor his family members gave him any information that would have been useful in presenting evidence of statutory mitigating factors." (PCR IV 336). But Mastos admitted that he never asked anyone for information. He conceded that he never engaged in any independent investigation. His client did not want his family "begging for his life," so he

did nothing to pursue mitigation. At no time, however, did Appellant thwart Mastos' attempts; Mastos simply never made any. Thus, the trial court's conclusion in this regard is not supported by the record. See Riechman v. State, 777 So.2d 342, 348-51 (Fla. 2000) (finding trial counsel's sentencing investigation "patently inadequate" and prejudicial where record refuted claim that defendant instructed or prevented counsel from investigating or presenting mitigation); Lara, 581 So.2d at 1288 (finding that trial counsel "virtually ignored the penalty phase of the trial," and rejecting state's argument that defendant and his family prevented counsel from developing and presenting evidence at trial); Deaton v. Dugger, 635 So.2d 4 (Fla. 1993) (same).

Even if Mr. Cummings-El did discourage Mastos from investigating mitigation, however, "a defendant's desires not to present mitigating evidence do not terminate [counsel's] responsibilities during the sentencing phase of a death penalty trial: 'The reason lawyers may not "blindly follow" such commands is that although the decision whether to use such evidence is for the client, the lawyer first must evaluate potential avenues and advise the client of those offering potential merit.'" Blanco, 943 F.2d at 1502 (quoting Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986)).

Alternatively, the trial court rejected this claim, believing that Appellant competently waived mitigation. But the record is clear that he did not. When Mastos first broached the subject, Appellant was not "that strident" about waiving mitigation. Shortly thereafter, Mr. Cummings-El twice told the court before trial that Mastos could contact his family. He also informed Dr. Jacobson that he might change his mind about presenting a penalty phase case. Ultimately, he did change his mind and allowed Mastos to present the testimony of his two sisters. But Mastos had done nothing to prepare for that eventuality, and as a result, his examination of these two witnesses was disastrous. See Porter v. Singletary, 14 F.3d 554, 557 (11th Cir. 1994) ("An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence."); Blanco, 943 So.2d at 1503 ("The ultimate decision that was reached not to call witnesses was not a result of investigation and evaluation, but was instead primarily a result of counsels' eagerness to latch onto [his client's] statements that he did not want any witnesses called.").

Here, Mastos made no investigation. As a result, Mr. Cummings-El had no frame of reference upon which to base his decision of whether or not to waive mitigation. See Deaton, 635

So.2d at 7-9 (finding that defendant had no opportunity to knowingly, intelligently, and freely waive mitigation because counsel did nothing to investigate defendant's background or mental health); Blanco, 943 F.2d at 1500-03 (finding trial counsel ineffective in penalty phase where "[c]ounsel essentially acquiesced in [his client's] defeatism without knowing what evidence [his client] was foregoing. Counsel therefore could not have advised [his client] fully as to the consequences of his choice not to put on any mitigation evidence."). Ultimately, even without such information, Appellant chose to present the testimony of his two sisters. Having been forewarned of that eventuality, counsel should have been prepared. But he was not.

As a third basis for rejecting this claim, the trial court determined that Mastos acted reasonably in not presenting any of this evidence because such evidence was inconsistent with Appellant's denial of guilt and because it was inconsistent with Mastos' "strategy" of presenting only positive character traits. (PCR IV 336-37). Again, Mastos had no "reasonable" strategy because he had no information upon which to base a strategy. "Case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and made a reasonable choice between them." Horton v.

Zant, 941 F.2d 1449, 1462 (11th Cir. 1991). Proceeding blindly is not a reasonable strategy. Nor is scraping up testimony during a court recess moments before trial:

> According to the principles established in Strickland v. Washington, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. Trial counsel claims that it was a matter of strategy not to develop a case in mitigation. "A strategic decision, however, implies a knowledgeable choice." Eutzy v. State, 536 So.2d 1014, 1017 (Fla. 1988) (Barkett, J., dissenting). It is apparent here that trial counsel's failure to investigate and present mitigating evidence was not the result of an informed decision because trial counsel was unaware the evidence existed. In this case, it is clear that the failure to investigate [Appellant's] background, the failure to present mitigating evidence during the penalty phase, [and] the failure to argue on [Appellant's] behalf . . . was not the result of a reasoned professional judgment. Trial counsel essentially abandoned the representation of his client during sentencing. "It should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness." Blake v. Kemp, 758 F.2d 523, 533 (11th Cir.), cert. denied, 474 U.S. 998, 88 L. Ed. 2d 367, 106 S. Ct. 374 (1985).

