CASE NO. SC01-2480
LOWER COURT CASE NO. 91-756 CF

ALFRED LEWIS FENNIE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR HERNANDO COUNTY, STATE OF FLORIDA

AMENDED INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Fennie's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court denied several of Mr. Fennie's claims without an evidentiary hearing. The circuit court held a limited evidentiary hearing on other claims. The following abbreviations will be utilized to cite to the record in this cause, with appropriate page number(s) following the abbreviation.

"R. ___." – record on direct appeal to this Court;

"RI. ___." - instruments portion of the record on direct appeal to this Court;

"PCR. ___." – record on appeal from the denial of postconviction relief;

"PC-T. ___." – transcript of the evidentiary hearing;

All other references will be self-explanatory or otherwise explained herewith.

REQUEST FOR ORAL ARGUMENT

Mr. Fennie has been sentenced to death. The resolution of the issues in this action will determine whether Mr. Fennie lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Fennie, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

On September 27, 1991, the grand jury in and for Hernando County returned an indictment charging Mr. Fennie with one count of first degree murder in violation of Section 782.04(1)(a), Florida Statutes (1991), one count of armed kidnaping in violation of Section 787.01(1), Florida Statutes (1991) and one count of robbery with a firearm in violation of Section 812.13(2)(a), Florida Statutes (1991). (R.20-21) Mr. Fennie proceeded to jury trial on the charges on November 5-13, 1992. Following deliberations, the jury returned verdicts finding Mr. Fennie guilty as charged on all counts. (R.1925; R384-387) After the penalty phase, the jury returned a unanimous recommendation for death. (R.2150-2151; R389)

Mr. Fennie filed a timely motion for new trial, (R.424-426), which was denied.(R.507, 522) On December 1, 1992, Mr. Fennie appeared for sentencing, and the trial court adjudicated him guilty on all counts and sentenced him to death for the first degree murder count and consecutive life sentences for the remaining two counts. (R.529-545, 442-466) Mr. Fennie filed a timely notice of appeal on December 10, 1992. (R.495-496) On direct appeal, this Court affirmed Mr. Fennie's conviction and sentences, including his sentence of death. Fennie v. State, 648 So.2d 95 (Fla. 1994). The United States Supreme Court denied certiorari in the case. Fennie v. Florida ,115 S.C. 1120 (1995).

Mr. Fennie filed timely but incomplete Rule 3.850 motions

on March 19, 1997, and April 22, 1997. (PCR. 163-204; 362-540) Mr. Fennie filed an amended Rule 3.850 motion[1] on March 22, 2000. (PCR. 2267-2445) The State responded to the amended motion on May 17, 2000. (PCR. 2642-2680) Mr. Fennie filed limited amendments to his amended Rule 3.850 motion on June 26, October 20, and November 13, 2000. (PCR. 2727; 2848; 2894) The State responded to the amendments on November 20, 2000. (PCR. 2901; 2909) Hearings were held pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993), on August 18, 2000, and December 8, 2000. (PCR. 2918; 3071)

On February 12, 2001, the lower court ordered an evidentiary hearing on five claims[2]. The evidentiary hearing

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1 Along with this amendment, Mr. Fennie filed a Notice of Intent to Interview Jurors. (PCR. 2446-48) The lower court refused to allow Mr. Fennie to interview the jurors. (PCR. 2458)

2 The claims were as follows: a) whether trial counsel rendered ineffective assistance of counsel by failing to question potential jurors during voir dire regarding alleged racial tension in the area where Mr. Fennie's trial was held, as well as other racial aspects relevant to the case and, included as sub-issues, whether individual voir dire should have been a part of any such questioning; and, whether Defendant's trial counsel rendered ineffective assistance of counsel by allegedly failing to request a change of venue in this case; **b)** whether trial counsel rendered ineffective assistance during the guilt phase proceedings of Mr. Fennie's trial; **c)** whether trial counsel rendered ineffective assistance during the penalty phase proceedings of Mr. Fennie's trial; **d)** whether trial counsel rendered ineffective assistance of counsel by failing to obtain an adequate mental health evaluation of Defendant before the time of Defendant's trial, and whether trial counsel was ineffective failing to obtain other expert assistance in this case; and, **e)** whether the actions of trial counsel prevented Defendant testifying at his trial. (PCR. 3143-55)

was held June 4-7, 2001. (PC-T. 1-862) The lower court denied Mr. Fennie relief on all claims. (PCR. 3613-3630)

STATEMENT OF THE FACTS

THE TRIAL

The following testimony was presented at Mr. Fennie's trial. On Sunday, September 8, 1991, Joseph Evans and his brother-in-law Bob Duckett were driving in the area of Ridge Manor in Hernando County. (R.978-980) As they drove on Highway 301, north of Highway 50, they came across a woman lying on the side of the road face down. (R.980) The woman had a bullet wound to the back of her head. (R.1027, 1044) No physical evidence was found near the body. (R.1031, 1047, 1049, 1051) The body was eventually identified through fingerprint comparison and determined to be Mary Strickland Shearin. (R.1086-1088) At trial, the medical examiner testified that the victim lost consciousness immediately upon being shot. (R.1113) The medical examiner also testified that she found no physical indication of forced sexual intercourse. (R.1118)

John Shearin, the victim's husband, testified that on the night of September 7, 1991, his wife left the house between 7:00 and 8:00 p.m. (R.1144-1146) Mary arrived back home at 3:00 a.m., stayed 15 minutes, and left again. (R.1146) At trial, the State also presented the testimony of Linda Browning, supervisor of the research department of the Tampa Bay Credit Union. Ms. Browning testified that in reviewing

the records of the victim's account, she found two transactions on September 8, 1991, using the victim's ATM card. (R.1699-1704) The final transaction was a $30.00 withdrawal at 3:18 a.m. on September 8, 1991. (R.1706)

After the police spoke with Mr. Shearin, a BOLO was issued for the victim's vehicle and on the evening of September 9, 1991, Sergeant Lou Potengiano of the Tampa Police Department observed a vehicle matching the description on the north side of Bexley's BBQ on the corner of 28th Avenue and 22nd Street in Tampa. (R.1155) Deputy Tim Whitfield processed the vehicle and found a .25 caliber Raven Arms firearm with a clip in place under the mat in the front of the car. (R.1179-1180) Although the firearm was processed for fingerprints, no usable prints were lifted. (R.1182-1183)

The two men found in the vehicle were taken into custody without incident. (R.1158) The driver of the automobile gave his name as Ezell Foster and the passenger gave his name as Ansell Rose. (R.1159) At trial, Rose testified that he happened to be with Mr. Foster (Fennie) at the time of the arrest because he had been at Bexley's BBQ looking for a ride home. (R.1278). At the intersection of 22nd Street and Hillsborough Avenue, Mr. Fennie turned left, took a small gun from behind him, and put it on the floor. (R.1285) When they got to Nebraska Avenue, the police ordered them to stop and get out of the car. (R.1287) As they got out of the car, Mr. Fennie tried to push the gun under the mat on the floor.

(R.1288)

At trial, detectives involved in the investigation testified that they interviewed the man known as Ezell Foster, Jr. (R.1244-1246) Foster gave a two-hour statement and midway through, Foster told Kramer that his real name was Alfred Lewis Fennie. (R.1260) During the statement (as well as subsequent statements), Mr. Fennie insisted that he did not kill the woman. (R.1263; 1329) Mr. Fennie first told the detectives that an individual named “Eric” had killed the victim and that, although he did not see “Eric” kill the woman, he stated that he (Mr. Fennie) did not kill anyone. (R.1329) Mr. Fennie later identified “Eric” as co-defendant Frazier and then identified Frazier from a photo pack. Fennie told the police that Frazier abducted the victim, forced Fennie to drive the victim north to a deserted road in Hernando county, and, after Frazier and the woman were out of sight, Mr. Fennie heard Frazier yell "Bitch, you bit me," and then heard a gunshot. (R.1365) Frazier returned to the car and told Mr. Fennie to start driving. (R.1365) Mr. Fennie then observed that Frazier had been bitten on his hand and, when Mr. Fennie asked where the victim was, Frazier said he was going to "Make the bitch walk home." (R.1365) Mr. Fennie also told the detectives that Frazier’s girlfriend, Ms. Regina Rogers, had a ring belonging to the victim and, when the detectives attempted to verify Appellant's statements, they learned that Ms. Rogers did in fact have the ring. (R.1384)

When co-defendant Frazier was arrested, the detectives also observed that he had a bite mark on his right hand which he was trying to hide. (R. 1388; 1432-1435)

The day before Mr. Fennie's trial began, the prosecutor announced that co-defendant Frazier would be testifying for the State.(R. 15) Counsel for Mr. Fennie announced to the trial court on the first day of trial that he was unprepared to go to trial due to Frazier suddenly becoming a witness for the State. (R. 15) Mr. Fennie's counsel admitted to the trial court that the defense had not anticipated a co-defendant testifying for the State and moved for a continuance because he was unprepared to go to trial (R. 15-17). The trial court found that defense counsel was aware for two months that the State was attempting to convince one of the co-defendants to testify, had no legitimate reason for not deposing witnesses regarding statements made by Frazier, and ultimately denied the continuance. (R. 17-18; 32-33)

At trial, co-defendant Frazier testified that in September of 1991, he was living with his cousin Pamela Colbert who had been dating Mr. Fennie for approximately twelve years. (R.1462-1463) A couple of weeks before his arrest, Frazier saw a firearm in his cousin's house. (R.1470-1471) This was the same firearm that he saw on the day of the incident at hand. (R.1471) Shortly after midnight on September 8, 1991, Frazier bumped into Mr. Fennie at the River View Terrace projects and told him that he desperately needed

money. (R.1472-1473) According to co-defendant Frazier, Mr. Fennie suggested to him that they go to the corner of Florida Avenue and Broad Street and try to get some money. (R.1473) They stood on the corner for approximately forty-five minutes, at which time a white woman drove up in a cream-colored Cadillac. (R.1474)

Frazier testified that Mr. Fennie got into the car with the victim, pulled a gun on the victim, and took control of her car. (R. 1474-75) Frazier further testified that after abducting the woman, Mr. Fennie told him to get into the victim's car, and they drove to the City Bank of Tampa at Buffalo and Armenia to try to get some money from the ATM. (R.1475) Frazier testified that Mr. Fennie then drove them to Pamela Colbert's house where they arrived shortly after 7:00 a.m. (R.1480) Frazier further testified that, upon reaching Hernando county, Mr. Fennie opened the trunk and hollered for Frazier to help him get the victim out of the trunk. (R.1490) Frazier reached in, the victim bit him on the hand. (R.1490) Frazier's hand was bleeding profusely so he got a towel out of the car. (R.1491)

At trial, Frazier admitted that he initially lied to the police and said he knew nothing about the incident. (R.1502) Frazier also admitted that he told the police that one of his cousin's children had bitten him. (R.1502) Frazier also admitted that he made money by selling cocaine and that often times he would jump into people's cars, get money, and then

leave, never giving the people the drugs. (R.1511)

The defense called no witnesses in the guilt phase of the trial. The jury found Mr. Fennie guilty on all charges. The State presented nothing during the penalty phase, instead choosing to rely on their guilt phase presentation. (R. 1946-49) The defense presented 10 witnesses during Mr. Fennie's penalty phase.

At the penalty phase, Annie Fennie, Mr. Fennie's mother, testified that she never married and Mr. Fennie's father was in fact married to someone else. (R.1951-1952) As Mr. Fennie grew up, they lived in the projects and he had no real friends. (R.1954) Mr. Fennie had asthma and breathing problems as he was growing up (R.1956), and he would often help his sister and her children. (R.1961).

Kathy Lewis Reed is Mr. Fennie's older sister. (R.1966) She testified in the penalty phase that before Mr. Fennie was arrested, he would come over often and check on her and her children. (R.1967) Ms. Reed remembered Michael Frazier coming by with rock cocaine, but knew that Mr. Fennie did no drugs. (R.1972-1973)

Erwin Ward, a rehabilitation counselor for the State of Florida, had known Mr. Fennie for sixteen years. (R.1980-1981) He testified that Mr. Fennie was a good mechanic and has always wanted to help Ward if he needed it. (R.1981) Ward has never known Mr. Fennie to be violent and is not the type to do violent crimes. (R.1983-1984) Denise Williams had

known Mr. Fennie for seven years (R.1988), and she had never known him to be violent. (R.1989) Melanie Simmons, who works for the Hillsborough County Home Base Program, met Mr. Fennie through his sister. (R.1995-1996) Mr. Fennie's sister had a daughter with cerebral palsy and Ms. Simmons had observed Mr. Fennie's interest with his niece. (R.1997)

Lastly, five correction officers at the Hernando County Jail testified that while Mr. Fennie was housed in their jail, he presented no discipline problem whatsoever. (R.2075, 2079, 2083, 2086, 2089) These officers believe that Mr. Fennie adjusted very well to incarceration and would present no discipline problem if he were to be incarcerated. (R.2076, 2081, 2083, 2086, 2089)

THE EVIDENTIARY HEARING

The evidentiary hearing was held June 4-7, 2001. Mr. Fennie presented the following witnesses: Trial Attorney Alan Fanter, William Salmon (Mr. Fennie's legal expert), Mr. Dwayne Jones, Dr. Ronald Peal (psychologist used by Mr. Fennie's trial attorneys), Dr. Jethro Toomer (psychologist), Ms. Pamela Colbert, Ms. Kathy Reed, Ms. Deborah Fennie, Ms. Yvonne Williams, and Trial Attorney Hugh Lee. The State presented one witness: Detective Carlos Douglas (Hernando County Sheriff's Office).

Fanter testified regarding the actions he did and did not take during the voir dire to prevent individuals from serving on the jury who would let race be a factor in their

deliberations. Fanter testified that he was aware that race was a factor in Mr. Fennie's trial, that he was aware of racial problems in the area where Mr. Fennie's trial was held, and that he would want to remove racist jurors from the panel. (PC-T. 27; 31-32) Despite this, Fanter testified that he had no real plan or strategy for confronting potential jurors with the racial issues present in Mr. Fennie's case. (PC-T. 32)

Mr. Fennie also presented the testimony of attorney William Salmon. The lower court accepted Mr. Salmon as a legal expert. (PC-T. 91) Mr. Salmon testified to the importance of having a strategy for questioning jurors on sensitive racial issues. (PC-T. 124) Mr. Salmon also testified to the even greater importance of questioning jurors on sensitive racial issues when the possibility exists that a penalty phase will occur. (PC-T. 126-7) Mr. Salmon also gave his expert opinion that, based on his review of the voir dire questioning performed at Mr. Fennie's trial, specifically the lack of questions regarding the racial issues involved in the case, Mr. Fennie's trial counsel was ineffective as a matter of law. (PC-T. 127-29)

Mr. Fanter was also questioned regarding his work in Mr. Fennie's guilt-phase[3]. Specifically, Mr. Fanter was

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3 Mr. Fennie had two trial attorneys: Alan Fanter and Hugh Lee. Mr. Fanter was primarily in charge of the guilt-phase of the trial, and Mr. Lee was in charge of the penalty-phase. (PC-T. 612; 748) The only exception was that Mr. Lee handled the questioning of co-defendant Frazier after the State informed the defense **the day before trial** that Frazier would

questioned regarding his failure to properly impeach witnesses (PC-T. 619-21; 633-637; 640-642), as well as his failure to call certain witnesses whose testimony would have cast doubt on the State's case, including the defendant himself (PC-T. 643-648; 648-655; 658-60).