Stevens, 552 So.2d 1087. See also Mitchell v. State, 595 So.2d 938 (Fla. 1992) (finding trial counsel ineffective where counsel

failed to investigate penalty phase evidence because of belief he would obtain acquittal).

Contrary to Mastos' belief, a defense of innocence in the guilt phase did not preclude the presentation of mitigating evidence. Once the jury returned an unfavorable verdict, it was incumbent upon counsel to at least attempt to secure a life sentence. Exceedingly few defendants admit their guilt in the first phase of trial. If their defense fails, they must change tacks. By presenting evidence in mitigation, they do not foreclose the issue of innocence. They may still challenge their guilty verdict on appeal and in post-conviction. Obviously, Mastos did not understand this concept.

As for Mastos' "strategy" of presenting only positive, humanizing evidence, he had no such evidence to present because he made no effort to gather it. Regardless, Mastos' attitude toward the evidence he failed to present only confirms his ignorance regarding mitigation. Mastos testified at the evidentiary hearing that Appellant's drug use history meant nothing because Appellant would not allow him to argue that he committed the murder in a drug-induced frenzy. Similarly, he testified that he would not have presented evidence of Mr. Cummings-El's drug use history even had he known about it because "juries are not sympathetic to junkies generally."

Mastos likewise dismissed the mental health evidence because he believed presenting evidence that Appellant was "a manipulative psychopath" would have been like putting gas on a fire. Similarly, Mastos assumed that evidence of Appellant's family history would have revealed that he came from a family of criminals. Finally, Mastos concluded that evidence of mental mitigation was inconsistent with Appellant's defense of innocence, so he "couldn't use it." (PCRS VII 1727-29).

Clearly, none of this is accurate. See Torres-Arboleda v. State, 636 So.2d 1321 (Fla. 1994) (finding trial counsel ineffective where counsel wrongly believed, among other things, that critical mitigation evidence was irrelevant or inadmissible). When argued in its proper context, all of this evidence, even that which reflects negatively on Appellant's character, is relevant and material to the jury's individualized determination of Appellant's appropriate sentence. Evidence of Appellant's drug use and criminal activities are part and parcel of his "life story." They corroborate and give meaning to the diagnoses of OCD and APD. They explain how Mr. Cummings-El came to be who he is and how he came to commit this crime. In fact, this Court has "consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order and

the failure to present it in the penalty phase may constitute prejudicial ineffectiveness." Rose, 675 So.2d at 573.

Without any of this evidence, four jurors voted to spare Mr. Cummings-El's life. With it, there is every reasonable probability that two more jurors would have voted to do so as well. But they did not have the benefit of this information because Theodore Mastos did nothing to investigate and present it to them. His constitutionally deficient conduct clearly prejudiced Appellant's penalty phase case. Therefore, this Court should reverse the trial court's order denying relief and remand for an immediate resentencing.

### F. Counsel's failure to call Daphne Roberts in the penalty phase to establish mental mitigation--Claim II

In Claim II of his Amended Motion to Vacate, Appellant alleged, among other things, that trial counsel was ineffective for failing to call Daphne Roberts in the penalty phase to establish mental mitigation. In a pretrial deposition taken by Theodore Mastos, Daphne Roberts testified that the victim, Kathy Good, told her that Appellant was very unhappy about Kathy going to clubs all the time. He also accused Kathy of going out with someone else and of having a homosexual relationship with Kathy's best friend, Ellen Thompson.[20] (PCR I 55-56).

[20] Kathy Good had spent the evening preceding her death at (continued...)

The trial court denied Appellant an evidentiary hearing on this claim, but failed to provide any basis for doing so in its written order. (PCR I 79). According to this Court, "a defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient." Freeman v. State, 761 So.2d 1055, 1061 (Fla. 2000). Here, Daphne Roberts' deposition established a prime facie claim for relief, as nothing in the record refuted it. Thus, Appellant was entitled to a hearing.

Evidence at trial established that Appellant became obsessed with Kathy Good after she terminated their live-in relationship. He began stalking her, and then assaulted her, after which Ms. Good obtained a restraining order. As outlined supra, Dr. Haber gave uncontradicted testimony that Appellant suffered from obsessive/compulsive personality features.[21] (PCRS VI 1340-41). Not only did Dr. Haber's psychological testing corroborate this diagnosis, but the facts of the crime confirmed it as well.

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[20] (...continued)
a nightclub with Ellen Thompson and Daphne Roberts. (TR IV 632).

[21] One of the State's experts, Dr. Ansley, even agreed with Dr. Haber's diagnosis. (PCRS VIII 1908).

(PCRS VI 1337-38). Ultimately, because of this and other diagnoses, Dr. Haber concluded that Appellant was under the influence of an extreme mental or emotional disturbance at the time of the offense. (PCRS VI 1334-36).

Daphne Roberts's testimony would have further supported Dr. Haber's conclusion as to the existence of this factor. The facts and circumstances leading up to the murder suggested that Appellant became obsessed with Kathy Good and was unable to suppress his fixation. Daphne Roberts' testimony would have established the emotional and psychological reasons for his obsession. Appellant's belief that Ms. Good was seeing someone else and/or was having a homosexual relationship with Ellen Thompson explained, in part, why he was so distraught and why he vowed not to let anyone else have her. These beliefs supported Dr. Haber's finding that Appellant was acting under the influence of an extreme mental or emotional disturbance. Therefore, trial counsel was ineffective for failing to call Daphne Roberts as a witness. His failure to do so precluded the jury from finding that Appellant acted under an extreme mental or emotional disturbance--an especially weighty statutory mental mitigating factor.[22] See Rose, 675 So.2d at 573 ("In evaluating

[22] From this testimony, and that of Drs. Haber, Schram, and Frumkin, Mastos could have argued as well that Appellant lacked (continued...)

the harmfulness of resentencing counsel's performance, we have consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order, Hildwin, 654 So. 2d at 110; Santos v. State, 629 So. 2d 838, 840 (Fla. 1994), and the failure to present it in the penalty phase may constitute prejudicial ineffectiveness."). As a result, this Court should reverse the trial court's order and remand this case for an immediate resentencing.

### G. Counsel's failure to object to the cumulative and inflammatory testimony of the victim's mother and cousin in the penalty phase--Claim XIII

Not only did Theodore Mastos fail to investigate and present evidence on Appellant's behalf in the penalty phase, he completely failed to prevent the State from presenting highly

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[22] (...continued)
the ability to commit this murder in a cold, calculated, and premeditated manner. See Spencer v. State, 645 So.2d 377, 384 (Fla. 1994) (striking CCP aggravator in domestic killing and remanding for resentencing where mental health evidence showed defendant believed victim was "trying to steal the painting business," that defendant's "ability to handle his emotions [was] severely impaired" when under stress, and that defendant's "personality structure and chronic alcoholism rendered him 'impaired to an abnormal, intense degree'"); Santos v. State, 591 So.2d 160, 163 (Fla. 1991) (striking CCP aggravator in domestic killing and remanding for resentencing where ongoing, highly emotional dispute with victim and her family "severely deranged him" and tended "to negate any inference that his acts were accomplished through 'cold' deliberation); Douglas v. State, 575 So.2d 165, 167 (Fla. 1991) (striking CCP factor where "[t]he passion evidenced in this case, the relationship between the parties, and the circumstances leading up to the murder negated the trial court's finding").

prejudicial testimony that inflamed the jury's sympathy and passion toward the victim in this case. The victim's cousin, Michael Adams, and the victim's mother, Daisy Adams, were the last two witnesses to testify in the guilt phase. Six days later, the State called them again in the penalty phase to reiterate and punctuate their previous testimony. Neither witness related any additional, relevant information. Rather, they testified solely to invigorate the jury's recollection of the victim's last moments--through the eyes of her surviving family members. The presentation of such testimony was a highly improper effort by the State to appeal to the jury's sympathy and emotions.

On direct appeal, this Court characterized the two witnesses' testimony as follows: "Daisy Adams and Michael Adams testified for the State concerning the duration of Good's state of consciousness after the stabbing." Cummings-El, 684 So.2d at 731. While that may have been the purpose of their testimony, "the duration of Good's state of consciousness" was amply conveyed by the same witnesses' testimony, as well as that of the medical examiner, during the guilt phase. No further amplification was necessary or appropriate in the penalty phase. Rather, it served only to inflame the jury's passion and to induce them to a recommendation of death.