Trial Attorney Hugh Lee also testified regarding his investigation of co-defendant Frazier's story to the police, as well as his questioning of Frazier during Mr. Fennie's guilt phase. Mr. Lee also testified regarding several missed opportunities to impeach Frazier's testimony, as well as missed opportunities to investigate both Frazier's and Mr. Fennie's version of events. (PC-T. 759-60; 764-66; 772-73)

Mr. Lee also provided testimony regarding his work in the penalty phase of Mr. Fennie's trial. Mr. Lee was questioned regarding the unexpected answers he got from Mr. Fennie's mother a trial. (PC-T. 751) Mr. Lee was asked about and unable to recall why he had not asked Mr. Fennie's sister or mother any questions regarding Mr. Fennie's tendency to avoid confrontation throughout his life. (PC-T. 752) Mr. Lee also testified that he *should have* put on lay witness testimony about Mr. Fennie being easily led and manipulated, compliant and easily dominated. (PC-T. 774) He also testified that if he had lay or expert testimony showing that Mr. Fennie could conform to a jail environment and wouldn't pose a threat to others in the future, he would have put that on as well. (PC-T.

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be a State witness. (PC-T. 757)

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Mr. Dwayne Jones was presented at the hearing below. Mr. Jones testified regarding co-defendant Frazier's history of violence (especially when on drugs), Frazier's history with guns, Frazier's past crimes, and the fact that he had never known Mr. Fennie to be violent. (PC-T. 228; 230-33) Mr. Jones also stressed that he would have been willing to testify at Mr. Fennie's trial. (PC-T. 233; 234) Co-defendant Pamela Colbert also testified below that, at the time of Mr. Fennie's trial, she would have been willing to testify to a version of events different than what Frazier testified to, as well as the fact that she had never known Mr. Fennie to be violent. (PC-T. 445; 447; 449; 470-71; 472; 476; 491) She also testified below that she would have been willing to testify for Mr. Fennie at his penalty phase but was never approached by anyone regarding doing so. (PC-T. 448-49) Ms. Yvonne Williams also testified below regarding Mr. Fennie's kind nature, his non-violence, and the fact that he never carried a gun. (PC-T. 683-86; 690)

Dr. Ronald Peal, the psychologist who evaluated Mr. Fennie at trial, had testified at a penalty phase before, particularly as to a defendant's life history, and said that he would have done the same for Mr. Fennie. (PC-T. 259) Dr. Peal testified that the only conversation that he knew he had with trial attorney Fanter was the initial conversation retaining him, and that was reflected in a little handwritten note. (PC-T. 252) Dr. Peal never spoke with and

had never even heard of Hugh Lee (PC-T. 256), the man primarily responsible for Mr. Fennie's penalty phase (PC-T. 611; 748-9).

Dr. Jethro Toomer testified for Mr. Fennie at the hearing below. Dr. Toomer evaluated Mr. Fennie during postconviction and, unlike Dr. Peal, was provided with the background and corroborative materials necessary to provide opinions within a reasonable degree of medical certainty. (PC-T. 318) According to Dr. Toomer, Mr. Fennie has a personality disorder that "is characterized by dependant traits and a need for acceptance, and a need to be overly accommodating in order to satisfy his own personal deficits." (PC-T. 319) Dr. Toomer testified that Mr. Fennie is not a leader-type, but again one who acts in order to please those around him and increase the likelihood of his acceptance. (PC-T. 319) Dr. Toomer also concluded that Mr. Fennie was not at high risk for future violent behavior. (PC-T. 319)

Lastly, at the hearing below, Mr. Fennie presented the testimony of his sisters Kathy Reed and Deborah Fennie. Both of the sisters testified below regarding the harsh conditions they and Mr Fennie grew up in, as well as Mr. Fennie's history of non-violence and history of helping others in need. (PC-T. 505-514; 533-44) Both sisters testified that they were not asked about most of this information by the trial attorneys (PC-T. 520-27; 548).

SUMMARY OF THE ARGUMENT

I. Trial counsel was functionally and constructively absent at critical stages in Mr. Fennie's trial in that he: failed to effectively question jurors on the issues of race and racial

tensions in the community; failed to request individual voir dire to ensure effective questioning of jurors on these issues; and, failed to request a change of venue due to the racially charged atmosphere in the community where the trial was held. Thus, trial counsel failed to protect Mr. Fennie's Sixth and Fourteenth Amendment rights to an impartial jury. The lower court erred in not finding that Mr. Fennie was entitled to a presumption of prejudice. See United States v. Cronic, 104 S.Ct. 2039 (1984)

II. Trial counsel rendered ineffective assistance during Mr. Fennie's penalty phase. Trial counsel failed to present available lay and expert testimony in mitigation. Trial counsel failed to call witnesses who could provide testimony consistent with their strategy of showing that Mr. Fennie's co-defendant was the actual trigger man. Trial counsel failed to present expert testimony consistent with their trial strategy, or consistent with the other mitigation presented. The lower court erred in denying relief.

III. The lower court denied Mr. Fennie a full and fair hearing by preventing him from interviewing jurors, thereby making it impossible for Mr. Fennie to establish the extent to which he was denied his constitutional rights during his trial.

IV. Trial counsel rendered ineffective assistance during the guilt/innocence phase of Mr. Fennie's trial. Trial counsel failed to properly prepare for and cross-examine Mr. Fennie's

co-defendant. Trial counsel failed to properly impeach several witnesses at Mr. Fennie's trial, and failed to call certain witnesses who possessed information critical to Mr. Fennie's defense. The lower court erred in finding that Mr. Fennie failed to establish trial counsel's ineffectiveness. V. The lower court erred in denying Mr. Fennie a hearing on several claims, including: denial of a fair trial due to the state attorney's misconduct and the state attorney's introduction and argument regarding non-statutory aggravating circumstances, and trial counsel's failure to object; VI. The lower court erred in denying Mr. Fennie relief on his claim that he was not allowed to testify on his own behalf.

STANDARD OF REVIEW

The constitutional arguments advanced in this brief present mixed questions of fact and law. As such, this Court is required to give deference to the factual conclusions of the lower court. The legal conclusions of the lower court are to be reviewed independently. See Ornelas v. U.S., 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); Stephens v. State, 748 So.2d 1028 (Fla. 1999).

ARGUMENT I

MR. FENNIE'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROTECT HIS CLIENT'S RIGHT TO BE TRIED BY A FAIR AND IMPARTIAL JURY. TRIAL COUNSEL FAILED TO EFFECTIVELY QUESTION JURORS ON THE ISSUES OF RACE AND RACIAL TENSIONS IN THE COMMUNITY WHERE MR. FENNIE'S TRIAL WAS HELD; TRIAL COUNSEL FAILED TO REQUEST INDIVIDUAL VOIR DIRE TO ENSURE EFFECTIVE QUESTIONING OF JURORS ON THE ISSUES OF RACE AND RACIAL TENSIONS IN THE COMMUNITY WHERE MR. FENNIE'S TRIAL WAS HELD; AND, TRIAL COUNSEL FAILED TO REQUEST A CHANGE OF VENUE DUE TO THE RACIALLY CHARGED ATMOSPHERE IN THE COMMUNITY WHERE MR. FENNIE'S TRIAL WAS HELD. TRIAL COUNSEL'S ERRORS VIOLATED MR. FENNIE'S SIXTH AMENDMENT RIGHT TO EFFECTIVE REPRESENTATION IN BOTH PHASES OF MR. FENNIE'S TRIAL. THE LOWER COURT ERRED IN DENYING MR. FENNIE RELIEF ON THIS CLAIM.

A. INTRODUCTION

Strickland v. Washington, 466 U.S. 668 (1984), requires an individual seeking postconviction relief due to ineffective assistance of counsel to prove the following: first, a defendant must establish that trial counsel's performance was unreasonable or ineffective; and, second, a defendant must establish that he was prejudiced by counsel's performance. Strickland, however, **does not** require a showing of prejudice in all situations where counsel is ineffective. "In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel is legally presumed to result in prejudice." Id, at 692. Thus, the mere presence of an attorney at a trial does not satisfy the Sixth Amendment. If counsel is present, but functionally absent, at a critical stage, the Sixth Amendment is violated and reversal

is automatic. See United States v. Cronic, 104 S.Ct. 2039 (1984).

Mr. Fennie's trial counsel was functionally and constructively absent during Mr. Fennie’s voir dire in that he: failed to effectively question jurors on the issues of race and racial tensions in the community; failed to request individual voir dire to ensure effective questioning of jurors on these issues; and, failed to request a change of venue due to the racially charged atmosphere in the community where the trial was held. In fact, trial counsel had no strategy for dealing with the racial issues present in Mr. Fennie's case. Trial counsel essentially did nothing pretrial or during voir dire to protect Mr. Fennie from a jury biased against him because of his race or the race of the victim. Thus, trial counsel failed to protect Mr. Fennie’s Sixth and Fourteenth Amendment rights to an impartial jury.

B. RACE AS A FACTOR IN THIS CASE

Mr. Fennie's case is one where the potential for racial bias to enter into the jurors' deliberations was clear. Mr. Fennie is black and the victim in Mr. Fennie's case was white. Additional factors other than the races of the defendant and victim added to the importance of a more extensive and thorough examination of jurors. For example, trial counsel was aware that the State would be arguing that Mr. Fennie had raped the victim despite the fact that he was not charged with

the rape[4]. (PC-T. 28). Furthermore, the community where Mr. Fennie's trial was held had a history of racial problems between blacks and whites leading up to his trial in 1992, and trial counsel knew this as well. (PC-T. 27; 607-08)

At the time of Mr. Fennie's trial, the atmosphere in the community where his trial took place (Brooksville/Hernando County) was one of heated racial animosity between blacks and whites. Less than two (2) years before the death of the victim in this case, a white teenager was beaten to death by a group of black youths. (See Defense Exhibit 1) The white teenager's death ignited a wave of racial hysteria in Brooksville and the surrounding community the likes of which Florida had not seen since the civil rights era in the 1960's. Police patrols were increased throughout the city and surrounding areas. Id. School sporting events were moved to daytime hours, police presence on school campuses was significantly increased, and many children missed school out of fear for their lives. Id. Community leaders commented in the media that this unfortunate event "increased" racial tensions that were already near the boiling point. Id.

The racial animosity ignited by this tragedy did not subside quickly. The white teenager's father publicly asked

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4 Courts have repeatedly recognized that in rape cases involving black defendants and white women, the chance that racism will rear its head is almost unavoidable. See Miller v. North Carolina, 583 F.2d 701, 703, 707 (4th Cir. 1978); Robinson v. State, 520 So. 2d 1, 7 (Fla. 1988).

that blacks not attend his son's funeral. Id. Soon after the killing, the Ku Klux Klan held a rally in Brooksville in which 200 supporters showed up. Id. The families and friends of several teenagers arrested in the incident (both black and white) publicly accused law enforcement officials of having racist motives behind the arrests, claiming members of the other race were receiving preferential treatment. Id.

Seven black youths were indicted for killing the white teenager, and all were denied bail. Many in the black community cried foul, charging that the number of indictments were too great, the charges were too strong (First Degree Murder), and the lack of set bail was discriminatory. Id. The first black youth tried was convicted of 3rd Degree Murder. Id. Many in the white community then cried foul, alleging that the jury acted out of fear of the black community. Id. This verdict led the State to make deals with most of the other defendants. Id. The victim's father held a news conference to express dissatisfaction with the deals, as well as his dissatisfaction with the results of the first trial. Id. Furthermore, as a result of the pleas, the Knights of the Ku Klux Klan held yet another rally on the steps of the courthouse, making a total of two since the death of the white teenager[5]. Id. Before the end of this tragedy came the news

5 In the three years proceeding the death of the white teenager, the Knights of the Ku Klux Klan had held three (3) rallies in Brooksville.(See Defense Exhibit 1)

that two black men and one black woman had kidnaped a white woman in Tampa, raped her, and brought her to Hernando county where she was executed. Thus, before the racial hysteria in Brooksville could subside, Mr. Fennie's case hit the front page.

C. TRIAL COUNSEL'S INEFFECTIVE PERFORMANCE AND THE PRESUMPTION OF PREJUDICE

Mr. Fennie's trial counsel was well aware of the racial climate that then existed in Brooksville. Trial counsel had worked in the community at the time of the white teenager's killing. In fact, he was the attorney for the only black youth who actually went to trial for the killing. (PC-T. 26; 604-08) During his representation of the black youth, he even commented to the media regarding his doubt that a fair trial could be had in Brooksville. (Defense Exhibit 1; PC-T. 26-27) Despite this, trial counsel completely failed to use this knowledge when questioning potential jurors.

The potential jurors in Mr. Fennie's case were questioned by the attorneys and the trial court in four (4) groups before a jury was picked. Regarding racial issues, Mr. Fennie's trial counsel asked some jurors generally whether they would be able to give Mr. Fennie a fair trial being that he is black. (R. 268-70; 479-483) He did not ask all of the white jurors this question. Furthermore, of the four groups of potential jurors, two groups were never asked any racial questions at all. (R. 658-706; 843-883) Several jurors from

these groups sat on Mr. Fennie's jury[6]. The general questions asked of the few jurors were too broad to be effective and trial counsel failed to follow up with questions that would ferret out those who were prejudiced against members of the black race.

Trial counsel also failed to ask all of the jurors any questions regarding the interracial aspect of the crime. In Mr. Fennie's case, it was extremely important that trial counsel voir dire on this because trial counsel was on notice that the State was going to make an uncharged rape of the victim a major feature of the trial[7]. Unfortunately, only one potential juror was asked a question regarding the interracial aspect of the crime(R. 482), and that individual did not serve on the jury.

Worse yet, not one potential juror was asked any

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6 Jurors Smith, Hennigan, Wright, and Williams.