During the guilt phase, the medical examiner, Dr. Roger Mittleman, testified that the fatal wound was inflicted to the left side of the victim's back, puncturing her lung. (TR IV 675). He opined that it would be a painful wound, and one that the victim would know was very serious. (TR IV 684-85). He further testified that, despite the internal bleeding caused by the wound, the victim would very likely be able to move around, think, and be conscious for some period of time. (TR IV 682-83). She could also talk or scream. (TR IV 683). As the chest cavity filled with blood, however, the victim would feel the compression of her lung, and it would become more difficult to breathe. (TR IV 685). Ultimately, the brain would lose oxygen, and the victim would suffocate to death. (TR IV 681).

Following this testimony, Michael Adams related in the guilt phase that he was sleeping on the floor in the victim's bedroom when the victim started screaming, "I'm cut." He saw an intruder leaving and ran after him. (TR IV 713-14). After the intruder left, Michael called 911 and while he was on the phone he saw the victim come into the living room and fall onto the television. He ran over to her, and she died in his arms. (TR IV 723-24).

The State's final witness, Daisy Adams, testified in the guilt phase that she was awakened by her daughter's screams, but

thought she was just “carrying on.” (TR IV 756). Then she heard her daughter say, “Mama, mama, he hurting me,” so she went to her daughter’s bedroom. There, she was confronted by a man leaving the room. (TR IV 757-58). The man pushed her onto a nearby sofa and fled. (TR IV 762-64). The witness’ grandson, Michael Adams, ran after the intruder while she struggled to support her daughter, who had come out of her bedroom. “Just minutes after [she] grabbed her,” the victim began to collapse, so the witness summoned Michael to hold her, while she placed the 911 call. (TR IV 767-70).

This testimony, presented in the guilt phase, sufficiently established “the duration of Good’s state of consciousness after the stabbing,” but the State wouldn’t rest on this evidence. It was determined to refresh the jury’s recollection with dramatic, heart-rending testimony from the victim’s mother and nephew in the hopes that the jury would demand death as an emotional reaction to the testimony.

During the penalty phase, the substance of Ms. Adams’ testimony was <u>exactly</u> the same, but the State used the disconsolate mother to recount in an emotionally charged atmosphere the last few moments of her daughter’s life. In fact, the prosecutor compelled her to reenact the scene, complete with screams and physical gestures. (TR V 926-32). At

one point, the prosecutor even simulated being the victim so that the witness could demonstrate how she had strained to keep her daughter standing. (TR V 933-34).

Similarly, the substance of Michael Adams' testimony was identical to that of his guilt-phase testimony. The State merely embellished it to invoke sympathy from the jury. Like his grandmother, Michael Adams was asked to imitate the victim's screams and actions, using the prosecutor as a prop. (TR V 937-42). As an encore, after the witness explained how he had grabbed the victim to keep her from falling to the floor, he revealed for the first time a poignant verbal exchange:

> Q. [BY THE PROSECUTOR] What did you say to your aunt after she said I am cut?
>
> A. [BY MICHAEL ADAMS] I said the paramedics coming. Then she said --
>
> Q. Did she say anything after that?
>
> A. Yes.
>
> Q. Show us, not just tell us, but show us what she said next and how she said it?
>
> A. What's taking so long. She said it like that.
>
> Q. Did she say that quieter than everything else she said?
>
> A. Yes.
>
> Q. Did she say it slower than everything else she said?

A. Yes.

Q. After she said what's taking so long what happened?

A. She went like jumping and then her eyes got big and her hands dropped and her head rolled. So I laid her down. She had done went out.

(TR V 941-42) (emphasis added).

Such emotionally charged testimony constitutes the type of prosecutorial grandstanding and "overkill" condemned in many previous cases. E.g., Ruiz v. State, 743 So.2d 1 (Fla. 1999); Urbin v. State, 714 So.2d 411 (Fla. 1998); Campbell v. State, 679 So.2d 720 (Fla. 1996); King v. State, 623 So.2d 486 (Fla. 1993); Garcia v. State, 622 So.2d 1325 (Fla. 1993). Yet, Theodore Mastos made no objection to it. He sat mute while the State manipulated the jurors' emotions, knowing he had very little to offer in mitigation.