7 Mr. Fanter also failed to question any potential African-American jurors regarding their beliefs on race, race relations, and intimate involvement between Caucasian-Americans and African-Americans. At the evidentiary hearing, Mr. Fanter had no explanation for why he failed to do so. (R. 47) The latter subject was particularly relevant to Mr. Fennie's case because the defense knew the State would be arguing that Mr. Fennie had raped the victim, and the defense was aware of police reports where Mr. Fennie had denied raping the victim but had asserted that he and the victim had consensual sex. Mr. Fanter's failure in this regard is even greater considering that the African-American jurors who sat on Mr. Fennie's jury were all female. Not only were no questions asked to these jurors regarding race, but no questions were asked regarding whether they could fairly judge Mr. Fennie despite the accusation of rape and Mr. Fennie's claim that the sex was consensual.

questions regarding the murder of the white teenager by black youths that had recently occurred, or if they were involved with or knew any of the major players in that tragedy, or their general opinion on the matter. As stated previously, trial counsel was well aware of that tragedy. The possibility that some of the jurors were affected by the tragedy is too great to ignore considering the small size of the Brooksville community. In fact, most of the individuals involved in the tragedy were school-age children, and the trial record indicates that at least five (5) of the jurors in Mr. Fennie's case had children in school during the incident. (R. 181; 367; 377; 600; 795) Despite this, trial counsel asked none of the jurors about the incident.

In Robinson v. State, 520 So. 2d 1 (Fla. 1988), this Court acknowledged racial discrimination, not only as a historical fact, but also as a continuing factor in the administration of justice, particularly in rape cases:

> Racial prejudice has no place in our system of justice and has long been condemned by this Court. Nonetheless, race discrimination is an undeniable fact of this nation's history. As the United States Supreme Court recently noted, the risk that the factor of race may enter into the criminal justice process has required its unceasing attention. We cannot, however, by rule of law so quickly eradicate attitudes long held and deeply entrenched. Thus, despite "unceasing" efforts, discrimination on the basis of race persists. As the United States Supreme Court acknowledged in Rose v. Mitchell:
>
> > [W]e . . . cannot deny that, 114 years after the close of the War Between the States . . ., racial and other forms of discrimination still remain a fact of life, in the administration of

> justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.
>
> **The situation presented here, involving a black man who is charged with kidnapping, raping, and murdering a white woman, is fertile soil for the seeds of racial prejudice.**

Id. at 7 (citations omitted)(emphasis added). Like the situation in Robinson, the facts in Mr. Fennie's case were also fertile soil for the seeds of racial prejudice.

At the evidentiary hearing held in this matter, Mr. Fennie's trial counsel acknowledged that, because of the races of both Mr. Fennie and the victim, race was a factor in Mr. Fennie's trial. (PC-T. 32) Trial counsel also testified that it would be his practice to rid the jury of racist jurors if race was a factor in the case. (PC-T. 31) Despite these answers, no explanation was ever offered by trial counsel for why he failed to question all of the potential jurors regarding the racial elements in Mr. Fennie's case. Furthermore, it appears from his testimony at the hearing below that trial counsel had no plan for how to confront potential jurors with these issues. Despite acknowledging the racial element involved in Mr. Fennie's trial, trial counsel's "strategy" was to simply wait for voir dire to begin and see how things evolved:

> Q But was race involved?
> A Well, because he was black and the victim's white, yes.
> Q Okay. Would that be enough for you to question

jurors? About race, excuse me.

A Depends. **It really depends on how it's going.**

(PC-T. 32)(emphasis added) Unfortunately for Mr. Fennie, trial counsel's "strategy" was really no strategy at all.

As stated *supra*, trial counsel had knowledge of the racial tension in Brooksville widely reported on by the media after the killing of the white teenager. (PC-T. 27) At the evidentiary hearing, trial counsel also acknowledged that jurors are not always forthcoming. (PC-T. 34) Despite this, trial counsel hardly touched on race through Mr. Fennie's voir dire. Furthermore, trial counsel never requested individual voir dire in order to thoroughly question jurors on these sensitive issues without offending other potential jurors, or alerting the other potential jurors what the “right” answers are.

At the evidentiary hearing, Mr. Fennie presented the expert testimony of Attorney William Salmon. During the direct examination, Mr. Salmon was asked a series of hypothetical situations involving facts identical to those from Mr. Fennie's voir dire. Mr. Fennie asserts that one particular hypothetical is critical to this Court's determination of this claim:

> Q Same situation, black defendant, black on white crime, but having some knowledge of racial problems or racial tensions in the county or in the city where it occurred.
>
> A Escalates the concern even more. Requires a refined strategy, an even more refined strategy, on how you're going to address that particular issue

during the voir dire process.

Q I mean, would it be a situation where you could start talking to the jurors and then decide at that point after you start hearing some answers where you would go?

A Not in my opinion, no. You might be able to do it that way if you had a predeveloped strategy that you were ready to implement once you got into the process. You still have to have the strategy developed.

(PC-T. 124).

Trial counsel's "strategy" to simply wait for voir dire to begin and see how things evolved was in no way sufficient to ensure Mr. Fennie received a verdict and sentence from an unbiased jury. Thus, trial counsel was functionally and constructively absent during this critical stage of Mr. Fennie's trial. Mr. Fennie's legal expert explained it best:

Q You did review the voir dire that Mr. Fanter did in Mr. Fennie's case, did you not?

A I received I believe it was five volumes totaling just under 900 pages. If that's the entirety of the voir dire in this case, then I received all of it.

Q And you reviewed it?

A I did.

Q Do you have an opinion on Mr. Fanter's job during Mr. Fennie's voir dire?

A I do.

Q And what would that opinion be?

A With regard to the racial issue that we've been talking about, I feel it was deficient and below the standards of reasonably competent and effective assistance of counsel.

Q And why?

A Because as I reviewed the transcript of the voir dire of this case, I may have missed something, but I counted -- I believe there were four panels that were introduced by the judge, two of them with a total of -- I believe it was 18 people were asked a single -- virtually a single question by Mr. Fanter to the effect of, "My client is black; will that trouble you?" That's insufficient to provide the kind of effective, competent counsel in a case of this nature.

Q Why is that?

A Because it is so fraught with the potential for denial of the defendant's constitutional right to a fair trial and effective assistance of counsel under the Sixth Amendment that to not do it is, as the courts have found in some cases, to be deficient as a matter of law.

And that's where I come down on reading the voir dire in this case. I didn't hear -- I didn't read in the transcript of the voir dire of this case a strategy that I could discern in Mr. Fanter's pattern of asking questions. Primarily, for the reason that some he asked -- the majority of the prospective venire people in this case were not asked a single question about race, not even the simple question that he did ask of, as I say, I believe it was 17 or 18 of the jurors that were called to the box in this case.

And that is where the United States Supreme Court has opined that it is imperative that effective and competent assistance of counsel be provided. Asking those few questions without an apparent strategy and failing to address what I read as the majority of the venire people called in this case, does not, in my opinion, meet that standard.

Q Do you believe it was Mr. Fanter's duty to his client to do so?

A To have an adequate strategy for dealing with the issue of race in this case?

Q Yes.

A Yes.

* * *

> Q Let me make sure this is clear, Mr. Salmon. Do you believe that Mr. Fanter was prejudicially ineffective in his voir dire?
>
> A As a matter of law, yes, I do.

(PC-T. 127-129).

Mr. Fennie was guaranteed the right to an impartial jury by the Sixth and Fourteenth Amendments, as well as by principles of due process. Ristiano v. Ross, 96 S.Ct. 1017 (1976). The right to an impartial jury, however, is useless if not protected by the actions of trial counsel. Trial counsel essentially did nothing pretrial and during voir dire to protect Mr. Fennie's right to a jury that would not be biased against him because of his race, because of the victim's race, or because of any other racial elements involved in his trial. Trial counsel was functionally and constructively absent during this critical stage, thus failing to act as the competent and effective counsel guaranteed by the Constitution. See, Cronic, *supra*; Rickman v. Bell, 131 F.3d 1150 (6th. Cir. 1997), cert. denied, 118 S.Ct. 1827 (1998) (prejudice presumed under Cronic despite being unable to find actual prejudice as required under Strickland). See also, Penson v. Ohio, 488 U.S. 75, 88 (1988); Evitts v. Lucy, 469 U.S. 387, 395 (1985); Green v. Arn, 809 F.2d 1257 (6th Cir. 1987), vacated on other grounds, 484 U.S. 806 (1987), reinstated, 839 F.2d 300 (1988).

Mr. Fennie is entitled to a presumption of prejudice

based on trial counsel's inaction during the trial. As the United States Supreme Court stated in Cronic:

> The dispositive question in this case therefore is whether the circumstances surrounding [Mr. Fennie's] representation justified the presumption."

Id. at 2049. See also Chadwick v. Green, 740 F.2d 897, 900 (11th Cir. 1984). The circumstances surrounding Mr. Fennie's case more than justify the presumption: trial counsel knew this was a black-on-white crime; trial counsel knew that the State would be arguing that Mr. Fennie raped the victim (PC-T. 28); lastly, and most importantly, trial counsel knew the area where Mr. Fennie's trial would be held had a history of racial problems between blacks and whites leading up to Mr. Fennie's case. (PC-T. 27) These circumstances required trial counsel, at the very least, to formulate and follow a strategy designed to ferret out jurors who may let racial biases interfere with their deliberations. Trial counsel, however, had no strategy to follow. (PC-T. 32)

Mr. Fennie's trial counsel failed to ask the necessary questions to ensure the jury consisted of members who would impartially decide the case. Trial counsel stood mute during voir dire regarding these issues. Mr. Fennie's case is analogous to the situation in Martin v. Rose, 744 F.2d 1245 (6th Cir. 1984). In Martin, trial counsel developed a strategy whereby he instructed the jury that Mr. Martin would be relying on certain pretrial motions for his defense and, otherwise, defense counsel would not be taking part in the

trial. Additionally, the record in that case indicated that Mr. Martin knew of and did not object to trial counsel's strategic maneuver not to participate. Despite this strategy and the defendant's acquiescence in it, the Sixth Circuit Court of Appeals reversed the conviction, finding that the strategy created a situation where the State's case was never subjected to a meaningful adversarial testing. Id. at 1250.

This case involves circumstances which cry out for a presumption of prejudice - much more than the situation in Martin. In Martin, the defendant acquiesced in counsel's strategy of standing mute and the Sixth Circuit still found a presumption of prejudice. In this case, there was no strategy for dealing with these issues. (PC-T. 32) Mr. Fennie's counsel basically stood mute despite knowing the racial implications involved in the case. Trial counsel was constructively absent during this critical stage of Mr. Fennie's trial, thus failing to protect his right to be tried by an impartial jury and failing to assure that his case received a meaningful adversarial testing.

The Sixth Amendment requires that Mr. Fennie receive a new trial. The possibility that Mr. Fennie's jury consisted of individuals who were automatically inclined to convict him due to the color of his skin, due to the color of the victim's skin, or due to other racial aspects of the case is far too great for this Court to ignore. The prejudice must be presumed.

At the very least, Mr. Fennie is entitled to a new sentencing hearing. Trial counsel's actions (or inaction) pretrial and during voir dire carry over with greater force when considering the penalty phase. An individual's right to an impartial jury is of much greater significance when that jury will decide whether that individual should live or die. In Turner v. Murray, 476 U.S. 28 (1986), the Court held that a capital defendant is entitled to voir dire the jury on the question of racial bias. The Court reasoned in Turner that: "Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." Id. at 35. Unless adequate voir dire is conducted, beliefs that blacks are more violence prone or morally inferior may infect a jury's determination, and racist beliefs may also cloud a juror's view of evidence in mitigation. Id. Without adequate voir dire, there is an unacceptable risk "of improper sentencing in a capital case." Id. at 37.

Mr. Fennie's legal expert, Mr. Salmon, explained at the evidentiary hearing the greater significance of a proper voir dire in anticipation of the penalty phase:

> Q Mr. Salmon, you've done capital trials. Do you know the difference between guilt and penalty phases?
>
> A Yes.
>
> Q And do you see a difference between the guilt and the penalty phase as far as the importance of exploring these matters with jurors?

A Quite dramatic, yes.

Q And why is that?

A Well, in the guilt phase of a capital trial the jury is constricted by the instructions from the Court, and it's their duty to resolve the issue of guilt or innocence.

In the penalty phase of a first-degree capital murder case the jury has much expanded latitude in how they're going to address the issues that they find important. To have a penalty phase jury that is composed of people that you, through your voir dire strategy, have developed and are prepared to listen to and hopefully respond to your mitigation testimony, is imperative.

(PC-T. 126-27)

At the evidentiary hearing, trial counsel testified that, in the past, he had picked jurors for capital murder trials in anticipation of the penalty phase. (PC-T. 42) He also testified that he looks for jurors who can sympathize, as well as empathize, with capital murder defendants. (PC-T. 43) Despite this, trial counsel still failed to conduct an adequate voir dire to identify jurors who would be unable or unwilling to decide Mr. Fennie's sentence without being influenced by the racial elements present in the case.

Trial counsel failed to effectively ensure that Mr. Fennie's jury could decide his guilt and sentence without being influenced by the racial elements involved in the case. Trial counsel's voir dire was wholly inadequate to do so. Trial counsel also made no attempt to individually voir dire jurors on these matters. Lastly, trial counsel made no effort to move for a change of venue to avoid having to choose among

jurors whose judgement would be clouded by their exposure to racial incidents in Brooksville leading up to Mr. Fennie's trial. Thus, trial counsel was functionally absent pretrial and during voir dire (two critical stages of Mr. Fennie's trial), and prejudice must be presumed. See, Cronic and Rickman, *supra*.

D. THE LOWER COURT'S ORDER

The lower court denied Mr. Fennie relief on all aspects of this claim. (PCR. 3614-3619) The lower court found that Mr. Fennie failed to establish that trial counsel was ineffective in his performance, and that he also failed to establish prejudice as required by Strickland v. Washington, 466 U.S. 668 (1984). (PCR. 3618) The lower court's order cannot be upheld by this Court, however, because it ignores and/or misconstrues the arguments presented below, it relies on facts that are irrelevant to the claim, and, most importantly, it completely ignores the legal basis for Mr. Fennie's claim.