In rejecting this allegation of ineffectiveness, the trial court concluded that the record refuted the claim. It decided that the purpose of Daisy and Michael Adams' testimony in the guilt phase was to identify the perpetrator, while the purpose of their testimony in the penalty phase was "to establish the number of the victim's screams, the decreasing volume of the screams, how the victim became weaker and to establish her knowledge of her impending death." **App. A** at 3. Ultimately, it

determined that the testimony was necessary for the State to meet its burden of proving the "heinous, atrocious, or cruel" aggravating factor, "as Defendant has argued that the victim was conscious for only a short period of time, negating HAC." Id.

Even where, as in the penalty phase, the rules of evidence are relaxed, there remains a two-pronged test of admissibility. Evidence must not only be relevant, but its prejudicial impact must not outweigh its probative value. Fla. Stat. § 90.404 (Fla. 1990); Johnson v. State, 660 So.2d 637, 645 (Fla. 1995) ("The rules of evidence may be relaxed during the penalty phase of a capital trial, but they emphatically are not to be completely ignored."); Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) ("Evidence concerning [irrelevant] matters have no place in [a penalty phase] proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal.").

Here, the Adams' testimony may have been relevant to establish the victim's awareness of her impending death or "the duration of [her] state of consciousness after the stabbing." But these witnesses' guilt phase testimony, as well as that of the medical examiner, adequately related those facts. Repeating their testimony, especially by compelling the victim's mother to simulate the moans and cries of her dying daughter, was both

unfairly cumulative and highly prejudicial, greatly outweighing any slight probative value. See Jones v. State, 569 So.2d 1234, 1239 (Fla. 1990) ("It is difficult to remain unmoved by the understandable emotions of the victim's family and friends . . . . Thus, the law insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented."); Jordan v. State, 694 So.2d 708, 717 (Fla. 1997) (reversing for resentencing where state improperly presented "testimony [that] served only to build sympathy within the jury for the victim"); cf. Johnson, 660 So.2d at 645 (finding photo of defendant's deceased daughter properly excluded because cumulative and "needlessly inflammatory"); Cooper, 336 So.2d at 1139 (finding evidence of co-defendant's reputation for violence and defendant's previous attempts to avoid co-defendant properly excluded as irrelevant and inflammatory).

By failing to object, Theodore Mastos unreasonably deprived Mr. Cummings-El of a fair sentencing hearing. By allowing these witnesses to stage the final moments of their loved one's life, complete with sound and visual effects, Mastos permitted the State to improperly appeal to the jurors' sympathy and to inflame their passions. Had he played his role properly as Appellant's attorney, there is a reasonable probability that the

jury's recommendation and the trial court's ultimate sentence would have been different. Because he failed to perform his function, this Court should reverse the trial court's order denying relief and remand for a new sentencing hearing.

H. Conclusion--Claim IX

"The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Strickland, 466 U.S. at 685 (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 275-76 (1942)). In the present case, Theodore Mathos completely failed to advocate on his client's behalf. The cumulative effect of trial counsel's ineffectiveness was to deprive Appellant of his Sixth Amendment right to an attorney. In essence, Appellant had no attorney. Mastos made no objections, made no investigation of the case, presented no evidence, and did nothing otherwise to preserve Appellant's rights to a fair trial and an impartial jury. Had counsel investigated Appellant's social and psychological history, had he presented the wealth of information that was available, and had he made proper objections and motions during the trial, there is a reasonable probability that Appellant's conviction

and sentence would have been different. Therefore, this Court must reverse the trial court's order denying relief herein and remand with instructions to grant Mr. Cummings-El a new trial.

## CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, Appellant, F.W. CUMMINGS-EL, respectfully requests that this Honorable Court reverse the trial court's denial of relief and remand this cause for a new trial.

Respectfully submitted,

_____
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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Sandra Jaggard, Assistant Attorney General, 444 Brickell Avenue, Miami, Florida; Tony Moss, Esquire, Law Office of Tony Moss, P.a., 851 N.E. 118th Street, Miami, Fl 33161; and F.W. Cummings-El, Inmate # 120190, Union Correctional Institution, P.O. Box 221, Raiford, Florida 32083, this ____ day of August, 2002.

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

_____
SARA D. BAGGETT, ESQ.