In denying the claim, the lower court initially finds that Mr. Fennie failed to establish the existence of "racial hostility and turmoil in the Brooksville community at the time of the trial." (PCR. 3615) At the hearing below, Mr. Fennie entered into evidence several media articles detailing the killing of the white teenager and the impact the killing had on the community in the years that followed. (Defense Exhibit 1) The articles also detail many racially-charged incidents in Brooksville's history proceeding the killing of the white

teenager. The lower court found that these articles standing alone did not conclusively demonstrate the "racial hostility and turmoil in the Brooksville community at the time of the trial", and that Mr. Fennie should have presented someone to testify who could demonstrate it. (PC-R. 3616) What the lower court fails to consider is that trial counsel admitted at the hearing below that he had knowledge of the racial tension in the community following the killing of the white teenager. (PC-T. 26-27) Furthermore, the lower court itself acknowledged during the hearing that the Brooksville community's history of racial tension was the subject of several publications. (PC-T. 102)

Presenting an individual to opine regarding the Brooksville community's history of racism was unnecessary considering that trial counsel himself admitted possessing the same knowledge. The lower court should have judged trial counsel's actions based upon, among other things, counsel's state of mind at the time he conducted Mr. Fennie's voir dire. The record is clear that trial counsel was on notice regarding the Brooksville community's history yet failed to consider such in formulating a strategy for Mr. Fennie's voir dire. In fact, the record is clear that trial counsel had no strategy at all. (PC-T. 32)

The lower court also misconstrues trial counsel's testimony at the hearing below in finding that trial counsel's actions during voir dire were part of his strategy for the

case. Specifically, the lower court states that the actions (or inaction) of trial counsel were "part of his trial strategy" of not wanting to "offend jurors by inquiring about racial issues with every one." (PCR. 3617) This, however, is not what trial counsel testified to. Trial counsel testified that, at the time of Mr. Fennie's trial, he thought it important to be careful how he asked questions pertaining to matters of race so as to be careful not to offend the potential jurors. (PC-T. 599) He did not testify that this was part of his strategy, or that he strategically chose not to ask any questions.

In discounting the opinion of Mr. Fennie's legal expert (that trial counsel was ineffective during voir dire), the lower court stresses that the expert was unfamiliar with the trial attorney's training, experience, or past successes in trials. (PCR. 3616-17) Initially, Mr. Fennie asserts that it was erroneous for the lower court to consider trial counsel's training, experience and past successes in concluding that he was not ineffective in Mr. Fennie's case. Even the most talented and experienced attorneys can perform ineffectively in a given case, and the real issue concerns trial counsel's performance in this case.

The lower court also relies on the fact that Mr. Fennie's legal expert was unfamiliar with the demographics of the county where the trial took place but fails to explain how this is relevant to Mr. Fennie's claim that trial counsel was

ineffective for failing to question jurors on the racial aspects of the case. (PCR. 3616-17) Equally irrelevant to this claim is the lower court's reliance on the number of black jurors who actually sat on Mr. Fennie's jury. Even if half of Mr. Fennie's jury had consisted of black jurors, it would still not make up for a jury that also included one, two or six white racists who would be unable to impartially sit in judgement of Mr. Fennie. Furthermore, the lower court completely overlooks the reality that black jurors may also let their racist views and attitudes prevent them from impartially judging Mr. Fennie. This is especially important in this case where the jury was informed that Mr. Fennie was claiming that he had had a consensual sexual relationship with the white victim. (R. 1312-1329; 1348-1380) The real issue is trial counsel's failure to ask the necessary questions to prevent any racists from sitting on Mr. Fennie's jury.

In a criminal trial, the impartiality of the jury is essential to guarantee a defendant the fair trial he or she in entitled to. This Court recognized the importance of an impartial jury in State v. Neil, 457 So.2d 481, 482-83 (Fla. 1984), when it explained that "it is time in Florida to hold that jurors should be selected on the basis of their individual characteristics". Nearly a century before their holding in Neil, this Court recognized the importance to black defendants of ensuring that juries are not tainted by racial bias. In Pinder v. State, 8 So. 837 (Fla. 1891), a black man

was on trial for murder. The trial court refused to ask jurors, at the request of the defense, whether they could give the defendant the same fair and impartial trial as they would a white defendant. The Court, recognizing the importance of questioning potential jurors on the issue of race, stated:

> The examination of jurors upon their voir dire... should be so varied and elaborated as the circumstances surrounding the juror under examination in relation to the case on trial would seem to require, in order to obtain in every cause a fair and impartial jury, whose minds were free and clear of all such interest, bias, or prejudice as would seriously tend to militate against the finding of such verdict as the very right and justice of the cause would in every case demand.

Id. at 838. The Court went on to conclude that the need to exclude jurors who express bias or prejudice "asserts itself with superadded force in such a case as this, where the life or death of the defendant was the issue to tip the scale in the jury's hands for adjustment." Id.

Mr. Fennie was guaranteed the right to an impartial jury by the Sixth and Fourteenth Amendments, as well as by principles of due process. See, Ristiano v. Ross, 96 S.Ct. 1017 (1976). The right to an impartial jury, however, is useless if not protected by the actions of trial counsel. Mr. Fennie’s trial counsel did basically nothing pretrial or during voir dire to protect Mr. Fennie's right to a jury that would not be biased against him because of his race or because of other racial aspects involved in the case. The possibility that Mr. Fennie's jury could end up consisting of individuals

who were automatically inclined to convict Mr. Fennie due to the color of his skin, due to the color of the victim's skin, or due to the other racial aspects present in this case, was too great for trial counsel to ignore. The lower court further erred by finding that Mr. Fennie was entitled to no relief because he failed to show prejudice as required by Strickland v. Washington. As stated previously, Strickland does not require a showing of prejudice in all situations[8]. "In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel is legally presumed to result in prejudice." Id, at 692. The mere presence of an attorney does not satisfy the Sixth Amendment. If counsel is present, but functionally absent, at a critical stage, the Sixth Amendment is violated and reversal is automatic. See also, Cronic, Penson, Evitts, Green, and Rickman, *supra*.

Mr. Fennie has always asserted that his trial counsel was functionally absent, or not acting as the advocate envisioned by the Sixth Amendment, when he failed to protect Mr. Fennie's constitutional rights by: failing to voir dire all jurors on their racial attitudes and the interracial aspect of the crime Mr. Fennie was charged with; failing to request individual

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8 It is important for this Court to note that, even if Mr. Fennie was required to meet the prejudice prong of Strickland, the lower court prevented him from doing so by refusing to let him interview the jurors in his case. See Argument III, *infra*.

voir dire[9] of jurors on these issues; and, failing to move for a change of venue due[10] to the racial climate in the Brooksville community, as well as the historically documented racial hostility in the Brooksville community.

In Turner v. Murray, 476 U.S. 28, 35 (1986), the Court held that a capital defendant is entitled to voir dire the jury on the question of racial bias because of the great amount of discretion entrusted to the jury. Despite this, trial counsel failed to ensure that Mr. Fennie's jury would act impartially and not be influenced by the racial factors trial counsel knew were present in this case. Thus, trial counsel was functionally and constructively absent during Mr.

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9 Regarding individual voir dire, the lower court finds no fault with trial counsel because he requested individual voir dire (which the trial court denied), and later renewed the request. (PCR. 3619) However, the lower court ignores the fact that trial counsel's motion was based on publicity surrounding the killing. Nothing in the request suggests that individual voir dire was needed to question jurors on racial matters. However, at the hearing below, trial counsel did imply that he would want to be careful asking prospective jurors these questions so as not to offend other members of the panel. (PC-T. 599) Of course, individual voir dire would have accomplished this.

10 The lower court excused trial counsel's failure to move for a change of venue by stating that trial counsel comported himself with the prevailing Fifth Circuit practice of first attempting to seat a jury in the area where the crime occurred. (PCR. 3620) The lower court's analysis is faulty, however, because trial counsel failed to ask the questions necessary to determine if jurors could impartially sit in judgement of Mr. Fennie. The lower court then further absolves trial counsel of any fault by detailing the "extensive" voir dire he performed. (R. 3620) Unfortunately for Mr. Fennie, trial counsel's voir dire did not consist of anything remotely extensive on the issues or race or racial tensions in the Brooksville community.

Fennie's voir dire, a critical stage of Mr. Fennie's trial. The lower court erred in not finding that the prejudice to Mr. Fennie is presumed under these circumstances.

At the very least, Mr. Fennie is entitled to a new sentencing hearing. As argued *supra*, trial counsel's actions (or inaction) pretrial and during voir dire carry over with greater force when considering the penalty phase. An individual's right to an impartial jury is of much greater significance when that jury will decide whether that individual should live or die. See Turner, at 35. Without adequate voir dire, there is an unacceptable risk "of improper sentencing in a capital case." Id. at 37. The lower court failed to address this aspect of Mr. Fennie's argument.

ARGUMENT II

THE OUTCOME OF THE PENALTY PHASE OF MR. FENNIE'S TRIAL WAS MATERIALLY UNRELIABLE BECAUSE NO ADVERSARIAL TESTING OCCURRED DUE TO THE INEFFECTIVE ASSISTANCE PROVIDED BY TRIAL COUNSEL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. THE LOWER COURT ERRED IN DENYING MR. FENNIE RELIEF ON THIS CLAIM.

In order to prevail on his claim of ineffective assistance of counsel, Mr. Fennie must prove two elements, deficient performance by counsel and prejudice. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish that counsel's performance was deficient, Mr. Fennie "must show that counsel's representation fell below an objective standard of reasonableness" based on "prevailing professional norms." Id. at 688. To establish prejudice Mr. Fennie "must show that there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Based on the evidence presented at the evidentiary hearing below, Mr. Fennie can prove both elements of Strickland.

A. FAILURE TO PRESENT MITIGATION

At the evidentiary hearing below, evidence was presented that trial counsel for Mr. Fennie failed to present available lay witnesses and expert testimony in mitigation. This testimony showed that Alfred Fennie grew up in a physically abusive home, one characterized by a lack of stability or positive influences, that he was a nonviolent man and that he was not as culpable in the death of Mary Shearin as was his codefendant Michael Frazier. Counsel's failure to present this evidence was deficient performance which prejudiced the penalty phase of Mr. Fennie's trial.

1. Laywitness Testimony[11]

Annie Fennie had her first two children, Kathy Reed and Alfred Fennie, by a man she didn't know to be married at the time (R. 1951), a man who would provide no emotional or financial support for her and the children. She worked days as a bartender, a house maid, or a cook, while she was healthy enough to do so. (PC-T. 510, 535) At

11 Mr. Fennie would note that his mother, Annie Fennie, was listed as a defense witness for the evidentiary hearing. (PC-R. 3140.) Unfortunately Ms. Fennie passed away prior to the evidentiary hearing. (See PC-T. 529.) Mr. Fennie's father was also unavailable to testify because, as Kathy Reed testified, he is currently in a nursing home. (PC-T. 501.)

night and on weekends, she gambled (PC-T. 506, 510, 536) leaving the children without a babysitter in the care of her 10-year-old daughter Kathy. (PC-T. 506; 511)

In addition to her gambling addiction, Annie Fennie was an alcoholic who only stopped drinking when told that her liver was going to kill her. (PC-T. 513) This probably exacerbated her numerous other health problems, including high blood pressure, diabetes, heart trouble, and kidney trouble. (PC-T 513, 543.) Annie Fennie had at least two strokes, the first when she was in her early thirties and the children were still young, and was unable to continue working after the second stroke. (PC-T. 508, 535, 544) Her health troubles contributed to the instability of the Fennie home.

The Fennie children moved at least five times while they were growing up, and they were sent to live with family members as well, on at least one occasion because of Ms. Fennie's poor health. (PC-T. 504; 506; 509; 533) The children lived with an uncle, probably on more than one occasion, and they stayed with a great-grandmother for a while until they found a place to live. (PC-T. 505, 509)

Kathy Reed testified that the two did live with their father for some period of time when they were very young. (PC-T. 501-2) She recalled doing heavy chores, and she recalled the inappropriate sleeping arrangements in the household, that she slept with her father and Mr. Fennie slept with his stepmother. (PC-T. 502-3) Finally, she remembered a confrontation between her mother and her stepmother that seemed to have resulted in the court custody battle and the two children eventually returning home to live with their

mother. (PC-T. 502)

According to both sisters, Ms. Fennie beat her children with whatever was within reach, including her hand, extension cords, fan belts, hangers, 2x4 wooden boards, and glass bottles. (PC-T. 512, 536) She beat them for disobeying her by looking out the window or opening the door when she left them home alone (PC-T. 512, 537), sometimes for days at a time. (PC-T. 511) The children wore pants and long sleeves so no one would see the bruises and welts (PC-T. 539, 546), and their mother threatened that if they told anyone they'd get some more when they got home. (PC-T. 546, 512) The children knew she would beat them wherever she found them, be it in the bed or in the bath. (PC-T. 512)

Each child was also beaten according to his or her particular bad proclivities. Annie Fennie beat Mr. Fennie for taking money from her purse to pay off the bullies who terrorized him. (PC-T. 537) (Evidently Mr. Fennie preferred a beating by his mother to one by a gang of bullies.) She also beat Mr. Fennie for wetting the bed, which he did until he was nine or ten years old. (PC-T. 513, 538) Sometimes he'd run away from his mother, and she'd chase him to the neighbor's house. (PC-T. 512, 538) One time Mr. Fennie ran naked to a neighbor's house, and the neighbor threatened to call the authorities if Ms. Fennie didn't stop beating her children. (PC-T. 538)

Ms. Fennie took a young Mr. Fennie gambling with her. (PC-T. 536) There was testimony by several witnesses at trial and at the evidentiary hearing touching on Mr. Fennie's gambling habits. (Kathy

Reed at R. 1974,1976-7; Annie Fennie at R. 1953, 1958; Dr. Ronald Peal at PC-T. 276; Dr. Jethro Toomer at PC-T. 343-348; Deborah Fennie at PC-T. 536; and Alan Fanter at PC-T. 728, referring to Mr. Fennie's statements during their transcribed conversation.) This was a habit he learned from his mother when he was as young as seven or eight years of age. (PC-T. 536) Sometimes there would be a room for the children at the card games and Ms. Fennie would take all of them (PC-T. 510, 542), but Mr. Fennie was the only one she ever took alone. (PC-T. 536) There was a lot of drinking and profanity, and people would cut each other with knives arguing over money. (PC-T. 510, 542)

Annie Fennie's children didn't mingle much with other people because they weren't allowed to leave the house or even look out the window while she was gone. (PC-T. 511-512, 537) If a passing neighbor saw them peek out the windows and told their mother, the children would be beaten. (PC-T. 512, 537) Thechildren didn't have a television until sometime after they moved to the projects (PC-T. 516), so they would remain locked in the house listening to radio mysteries or playing made-up games until young Kathy fed them and put them to bed. (PC-T. 511)

The Fennie family moved to the projects when Mr. Fennie was still a frightened young child in the fourth grade. (PC-T. 505)[12] Ms.

12 Deborah Fennie's testimony also corroborates that of her sister and contradicts her mother's trial testimony, which indicated that the family moved to the projects in 1979 when Mr. Fennie was seventeen and just short of being legally an adult Ms. Deborah Fennie says the family moved to the Ponce de Leon Projects when, "I was a little less than six or seven years old, or a little older." (PC-T. 534)

Reed testified:

> It was rough. The projects was like stepping into people that you don't know that they could be like your enemy, like it was somebody that you just afraid of. You don't know if you walk out the door what will happen to you.

(PC-T. 505) It was a neighborhood of violence and animosity. Deborah Fennie recalled seeing a woman get shot twice on her front porch. She went into the house and told Alfred, and by the time he came out the paramedics were already on the scene. (PC-T. 542) Sometimes the people Annie Fennie worked for gave her things like toys for her children or a barbecue grill, but these gifts wouldn't survive long in the projects. (PC-T. 544)

All of the Fennie children grew up under the same difficult conditions, and, contrary to the impression given by Annie Fennie's testimony (R. 1965), not one remained unaffected. The youngest, John, was in prison during Mr. Fennie's trial. (PC-T. 525) Deborah had a problem with drugs prior to Mr. Fennie being arrested for this crime. (PC-T. 526, 551) Kathy, who was a surrogate mother to her siblings at such a young age, became a mother of her own children when she was only fifteen years old. (PC-T. 531)

Yvonne Williams, a former girlfriend of Mr. Fennie's, corroborated the sisters' testimony of Mr. Fennie as a nonviolent man. Ms. Williams never knew Mr. Fennie to be violent, and she never knew him to carry a gun. (PC-T. 684) Mr. Fennie never drank alcohol (PC-T. 683, 685) and you always saw him with a soda (PC-T. 683). He was kind to her (PC-T. 683) and helped her with her children (PC-T. 690). Ms. Williams and Mr. Fennie sometimes went to social

gatherings together, but if anyone started arguing Mr. Fennie would leave. (PC-T. 686) As Ms. Williams testified, "Alfred just would leave because he wasn't the type to just hang around with the violence." (PC-T. 686)

Pamela Colbert testified at the evidentiary hearing that she had a long-term relationship with Mr. Fennie and could have testified at trial about his character.

Mr. Fennie was a kind and generous man who never drank or did drugs. (PC-T. 441-3) In fact, he helped her get off cocaine once he learned she was a user[13]. (PC-T. 443-44) Mr. Fennie was not a violent man (PC-T. 445, 447-8), and she never knew him to carry a gun (PC-T. 447, 476-8). She saw him walk away from confrontations plenty of times. (PC-T. 448) She was the aggressor in their relationship. (PC-T. 445)[14]

2. Witnesses Demonstrating that Mr. Frazier, not Mr. Fennie, was the Trigger Man

Both Mr. Fanter and Mr. Lee testified that their guilt strategy was to minimize Mr. Fennie's involvement and portray co-defendant Michael Frazier as the trigger man, and that this strategy carried over into the penalty phase as well. (PC-T. 613, 749-50) However,

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13 Deborah Fennie's testimony corroborates that Mr. Fennie tried to help Ms. Colbert. The first time Ms. Fennie ever met Ms. Colbert, Ms. Colbert was covered with bruises. Ms. Colbert told Ms. Fennie she had been abused by another man.

14 This characterization is also supported by Kathy Reed's testimony. She said she saw Ms. Colbert throw Mr. Fennie against a table and tear his shirt off, but he refused to fight with her. When Ms. Colbert was being too rough with their child, Mr. Fennie spoke "with a calm spirit to her, not to hurt that girl." PC-T. 519.

they failed to call several witnesses consistent with this professed strategy. These witnesses included co-defendant Pamela Colbert, Dwayne Jones, and Dr. Kenneth Martin.

In addition to presenting mitigating evidence regarding Mr. Fennie's background, Ms. Colbert testified at the evidentiary hearing that, contrary to Mr. Frazier's trial testimony, both Michael Frazier and Mr. Fennie walked down the road with the victim. (PC-T. 474-5, 491) She couldn't see who shot Ms. Shearin, but she was able to say that both men were present when the shots were fired. (PC-T. 474-5, 491-2) This is consistent with the testimony Ms. Colbert gave at her own trial (PC-T. 472), testimony Mr. Fanter and Mr. Lee had videotaped. (PC-T. 729) Mr. Fanter watched the videotape and testified that he may have even watched her testimony in person. (PC-T. 729)

It's clear from a conversation between Mr. Fennie and his trial attorneys, which his trial attorneys had transcribed by the court reporter, that Mr. Fennie wanted Ms. Colbert to testify. (Defense Exhibit 15; PC-T. 660-1; 725-9) According to Ms. Colbert, she was never approached by either Mr. Fennie's trial attorneys or investigator, nor did her own trial attorney ever broach the subject of testifying for Mr. Fennie. (PC-T. 448-9) She testified at Mr. Fennie's evidentiary hearing, and she would have been willing to testify at his trial as well. (PC-T. 449)

Michael Frazier, unlike Alfred Fennie and despite his trial testimony to the contrary (R. 758), had a history of violent crimes and was known to carry a gun. In fact, during the transcribed

conversation between Mr. Fennie and his trial attorneys, Mr. Fennie told his attorneys about a .357 Magnum that Mr. Frazier had stolen from a sheriff's vehicle. (Defense Exhibit 15; PC-T. 658-9, 760-1) When asked about this exchange at the evidentiary hearing, Mr. Lee said Mr. Fennie was asking them to investigate "some crime that we had attempted to verify and couldn't." (PC-T. 761) All it would have taken to verify this crime was a simple review of Mr. Frazier's criminal history documents, documents which were provided by the State during discovery. (PC-T. 758-60)

Prior the this crime, Mr. Frazier was arrested for the armed robbery of a Kentucky Fried Chicken. (PC-T. 759; Defense Exhibit 19) One of his co-defendants, a man named Dwayne Jones, was also arrested and confessed to his involvement in the crime. (PC-T. 760) He knew both Mr. Fennie and Mr. Frazier, and was good friends with Mr. Frazier. (PC-T. 227-8.) Mr. Jones never knew Alfred Fennie to be violent (PC-T. 230, 231), but he did know Mr. Frazier to have a temper (PC-T. 228, 230) and had seen him violent. (PC-T. 230, 232) Mr. Frazier was even more violentwhen he was using drugs (PC-T. 232), generally crack (PC-T. 229) and powder cocaine. (PC-T. 230) (Recall that in Mr. Fennie's taped statement implicating Mr. Frazier, he said that Mr. Frazier had done crack cocaine with the victim prior to her death, and that Mr. Frazier and Ms. Shearin argued because she owed him money.) (R. 1354) Mr. Jones also testified at the evidentiary hearing that he was with Mr. Frazier when he, Mr. Frazier, broke into a police officer's house and stole a .357. (PC-T. 232-3) In fact, Mr. Jones knew Mr. Frazier to carry various guns. (PC-T. 239) Mr.

Jones was in the custody of the Department of Corrections at the time of Alfred Fennie's trial, and would have been willing to testify. (PC-T. 233, 235, 237)

Dr. Kenneth Martin is a dentist who was retained by the State to evaluate a bite mark on Mr. Frazier's hand. He concluded that the bite mark was made by the victim, Ms. Shearin. (Defense Exhibit 13, 14; PC-T. 646) At Mr. Fennie's trial, Mr. Frazier admitted that the bite mark had been made by Ms. Shearin, so the State had no reason to call Dr. Martin as they had in Mr. Frazier's trial. (R. 1490-1) However, the defense had great reason to do so. Mr. Frazier testified at Mr. Fennie's trial that Ms. Shearin bit his hand when he reached into the trunk to try to get her out, at Mr. Fennie's urging. (R. 1490) In fact, Dr. Martin's expert opinion, from his report and his deposition testimony, was that "this mark's orientation would be consistent with Mr. Frazier's hand coming from behind Ms. Shearin in an upright position, being placed against her mouth." (PC-T. 646)

Mr. Fanter admits that Dr. Martin's testimony would have discredited that portion of Mr. Frazier's testimony. (PC-T. 647) Further, it would have been consistent with the trial attorneys' guilt and penalty strategy, as professed in their testimony (PC-T. 613, 749-50), and as demonstrated by actual trial closing argument. Mr. Fanter describes a scenario where Michael Frazier walks behind the victim down the deserted road:

> Maybe she's getting scared at this point and she starts to squirm, so he puts his hand around her neck. And then what happens? She bites him. Right there because that's right where his hand would be. And when she bites him he gets mad, and when he gets made he goes into a rage. The

> same type of rage you heard Officer Preyer testify to. He goes out of control. And he shoots her. Because he's so incensed, he is so mad, he has to strike back, so he shoots her.

(R. 1882)

3. Expert Testimony

The testimony of Deborah Fennie, Kathy Reed, and Pamela Colbert could have provided the necessary link between expert testimony and mitigation. Kathy Reed did testify at trial, but because Mr. Lee did not recall calling Kathy Reed, he had no explanation for why he had not asked her or her mother Annie Fennie any questions about Mr. Fennie's tendency to avoid confrontation. (PC-T. 752) Mr. Lee said that he *should have* put on lay witness testimony about Mr. Fennie being easily led and manipulated, compliant and easily dominated. (PC-T. 774) If he had similar expert testimony it *should have been in*, but he doesn't recall having any such testimony. (PC-T. 774) He also testified that if he had lay or expert testimony showing that Mr. Fennie could conform to a jail environment and wouldn't pose a threat to others in the future, he would have put that on as well. (PC-T. 776)

Dr. Peal, the psychologist who evaluated Mr. Fennie at trial, had testified at a penalty phase before, particularly as to a defendant's life history, and said that he would have done the same for Mr. Fennie. (PC-T. 259) If he had spoken to Mr. Fennie's family members, much of their compelling testimony could have come in through him. In fact, their testimony of Mr. Fennie as a nonviolent person comports with Dr. Peal's own report, which stated that Mr.

Fennie's test scores "support the notion that he is generally not a violent, impulsive individual, as do the types of crimes he has committed in the past." (Defense Exhibit 5) Dr. Peal would have been willing to testify about this aspect of his evaluation. (PC-T. 260)

Similarly, at the evidentiary hearing, Dr. Peal indicated that in his expert opinion "the most significant criteria that has the best predictive value [as to future dangerousness, violence] is prior violent history. That's above and beyond all psychological tests." (PC-T. 263) Dr. Peal had attended a 3-day workshop on assessing the dangerousness of individuals less than a year before Mr. Fennie's trial. (See Defense Exhibit 6) The trial attorneys did put on several guards to testify that Mr. Fennie was a model prisoner, but Dr. Peal questioned the efficacy of such testimony in predicting future dangerousness. As Dr. Peal said, "People who are violent, sometimes when they are put in prison systems are kind of on their best behavior." (PC-T. 279) This certainly would not have been lost on the jury.

This information was not developed because trial counsel failed to communicate with his expert. Dr. Peal testified that the only conversation that he knew he had with Mr. Fanter was the initial conversation retaining him, and that was reflected in a little handwritten note. (PC-T. 252) Dr. Peal never spoke with and had never even heard of Hugh Lee (PC-T. 256), the man primarily responsible for Mr. Fennie's penalty phase. (PC-T. 611, 748-9) The only discussion of mitigation with either of Mr. Fennie's attorneys

was during that initial conversation with Mr. Fanter. (PC-T. 255) There is no documentation to indicate any follow-up by trial counsel. (PC-T. 252) Clearly then counsel could not have discussed Dr. Peal's findings after Dr. Peal evaluated Mr. Fennie. Dr. Peal testified that after providing his report to trial counsel, he was never provided any more materials, never saw Mr. Fennie again, and, in short, had no further involvement with the case whatsoever. (PC-T. 252-3)

Dr. Toomer, who evaluated Mr. Fennie during postconviction, unlike Dr. Peal, was provided with the background and corroborative materials necessary to provide opinions within a reasonable degree of medical certainty. (PC-T. 318) According to Dr. Toomer, Mr. Fennie has a personality disorder that "is characterized by dependant traits and a need for acceptance, and a need to be overly accommodating in order to satisfy his own personal deficits." (PC-T. 319) Dr. Toomer's testing of Mr. Fennie "reflected deficits in terms of overall personality functioning with respect to dimensions like insecurity, need for acceptance, being easily manipulated, high dependency needs, and immaturity" (PC-T. 306-7; 309-10), and demonstrated characteristics of "dependent personality traits, histrionic personality traits, [and] avoidant personality traits." (PC-T. 307)

These characteristics of Mr. Fennie "are reflective of the deficits that were experienced early on. So what you have here is an individual who is compensating for those early on deficits." (PC-T. 323) For example, Mr. Fennie's paranoia is a fear of being rejected or isolated (PC-T.323), as he was rejected and isolated by both

parents throughout his young life. Dr. Toomer testified that information received from Mr. Fennie's sister, Ms. Reed, was corroborative of his conclusions. (PC-T. 307-8) In fact, the evidentiary hearing testimony of Mr. Fennie's sisters clearly demonstrates the early deficits Mr. Fennie suffered, and their testimony as well as that of the other lay witnesses at the evidentiary hearing and at trial demonstrate Mr. Fennie's attempts to compensate for these deficits and gain the acceptance of others.

Dr. Toomer testified that Mr. Fennie is not a leader-type, but again one who acts in order to please those around him and increase the likelihood of his acceptance. (PC-T. 319) Mr. Fennie is easily susceptible to duress, both internal duress and duress resulting from his relationships with others. (PC-T. 320) Dr. Toomer also concluded that Mr. Fennie was not at high risk for future violent behavior. (PC-T. 319) Dr. Toomer would have been willing to testify to these opinions, whether they rose to the level of statutory or nonstatutory mitigation, at the time of Mr. Fennie's trial. (PC-T. 324)

All of the above witnesses were available for testimony or perpetuation of testimony at the time of Mr. Fennie's trial, and all stated under oath that they would have been willing to testify. Kathy Reed, the only lay witness to speak substantively to the trial attorneys prior to trial, said she would have given them this information if she knew it would have been helpful. (PC-T. 527) She would have answered the questions, if only they had been asked.

Failure to investigate available mitigation constitutes

deficient performance. Rose v. State, 675 So. 2d 567 (Fla. 1995); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); Deaton v. Singletary, 635 So. 2d 4 (Fla. 1994); Heiney v. State, 620 So.2d 171 (Fla. 1993); Phillips v. State, 608 So.2d 778 (Fla. 1992); Mitchell v. State, 595 So.2d 938 (Fla. 1992); State v. Lara, 581 So.2d 1288 (Fla. 1991); Stevens v. State, 552 So.2d 1082 (Fla. 1989); Bassett v. State, 541 So.2d 596 (Fla. 1989). Defense counsel's inadequate investigation and preparation precluded Mr. Fennie's sentencers from hearing substantial mitigating evidence. This ineffective assistance prejudiced Mr. Fennie. Clearly, under the Strickland standard, Mr. Fennie's trial attorneys performed unreasonably, and this unreasonable performance prejudiced Mr. Fennie. Strickland v. Washington, 466 U.S. 668 (1984)

B. THE TRIAL COURT'S ORDER DENYING RELIEF

The trial court's denial of Mr. Fennie's penalty phase ineffectiveness claim seems to be more an acceptance of the State's conclusory arguments than any consideration of the actual substantive evidence presented.

1. The Laywitnesses

The trial court correctly stated in his order that Mr. Fennie argued that the failure to prepare witnesses, particularly Mr. Fennie's mother who gave damaging testimony at trial, and the failure to perpetuate the testimony of his sister Deborah Fennie, constituted ineffective assistance of counsel. The trial court's response to these allegations was that, "The claim that trial defense counsel failed to adequately prepare these family witnesses is, however,

belied by the testimony at the evidentiary hearing that members of the trial defense team met with Cathy Fennie [sic] in her home about three times prior to trial, and called almost every weekend." (Order Denying Relief, p. 12)[15]

Kathy Reed testified that, "They always call and say, trying to pressure us to tell–to make him take the plea–bargain, or he take life, or he take death." (PC-T. 520) They never discussed anything substantive regarding the penalty phase. (PC-T. 523-25) Certainly an attorney's repeated telephone contact with family members, when it is done solely for the purposes of pressuring those family members into convincing the defendant that he should take a deal, does not constitute an adequate investigation into a client's background, nor does it indicate competent and effective trial preparation regarding those family member-witnesses.

The trial court never addressed that trial counsel elicited "unexpected" information from Annie Fennie regarding Mr. Fennie's prior crimes during her direct examination. The trial court also failed to address that trial counsel did not recognize his own witnesses, that he apparently had little if any contact with Deborah Fennie despite his intent to call her as a witness, and that trial counsel failed to perpetuate Deborah Fennie's testimony not because he made a strategic decision, but because, as the State admitted in Closing Arguments, trial counsel was unaware that Deborah Fennie was unavailable to testify until he tried unsuccessfully to call her to

15 Note that the trial court does not say that trial counsel ever met with Deborah Fennie.

the stand.

The trial court states in his order:

> Almost all of the mitigating circumstances that collateral defense counsel suggests should have been presented at trial, were presented at trial. The most prominent exception was more evidence concerning the issue of physical abuse that allegedly was inflicted upon the defendant. Evidence of such alleged abuse was **minimized** by the defendant's mother during her trial court testimony.

(Order Denying Relief at p. 14) (emphasis added) The trial court further finds that, "In summary, it appears that much of the mitigation evidence that collateral defense counsel suggests should have been presented, was in fact presented in some form or fashion, and that anything more would have been largely redundant and cumulative." (Order Denying Relief, p. 14)[16] In fact, the mitigation presented at the evidentiary hearing was not presented at trial.

At the penalty phase of Mr. Fennie's trial, his trial attorneys called 10 witnesses, five of whom were correctional officers. These officers were able to contribute little to an understanding of Mr. Fennie's character except that he behaved well in jail, and knew nothing about Mr. Fennie's life prior to his incarceration for this crime. Their collective testimony contributed a grand total of 15 pages to the penalty phase transcript. (R. 2074-2089)

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16 The lower court also question how effective any of the information about Mr. Fennie's childhood would have been because it "would merely be anecdotal evidence." (Order Denying Relief, p. 15) If one characterizes firsthand testimony from people who witnessed the events of Mr. Fennie's childhood as "anecdotal," it is difficult to imagine any penalty phase testimony that would rise above that term.

The other witnesses included Mr. Fennie's mother, Annie Fennie (R. 1949); his sister, Kathy Reed (R. 1966); his friend, Erwin Ward (R. 1980); a girlfriend, Diane Williams (R. 1987); and his disabled niece's head start instructor, Melanie Simmons (R. 1995).

While these witnesses were able to provide a glimpse at some of the good qualities of the defendant, Mr. Fennie's trial attorneys did not adequately prepare them to discuss his character or his formative experiences. For example, Diane Williams was asked, but didn't know anything about Alfred's childhood or what he was like before they met. (R. 1989.) When trial counsel asked Ms. Reed if her brother attended church, Ms. Reed said that Mr. Fennie "went a few times in his younger days," but wasn't much of a church-goer. In fact, Ms. Reed testified, "Alfred mostly was a gambler." (R. 1974) In case the jury missed that Mr. Fennie was not a religious man, trial counsel reiterated, "So, basically, Alfred has broken with the church and wasn't there a lot?" (R. 1974)

Perhaps the most striking question posed by trial counsel, and the one for which the lay witnesses were almost universally unprepared, was the one meant to be answered by the jurors: Why does Alfred Fennie deserve to live? Instead of showing the jury who Alfred Fennie was and making argument (not subject to cross-examination) that he was worthy of life, trial counsel shifted the burden to unprepared lay witnesses, unacquainted with the judicial system, to convince the jury that their friend or loved one should be spared. From sister Kathy Reed, trial counsel elicited that Mr. Fennie was a gambler who loved women. (R. 1974-77) From Erwin Ward,

trial counsel elicited that Mr. Fennie was a caring person. (R. 1984-5) From Diane Williams, trial counsel elicited that Mr. Fennie is not a violent man. (R. 1991-92) From Melanie Simmons, trial counsel elicited that Mr. Fennie could be a good example for others to follow[17]. (R. 2001)

Ms. Annie Fennie appears to be the only one prepared for the all-important question of why her son should live. When asking the question, trial counsel made a reference to having discussed the subject before. Ms. Fennie responded that her son had a lot of good in him and had helped a lot of people, that "God put him here to help other people." (R. 1961) Ms. Fennie and trial counsel were arguably less prepared for other subjects.

Hugh Lee testified at the evidentiary hearing that he specifically remembers calling Annie Fennie at the penalty phase because she gave an unexpected damaging response. (PC-T. 750) The defense had managed to keep Mr. Fennie's criminal history from the jury until Annie Fennie testified that he had done well in prison and gotten his GED there. (PC-T. 1956) Mr. Lee testified at the evidentiary hearing that he could not recall whether he knew that Mr. Fennie had received a GED prior to her testimony, or whether he knew Mr. Fennie had received this GED while he was incarcerated, but the record speaks for itself. (PC-T. 781)[18] Mr. Lee even led Ms. Fennie

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17 Ms. Simmons also admitted that the reason she had given for Mr. Fennie to live (good example to others) applied equally to everyone on death row. (R. 2005)

18 Keep in mind that Mr. Lee testified about the importance of school records in preparing mitigation. (PC-T. 818), "A large source comes

back to this line of questioning later[19]. (R. 1959-60) These are not the responses of a prepared witness, or the questions of a prepared trial attorney.

Arguably the cardinal rule of any examination is never ask a question to which you don't know the answer. It appears Mr. Lee didn't know the answer to several questions, and not just those relating to education. When Mr. Lee tried to elicit that Mr. Fennie contributed financial support to the household, Ms. Fennie said that Mr. Fennie only worked about six months out of the year, but that people always gave him money and he was very lucky at the track. (R. 1953) To make matters worse, Mr. Lee asked Ms. Fennie who was taking care of Mr. Fennie's three children, to which she responded she did not know. (R. 1957)

The picture the jury got of her son from Ms. Fennie at trial as a gambling womanizer[20] who was adored by his mother and had apparently faced little adversity in his life was far different from the reality of Mr. Fennie's life, as shown by the testimony of Ms. Fennie's daughters, Kathy (PC-T. 499) and Deborah (PC-T. 532). Kathy

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from school records. There's more there that can give you leads than anything else."

19 In fact, Ms. Fennie made another oblique reference to Mr. Fennie's prior incarceration when asked if he had been in jail for over a year. (R. 1950)

20 During Mr. Fennie's trial, the prosecutor elicited in Ms. Fennie's cross-examination that her son "play[ed] women" for money. (R. 1962) Ms. Fennie testified, "Well, if a woman love a man she give him her money. Some of them still do. They keep them. That's what Pam were doing. She gave Alfred money to keep him from being with other women." (R. 1963)

Reed had testified at trial, but recall that her testimony dealt primarily with Mr. Fennie's assistance to her handicapped daughter and his encouragement to her other children. Deborah had been in a serious accident at the time of trial, but she had just returned home and would have been available for preservation of testimony. (PC-T. 549)

Note that Mr. Lee testified that he did not recall considering preserving Deborah Fennie's testimony for presentation at the trial (PC-T. 755), and although he had no specific recollection of meeting Deborah Fennie or what the substance of her or Kathy Reed's testimony would have been, Mr. Lee testified that he would have tried to perpetuate her testimony if she had been a critical witness. (PC-T. 807-8) The record plainly presents an alternative explanation for not perpetuating Deborah Fennie's testimony. Immediately after Annie Fennie's testimony, the following exchange took place:

> The Court: All right. Next witness.
> Mr. Lee: Deborah?
> [Ms. Fennie]: Deborah's not here. Deborah is not here. She's ill. I had told Mr. Foster [sic] that she was in the hospital.
> Mr. Lee: That's Kathy out there?
> [Ms. Fennie]: Yeah. (R. 1965)

Trial counsel clearly intended to call Deborah Fennie as a witness and could not have made a strategic decision not to perpetuate her testimony when, as that State admitted during its Written Closing Argument from Post-Conviction Evidentiary Hearing at p. 28-9, trial counsel was "unaware that Deborah was unavailable" to testify until he attempted to call her to the stand.

Returning to the lower court's Order Denying Relief and his

characterization of the testimony presented at the evidentiary hearing:

> Collateral counsel believes that a proper presentation of the defendant's life history and background would show that the defendant was the child of a **poor, not well educated, single mother**, who had numerous health problems, including alcoholism and diabetes, and that the defendant's mother worked long hours at numerous jobs to try to provide for her children. Collateral defense counsel believes that a fair review of the available evidence would also demonstrate that the defendant's mother was a gambler who taught her son how to gamble; that Mrs. [sic] Fennie beat all of her children including the defendant; and that Mrs. [sic] Fennie often left the children alone with their oldest sister to care for them. Furthermore, collateral defense counsel stresses that the available evidence shows that the defendant grew up in **the projects** of Tampa, often running from bullies, and afraid to come out of his own house. Even more, collateral counsel claims Mrs. [sic] Fennie, the defendant's mother, required that the defendant and his siblings stay at home, locked in the house, and that they not come out; and if the children came out, or sometimes even if they looked out the windows, they were beaten.

(Order Denying Relief, p. 12-3) (emphasis added). Ms. Annie Fennie did testify that she was a single mother (R. 1951), and perhaps from the totality of her testimony the jury could infer that she was poor or the level of her education. She testified that she had lived in the projects from 1979 to 1987, and that life in the projects is "okay, if you mind your own business." (R. 1954)

Nothing else detailed above in the lower court's Order was testified to at Mr. Fennie's trial. In fact, Ms. Fennie didn't even say Mr. Fennie "grew up" in the projects. Ms. Fennie was mistaken about the dates the family lived there, giving the jury the impression that Mr. Fennie was nearly an adult, approximately 17 years of age, when they moved to the projects, rather than having

been approximately in the fourth grade. (PC-T. 505, 534) Further, while the original trial court did find as a nonstatutory mitigating circumstance that, "The defendant grew up in the housing projects of Tampa" (Findings of Fact in Support of Sentencing Order, RI. 461), he gave no indication of the weight assigned. Certainly when a predominately white jury from Brooksville inaccurately hears from a defendant's mother that he moved to the projects of Tampa when he was 17 years of age, but that the projects were okay as long as you minded your own business, that jury is unlikely to give such mitigation much weight.

As the previous discussion of trial counsel's failure to present mitigation demonstrates, the lower court's above list does not include all of the mitigation testimony regarding Mr. Fennie's background presented at the evidentiary hearing. Even within this list, however, the only specific mitigation addressed by the trial court is the physical abuse suffered by Mr. Fennie, which the trial court says was "minimized" by Annie Fennie. Because there was **no testimony at all** regarding physical abuse at Mr. Fennie's trial, it may be technically accurate but certainly misleading to say such abuse was minimized.

The lower court also opines that the effectiveness of "anecdotal evidence" of Mr. Fennie's difficult childhood is questionable because "at the time of the trial the defendant was approximately thirty years old." (Order Denying Relief, p. 14-15) Such a statement flies in the face of common sense, and of Dr. Toomer's testimony. Certainly the physical abuse and neglect, the

fear and general instability Mr. Fennie suffered during his formative years played a great role in determining the adult Mr. Fennie would become. Recall that Dr. Toomer testified that Mr. Fennie's dependant personality, his susceptibility to the influence of others, his desire to please and be accepted, were reflective of the deficits he suffered early in his life. (PC-T. 318-23) Thus testimony about Mr. Fennie's childhood was crucial for two reasons: to ensure, as is constitutionally required, that the jury recognized and sentenced Mr. Fennie as an individual rather than just "the defendant"; and to show how, as an adult, Mr. Fennie would be susceptible to the domination of and less culpable than his codefendant Mr. Frazier.

In fact, this Court has expressly rejected the rationale, employed here by the trial court, that child abuse is not mitigating if a crime occurred during adulthood. Walker v. State, 707 So.2d 300, 318 (Fla. 1997).

In Nibert, this Court held:

> The fact that a defendant had suffered through more than a decade of psychological and physical abue during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary.

Nibert v. State, 574 So.2d 1059, 1062 (Fla. 1991). This Court found support for its holdings in Eddings v. Oklahoma, 455 U.S. 104 (1982). In Mr. Fennie's case, the lower court did in the context of a Strickland prejudice analysis exactly what this Court said was forbidden in a capital sentencing decision. Instead of evaluating

the evidence presented in support of the mitigator, the trial court simply dismissed it because of the time elapsed between when the abuse occurred and the time of the crime.

2. Mr. Frazier was the Trigger Man

Finally, the trial court failed to address or even mention the relative culpability of the co-defendants and the likelihood that Mr. Fennie was, in fact, far less culpable in the death of Ms. Shearin than was Mr. Frazier. The trial judge specifically found in his Findings of Fact in Support of Sentencing Order that:

> The Defendant stated to his co-defendant, Michael Antoine Frazier, that he had to kill Mary Elaine Shearin because she saw his face. (RI. 453.)
>
> * * * * *
>
> Later, when told by Mr. Frazier that he (Frazier) did not have the heart to kill someone, Mr. Fennie stated: "If you don't have the heart to do it, then don't be around when it's done." (RI. 457-8.)
>
> * * * * *
>
> All of the credible evidence before this Court establishes that the Defendant personally killed the victim. (RI. 460.)
>
> * * * * *
>
> Between himself and his accomplices, the Defendant was the dominant personality. (RI. 460.)
>
> * * * * *
>
> The Defendant is not some naive person of tender years. His brazen lies to the police, blaming an innocent man for a murder he himself committed, attests to that. (RI. 461.)
>
> * * * * *
>
> Clearly, in the instant case, the Defendant's unaided act of executing Mary Elaine Shearin by marching her down the road and putting a bullet in her head, without the aid or assistance of either of his co-defendants, warrants a distinction between any sentence he might receive and that which has been previously imposed upon his co-defendants. (RI. 462.)

The trial court explicitly relied upon Mr. Frazier's testimony and his version of events in finding each of the five aggravating

circumstances against Mr. Fennie and in rejecting three statutory mitigating circumstances. Certainly the trial court felt strongly, based upon what evidence was presented at Mr. Fennie's trial, that Mr. Fennie was almost solely responsible for Ms. Shearin's death.

Both Mr. Fanter and Mr. Lee testified that their guilt strategy was to minimize Mr. Fennie's involvement and portray co-defendant Michael Frazier as the trigger man, and that this strategy carried over into the penalty phase as well. (PC-T. 613, 749-50) Significant testimony was presented at the evidentiary hearing, both lay and expert, that was available to trial counsel and would have been consistent with their strategy, but was never presented at trial. The testimony of Mr. Fennie's sisters Kathy Reed and Deborah Fennie laid the foundation for the formation of Mr. Fennie's dependent personality disorder, his desire to be accepted, and his susceptibility to manipulation and domination, traits which Dr. Toomer testified affected Mr. Fennie's behavior and his relationships with others. Kathy Reed, Deborah Fennie, Pamela Colbert (PC-T. 445, 447-8), Dwayne Jones (PC-T. 230, 231), and Yvonne Williams (PC-T. 684) testified that Mr. Fennie is not a violent man, which is consistent with the findings of Dr. Peal (Defense Exhibit 5; PC-T. 260) and Dr. Toomer (PC-T. 319)[21] Dwayne Jones testified that he had seen Mr. Frazier violent (PC-T. 228, 230, 232), particularly when under the influence of drugs (PC-T. 232), and that he had seen Mr.

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21 This is also consistent with the testimony presented at Mr. Fennie's trial, including Mr. Ward (R. 1983); Ms. Williams (R. 1989-90); and Ms. Simmons. (R. 2000-1)

Frazier carry various guns. (PC-T. 239)

Pamela Colbert testified that, unlike the version of events Michael Frazier told to Mr. Fennie's jury, Mr. Fennie and Mr. Frazier both walked down the wooded path with Ms. Shearin, and both men were out of her sight when she heard the popping of a gun. (PC-T. 472, 474-5, 491-2) [22] According to Dr. Kenneth Martin's expert opinion, the bite mark on Mr. Frazier's hand, made by Ms. Shearin, was "consistent with Mr. Frazier's hand coming from behind Ms. Shearin in an upright position, being placed against her mouth." (PC-T. 646) This contradicts Mr. Frazier's testimony from Mr. Fennie's trial where he says that he was bitten when Mr. Fennie told him to remove the victim from the trunk (R. 1490), and it's consistent with the version of events trial counsel argued to the jury (R. 1882). All of this information tends to prove that Mr. Frazier, not Mr. Fennie, was the trigger man, and that Mr. Frazier was the motivating force behind the murder. All of this information was available to trial counsel, but none of it was presented. Further, none of this testimony was addressed by the trial court in his Order Denying Relief.

3. Expert Testimony

As for the failure to present expert mental health testimony at

22 She also contradicted Mr. Frazier's trial testimony in other ways. For example, she testified that there was never a gun in her house, while Mr. Frazier and his girlfriend Regina Rogers testified that Mr. Fennie had one there prior to this crime. (PC-T. 476-8) Obviously any guilt phase testimony that impeached Mr. Frazier's version of events would carry over into the penalty phase in determining Mr. Fennie's culpability.

the penalty phase,[23] specifically Dr. Peal and Dr. Toomer or a surrogate, the lower court acknowledges that this was an allegation.[24] The trial court's only discussion of this portion of the claim, and its resolution, is as follows:

> As to the alleged failure of trial defense counsel to call Dr. Peal, trial defense counsel (Hugh Lee) testified that Dr. Peal was not called because of the numerous conflicting statements that the defendant had made to him. **Apparently** trial counsel discussed at some length calling Dr. Peal at trial, but decided against it for this reason. **Apparently** trial defense counsel were afraid Mr. Fennie would be shown to be a frequent liar, and that this damaging testimony would hurt the defendant more than the other testimony of Dr. Peal would bolster Mr. Fennie's situation before the jury.

(Order Denying Relief, p. 13) (emphasis added) In fact, Mr. Lee testified that he did not remember Dr. Peal and had never worked with him. (PC-T. 753) Mr. Lee had no specific recollection of discussing

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23 Mr. Fennie was entitled to expert psychiatric assistance when the state made his mental state relevant to the proceeding. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, see O'Callaghan v. State, 461 So.2d 1354 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Fessel; Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Mason v. State, 489 So.2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984). Under the Ake standard, Mr. Fennie's trial counsel failed to provide him with "a competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake, 105 S. Ct. at 1096 (1985).

24 There is no discussion at all of Dr. Toomer's testimony in the trial court's Order denying penalty phase ineffectiveness.

Dr. Peal's with Mr. Fanter, but he assumed he must have. (PC-T. 804) Mr. Lee testified, "We were scared of getting into any statements made by Alfred in the course of performing that evaluation or performing that opinion, and I don't have a specific note, but I suspect there was more to it that probably would have precluded his testimony." (PC-T. 810) Mr. Lee never testified that Dr. Peal was not called because of the numerous conflicting statements that the defendant had made to him. In fact, his comment about trial counsel's concerns could just as easily refer to Mr. Fennie possibly making inculpatory rather conflicting statements. The trial court's court discussion of what "apparently" happened is pure supposition. Neither trial attorney testified to any such a strategic reason.

C. LEGAL ANALYSIS

The above testimony establishes that the penalty phase evidence did not serve to individualize Mr. Fennie, the very purpose of mitigation evidence and essence of a reliable penalty phase. See Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995). In its order denying relief, the lower court found that the deficient performance and prejudice prongs of Strickland had not been met. (Order Denying Relief, p. 15) However, in sustaining Mr. Fennie's sentence, the lower court erred in failing to consider all evidence presented in his and failing to follow this court's precedent regarding the prejudice prong of Strickland. Had this evidence been presented to the Mr. Fennie's jury, there is a reasonable probability that the outcome of the penalty phase would have been different.

In Rose v. State, 675 So.2d 567 (Fla. 1996), this Court ordered

a new penalty phase because counsel did not obtain school, hospital, prison, and other records. Rose 675 So.2d at 572. Certainly, in Rose, as in this case, the evidence presented in postconviction was far more compelling than that presented at trial. See also Phillips v. State, 608 So.2d 778 (Fla. 1992); Mitchell v. State, 595 So.2d 938 (Fla. 1992); State v. Lara, 581 So.2d 1288 (Fla. 1991); Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995); Rutherford v. State, 727 So.2d 216 (Fla. 1998); see also Haliburton v. Singletary, 691 So.2d 466 (Fla. 1997); Lush v. State, 498 So.2d 902 (Fla. 1986); Breedlove v. State, 692 So.2d 874 (Fla. 1997); LeCroy v. Dugger, 727 So.2d 236 (Fla. 1998); Stevens v. State, 552 So.2d 1082 (Fla. 1989); Heiney v. State, 620 So.2d 171 (Fla. 1993); Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995); and Chandler v. United States, 193 F.3d 1297 (11th Cir. 1999).

As for trial counsel's deficient performance, state and federal courts have repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration. See, e.g. Deaton v. Dugger, 635 So.2d 4, 8 (Fla. 1993); Phillips v. State, 608 So.2d 778 (Fla. 1992); State v. Lara, 581 So.2d 1288 (Fla. 1991); Stevens v. State, 552 So.2d 1082 (Fla. 1989); Bassett v. State, 541 So.2d 596 (Fla. 1989); State v. Michael, 530 So.2d 929, 930 (Fla. 1988); O'Callaghan v. State, 461 So.2d 1154, 1155-56 (Fla. 1984); Eutzy v. Dugger, 746 F. Supp. 1492 (N.D. Fla. 1989), aff'd, No. 89-4014 (11th Cir. 1990); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523

(11th Cir. 1985).

Mr. Fennie's trial attorneys failed to review and utilize the information in their possession, including documents like Mr. Frazier's criminal records and the bite report of Dr. Martin, and they failed to prepare the witnesses they intended to call in mitigation. Many of the penalty phase witnesses clearly did not know what was required of them in the courtroom, nor were they asked the questions prior to trial that would have led Mr. Fennie's trial attorneys to substantial mitigation. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. See Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986).

The evidence presented by Mr. Fennie at the evidentiary hearing demonstrates a far different picture than that presented at trial. See, Chandler, Lara, and Baxter, supra. The jury and judge were never made aware of the physical abuse, the isolation and fear of Mr. Fennie's formative years. Had the jury heard this testimony, there is no reasonable probability that the results of the sentencing phase of the trial would not have been different. Strickland, 466 U.S. at 694. Having heard only a small fraction of the mitigating evidence available, the jury and judge were incapable of making an individualized assessment of the propriety of the death sentence in this case.

The overwhelming mitigation developed and presented by postconviction counsel could not and would not have been ignored had

it been presented to the sentencing judge and jury. Prejudice is established under such circumstances. See, Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991); Bassett v. State, 541 So. 2d 596, 597 (Fla. 1989).[25]

Recently, in Ragsdale v. State, 798 So. 2d 713 (Fla. 2001), this Court reversed a circuit court's order rejecting an ineffective assistance of counsel claim which is similar to Mr. Fennie's case. In Ragsdale, this Court stated: "[A]n attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." 798 So. 2d 713, 716, citing Riechman v. State, 777 So. 2d 342 (Fla. 2000). The Court noted, "The record at the 3.850 evidentiary hearing conclusively established that counsel failed to investigate and present at the penalty phase an abundance of potential mitigating evidence." 798 So.2d 716.

Like Mr. Fennie's case, in postconviction, Mr. Ragsdale presented evidence of physical abuse, poverty and instability. Id. at 717. Also, as in Mr. Fennie's case, no mental health testimony was presented at Mr. Ragsdale's penalty phase. Id. In postconviction, mental health testimony was presented. Finally, this Court found regarding Ragsdale's substantial mitigation, "This is especially compelling when considered with the relative culpability evidence presented at the penalty phase by counsel for Ragsdale's codefendant,

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25 Prejudice was found in these cases despite the existence of numerous aggravating circumstances. See, Hildwin (four aggravating circumstances); Phillips (same); Mitchell (three aggravating circumstances); Lara (same); Bassett (same).

Illig, who pled nolo contendere in exchange for a life sentence." Id. At 720.

In Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985), the Federal Court of Appeals explained the essential constitutional mandate the United States Supreme Court has annunciated and emphasized:

> In Lockett v. Ohio, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the [sentencer] receiving accurate information regarding the defendant. Without that information, a [sentencer] cannot make the life/death decision in a rational and individualized manner. Here the [sentencer] was given no information to aid [him] in the penalty phase. The death penalty that resulted was thus robbed of the reliability essential to confidence in that decision.

Tyler v. Kemp, 755 F.2d 531, 743 (11th Cir. 1985) (citations omitted).

Therefore, in preparing and presenting penalty-phase evidence, counsel's highest duty is to individualize the human being in jeopardy of losing his or her life. See, e.g, Harris v. Dugger; Middleton v. Dugger; Kimmelman v. Morrison, 106 S.Ct at 2588-89 (1986); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986); Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986), cert. denied, 107 S.Ct 602 (1986); King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978); Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972) (refusal to interview alibi witnesses); see also Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985).

D. CUMULATIVE REVIEW

Furthermore, Mr. Fennie urges this Court to review his ineffective assistance of counsel claim cumulatively with the other error recognized by this Court which occurred at his penalty phase and sentencing proceeding. State v. Gunsby, 670 So. 2d 920 (Fla. 1996); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991); Blanco v. Singletary.[26]

This Court found that the cold, calculated and premeditated instruction given to Mr. Fennie's jury was unconstitutionally vague pursuant to this Court's decision in Jackson v. State, 648 So.2d 85 (Fla. 1994), and that the issue had been preserved by trial counsel. Fennie v. State, 648 So.2d 95, 98-9 (Fla. 1994). However, this Court found the instruction error to be harmless because the crime was cold, calculated and premeditated under any definition of those terms. Fennie, Id. at 99. Certainly the testimony presented at Mr. Fennie's evidentiary hearing, particularly as to the relative culpability of Mr. Fennie and codefendant Frazier, challenges that finding.

In Jones v. State, 569 So. 2d 1234 (Fla. 1990) this Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." Id. at 1235 (emphasis added). Likewise, this Court

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26 Mr. Fennie would also refer this Court to Claims I and II of his Habeas Petition, filed simultaneously with this brief, to consider the State's prosecutorial misconduct and the trial court's failure to perform an independent weighing cumulatively with these claims of error.

should reverse Mr. Fennie's sentence and remand for a new penalty phase.

ARGUMENT III

MR. FENNIE WAS DENIED A FULL AND FAIR HEARING BY THE LOWER COURT IN VIOLATION OF HIS RIGHTS UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS. THE LOWER COURT DENIED MR. FENNIE THE ABILITY TO ESTABLISH HIS RIGHT TO RELIEF IN POSTCONVICTION.

Together with the last amendment to his postconviction motion, Mr. Fennie filed a Notice of Intent to Interview Jurors. (PCR. 2446-48) In it, Mr. Fennie argued that he needed to interview the jurors to determine whether their deliberations were in any way affected by: the racially charged atmosphere present in the community at the time of trial; the interracial elements present in the case; or, by the state's making an uncharged rape a central feature of the trial. (See Argument I, *supra*). Mr. Fennie argued that unless the lower court was willing to find that these errors rose to the level of fundamental error, it would be necessary to interview the jurors to establish whether he suffered harm and/or prejudice from the errors. The lower court denied Mr. Fennie's request. (PCR. 2458) At the conclusion of Mr. Salmon's testimony, Mr. Fennie renewed his motion to interview jurors. In doing so, Mr. Fennie again argued that if the lower court was going to reject his argument that the prejudice should be presumed and require that he establish the prejudice prong of Strickland, it was necessary that he interview the jurors. (PC-T. 193-94)

The lower court again denied Mr. Fennie's request to interview the jurors on these matters. (PC-T. 194) The lower court subsequently denied relief on Mr. Fennie's claim that trial counsel was ineffective for failing to properly voir dire jurors on the racial elements present in his case, finding that he had failed to establish prejudice as required by the second prong of Strickland. (PCR. 3614-18)

By not allowing Mr. Fennie to interview the jurors, the lower court prevented him from establishing his right to relief. To make matters worse, the lower court failed to do any analysis whatsoever regarding whether or not trial counsel's performance rose to such a level of ineffectiveness that prejudice should be presumed which, in reality, was Mr. Fennie's main argument. Thus, the lower court ignored Mr. Fennie's main claim for relief, and then denied another aspect of his claim after preventing him from establishing that he was entitled to relief. This was not the full and fair hearing Mr. Fennie was entitled to in the lower court.

Mr. Fennie is entitled to full and fair Rule 3.850 proceedings, Holland v. State, 503 So. 2d 1250 (Fla. 1987); Easter v. Endell, 37 F. 3d 1343 (8th Cir. 1994). The actions of the lower court detailed above ultimately denied Mr. Fennie a full and fair hearing.

ARGUMENT IV

THE OUTCOME OF THE GUILT/INNOCENCE PHASE OF MR. FENNIE'S TRIAL WAS MATERIALLY UNRELIABLE BECAUSE NO ADVERSARIAL TESTING OCCURRED DUE TO THE INEFFECTIVE

ASSISTANCE PROVIDED BY TRIAL COUNSEL, IN VIOLATION OF MR. FENNIE'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. THE LOWER COURT ERRED IN FINDING THAT MR. FENNIE HAD FAILED TO ESTABLISH THAT TRIAL COUNSEL WAS INEFFECTIVE.

A. INTRODUCTION

Strickland v. Washington, 466 U.S. 668 (1984), requires an individual seeking postconviction relief due to ineffective assistance of counsel to prove the following: first, a defendant must establish that trial counsel's performance was unreasonable or ineffective; and, second, a defendant must establish that he was prejudiced by counsel's performance. The files and records from Mr. Fennie's case, as well as the testimony from the hearing below, establish that trial counsels' performance at Mr. Fennie's trial was ineffective and that Mr. Fennie was prejudiced as a result. Counsel failed to properly prepare for the testimony of the co-defendant (the State's star witness), investigate the co-defendant's statements, or bring out inconsistencies in the co-defendant's testimony. Certain witnesses who testified made statements inconsistent with their testimony at trial, but counsel failed to properly impeach these witnesses and bring the inconsistencies to the jury's attention in an effort to cast doubt on the State's case. In fact, counsel failed to call certain witnesses whose testimony would have cast doubt on the State's theory of how the crime occurred, including the defendant himself

B. TRIAL COUNSEL'S INEFFECTIVENESS REGARDING MR. FENNIE'S

CO-DEFENDANT

Trial counsel failed to properly prepare for the co-defendant's testimony, failed to properly cross-examine the co-defendant, and failed to bring to the attention of the jurors inconsistencies in the various statements of the co-defendant. Mr. Fennie was represented at trial by defense attorneys Alan Fanter and Hugh Lee. At the evidentiary hearing, Fanter testified that the division of labor (and responsibility) between himself and Lee was equal (PC-T. 612), with Fanter being primarily responsible for the guilt phase of Mr. Fennie's trial and Lee being primarily responsible for the penalty phase. (PC-T. 611) The only clear exception to this was Lee's handling of the deposition and trial cross-examination of Mr. Fennie's co-defendant (Michael Frazier), as well as taking a statement from Frazier once the state informed the defense that Frazier would be testifying. Both attorneys testified that the guilt-phase strategy employed in Mr. Fennie's trial was to put the blame for kidnaping and killing the victim on co-defendant Frazier. (PC-T. 613; 750)

At trial, the State called Frazier to testify. Counsel for Mr. Fennie was informed by the State one day before trial began that Frazier would be a State witness. (R. 15) Counsel for Mr. Fennie announced to the trial court on the first day of trial that he was unprepared to go to trial due to Frazier suddenly becoming a witness for the State. (R. 15) Mr. Fennie's counsel admitted to the trial court that the defense

had not anticipated a co-defendant testifying for the State, the defense had not deposed co-defendant Frazier, the defense was unprepared to depose and subpoena witnesses to impeach Frazier's testimony, the defense had not deposed any of the State's witnesses regarding Frazier, and the defense had never reviewed Frazier's testimony from his own trial. (R. 15-17) Trial counsel failed to do all of these things despite the fact that the guilt-phase strategy employed in Mr. Fennie's trial was to put the blame for kidnapping and killing the victim on co-defendant Frazier[27]. (PC-T. 613; 750)

During cross-examination, trial attorney Lee elicited from Frazier that he testified at his own trial that he never had a violent crime. (PC-T. 1537) Lee failed to follow up on Frazier's response. At the postconviction evidentiary hearing, the Defense entered into evidence a report from the Tampa Police Department detailing an armed robbery Frazier was involved in prior to his involvement in this case. (Defense 19, PC-T. 831) The report details Frazier's involvement,

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27 Counsel for Mr. Fennie moved for a continuance because he was unprepared to go to trial. (R. 15) The trial court found that defense counsel was aware for two months that the State was attempting to convince one of Mr. Fennie's co-defendants to testify against him. (R. 17) The trial court also found that counsel for Mr. Fennie had no legitimate reason for not deposing witnesses regarding statements made by Mr. Fennie's co-defendants. (R. 18) The trial court was also aware that both co-defendants' trials had been videotaped by defense counsel's office and counsel for Mr. Fennie had access to them. (R. 17) The trial court ultimately denied the continuance. (R. 32-33)

including Frazier supplying the guns for the robbery. At the evidentiary hearing, Lee admitted that there is no reason the defense would not have had access to the report. (PC-T. 760) Lee also admitted at the evidentiary hearing that an armed robbery is a violent crime. (PC-T. 759-60) Unfortunately, Lee missed a golden opportunity to impeach Frazier in the eyes of the jury, as well as point out to the jury that Frazier had in the past supplied guns for crimes.

There is, however, more to the report (Defense 19) than exposing Frazier's dishonesty about his involvement in violent crimes. The report also lists the individuals involved with Frazier in the robbery. One of those individuals was Dwayne Jones. Mr. Jones was a friend of Mr. Frazier's who also knew Mr. Fennie. At the evidentiary hearing, Mr. Jones testified that Frazier was known to carry guns (PC-T. 232), that Frazier had a temper that became worse when he was on drugs (PC-T. 232), and that he had never witnessed violence from Fennie. (PC-T. 230) Mr. Jones also testified that he would have been willing to testify to this information at Mr. Fennie's trial had he been asked. (PC-T. 233)

All of this information would have helped Mr. Fennie's defense strategy of pointing the finger at Frazier. The jury had already heard Frazier's testimony on direct that the gun used to kill the victim was Fennie's. (R. 1470-72) The fact that Frazier had a history with guns would have cast doubt on his testimony that the gun used in this crime was Fennie's.

Furthermore, the fact that Frazier became more violent on drugs would have supported Fennie's story (which the jury heard through police testimony) that the violence inflicted on the victim by Mr. Frazier was related to a drug debt.

Had the defense attempted to locate Jones at the time of trial (an easy task considering he was incarcerated at the time), and had the defense questioned Jones about Frazier's past, they would have learned that Frazier had gone so far as to break into a police officer's house and steal his gun. Mr. Jones knew about this incident because he was with Frazier at the time, and Jones would have been willing to testify to this at Fennie's trial. (R. 233; 234) Worse still, Mr. Fennie knew about this incident and attempted to get his defense team to investigate this in order to find information to discredit Frazier. (See Defense 15, pp. 8-9) Mr. Fennie's jury never heard this information.

Attorney Lee also failed to effectively cross-examine Frazier regarding the time frames surrounding the victim's kidnapping and murder. Specifically, Frazier had testified at Mr. Fennie's trial that once the victim was kidnapped and placed in the trunk of the car, they drove to a bank located "on the other side of town". (R. 1516) Lee also elicited from Frazier that he had previously stated under oath that it took at least two hours to travel back roads to get to the bank located "on the other side of town". (R. 1516) Clearly, Lee was trying to impeach Frazier's version of events but he

failed to do so effectively.

At the evidentiary hearing, Lee admitted that the time frames in Frazier's version of events were important. (PC-T. 766) Mr. Lee, however, never travelled to Tampa to recreate (or view) any of the places mentioned in Frazier's version of events, or travel the routes Frazier claims he and Fennie took. (PC-T. 764) At the evidentiary hearing below, the defense showed Lee a street map of Tampa. (Defense 16, PC-T. 773) On the map, the defense pointed out the place Frazier had claimed the victim was kidnapped, as well as the bank the victim was first taken to that Frazier claimed was “on the other side of town.” (PC-T. 769) After viewing the map, Lee agreed that the bank did not appear to be on the other side of town. (PC-T. 772) Lee also agreed that, had the jury been shown the same map, it may have cast more doubt on the time frames Frazier testified to[28]. (PC-T. 773)

Trial counsel’s performance was clearly ineffective. The mistakes detailed above establish that trial counsel’s actions or inaction were completely inconsistent with their own chosen strategy of pointing the finger at Frazier and showing the

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28 The map, however, is more significant to Mr. Fennie's postconviction case than simply a tool that could have been used to impeach Frazier. Mr. Fennie was tried in Brooksville, and all of the jurors were from in or around Brooksville. No questions were asked during voir dire of the jurors regarding their familiarity with Tampa. Thus, it was impossible to properly impeach these portions of Frazier's story without first ensuring that the jurors (through their own knowledge or the use of some kind of exhibit) had a general idea of the geography of Tampa.

jury that he was a liar. Mr. Fennie was prejudiced by these errors because trial counsel, despite their chosen strategy, missed important opportunities to raise doubt in the minds of the jurors regarding the veracity of co-defendant Frazier. Because this entire case amounts to two co-defendants pointing the finger at each other regarding who actually shot the victim, every opportunity was crucial to ensure that Mr. Fennie's adversarial testing was adequate.

The lower court found that Mr. Fennie had failed to establish that trial counsel were ineffective but, in doing so, failed to consider all aspects of Mr. Fennie's claim. Initially, the lower court's order spends most of its space denying this claim based on its belief that trial counsel was not caught off guard by Frazier's testimony. (PC-R. 3620-21) Instead, based on no testimony whatsoever, the lower court determines that trial counsel's request to the trial court for a continuance was "simply an attempt to stymy the State's case and/or gain additional time for even more trial preparation." (PC-R. 3620) Basically, the lower court finds that trial counsel was lying under oath[29] when he told the trial court that the defense was unprepared to go to trial due to Frazier suddenly becoming a witness for the State. (R. 15-17) The

29 Attorneys are officers of the court, and when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath. Holloway v. Arkansas, 98 S.Ct. 1173, 1179 (1978) (citing State v. Brazil, 75 So.2d 856 (La. 1954))

evidence and testimony detailed throughout this brief suggest otherwise.

The lower court then briefly touches on other aspects of this claim. The lower court then states: "[D]uring Mr. Frazier's cross examination trial defense counsel did clearly reveal to the jury Mr. Frazier's many prior violent convictions, and did provide ample testimony of Mr. Frazier's propensity to lie." (PCR. 3621) The lower court's order never addresses the specific allegations in Mr. Fennie's claim nor details what part of the cross-examination of Frazier the court found sufficient to show the jury that Frazier was a violent liar.

The lower court failed to consider that evidence showing Frazier supplied guns for robberies, or committed burglaries in order to obtain guns, would have assisted Mr. Fennie's case because who actually owned or controlled the murder weapon, as well as who really shot the victim, was at issue. The lower court also failed to consider that evidence regarding co-defendant Frazier's violence when on drugs was relevant because the State's theory that the victim was killed in a drug buy, as well as the fact that Fennie had told the police that Frazier's attack on the victim began during a dispute over a drug debt. Lastly, the lower court failed to consider that Frazier's testimony regarding how long it took for the defendants to drive between two points in Tampa was impossible to properly impeach without first ensuring that the jurors had

a general idea of the geography of Tampa.

The defense had most of this information in their possession, and what they did not have was due to nothing more than the lack of a thorough investigation. An effective attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, (5th Cir. 1970); see also Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978). This is impossible, however, if trial counsel does not understand the importance of information they already have in their possession, or if trial counsel fails to investigate leads provided by the same information.

Defense counsel have been found to be ineffective for failing to impeach key state witnesses with available evidence. Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983), cert. denied, 464 U.S. 1053 (1984). Furthermore, courts have repeatedly said that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980); see also Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982), cert. denied, 460 U.S. 1098 (1983) ("At the heart of effective representation is the independent duty to investigate and prepare."). No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991),

or on the failure to properly investigate or prepare. See Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986). These failures occurred at Mr. Fennie's trial and, because of them, Mr. Fennie was denied the fair adversarial testing he was entitled to under Strickland v. Washington.

C. TRIAL COUNSEL'S FAILURE TO CALL OR EFFECTIVELY CROSS-EXAMINE WITNESSES

Certain witnesses who testified at Mr. Fennie's trial had made prior statements inconsistent with their testimony at trial, but counsel failed to properly impeach these witnesses and bring the inconsistencies to the jury's attention. Trial counsel also failed to call certain witnesses whose testimony would have cast doubt on the State's theory of how the crime occurred. Individually, as well as cumulatively, the result of these errors was to deny Mr. Fennie a fair adversarial testing, resulting in an outcome that is materially unreliable.

Trial attorney Fanter conducted the cross-examination of the other state witnesses. One of those witnesses was the victim's husband, John Shearin. Mr. Shearin testified at Mr. Fennie's trial that he had last seen the victim when she came home around 3:00am the morning she was murdered. (R. 1146) Mr. Shearin had previously told the police that he last saw the victim between 3:30am and 3:45am. (Defense Exhibit 11, PC-T. 638) Fanter ineffectively failed to bring this discrepancy

to the attention of the jurors despite the fact that it would have benefitted Mr. Fennie's case.

The lower court found this time discrepancy to be largely unimportant. (PCR. 3632) However, as stated previously, the defense strategy at trial was to point the finger at Frazier. (PC-T. 613) Clearly, creating doubt in the minds of the jurors regarding Frazier's version of events was essential to this strategy. Frazier had testified that he met Fennie the night of the murder between 12:30am and 1:00am (R. 1472), and that the victim pulled up around forty-five minutes later. (R. 1474) Thus, following Frazier's testimony, the victim was in the hands of Fennie and Frazier by (at latest) 2:00am. Mr. Shearin's testimony of last seeing the victim around 3:00am was already inconsistent with Frazier's testimony. However, properly cross-examining Shearin regarding what he told the police **around the time the incident occurred** would have cast even greater doubt on Frazier's story in the eyes of the jury. After all, how could the victim be tied up in the trunk of a car (Frazier’s version) and visiting her husband at the same time. Furthermore, it would have provided greater support to Mr. Fennie's version of events related to the police (that the victim initially spent time with Fennie and Frazier voluntarily, and that Frazier and the victim seperated from Fennie for a period of time).

Fanter also did the cross-examination of state witness Ansell Rose. Mr. Rose was in the car with Mr. Fennie when he

was arrested. Rose testified that, as they were being followed by the police, he observed Mr. Fennie take a gun from on or near his person, place it somewhere in the car, and later conceal it under or near a floor mat. (R. 1285; 1288) Mr. Rose, however, had told different versions to the police. Mr. Rose had told Hernando County Sheriff Detective Rick Kramer that he did not see what Mr. Fennie was trying to conceal (Defense Exhibit 11), and Mr. Rose never mentioned to Kramer or Detective Carlos Douglas that he saw Fennie place a gun under the floor mat of the car. (Defense Exhibit 12)[30]

The lower court found that trial counsel's cross-examination of Rose was "at least adequate", and that the differences in his statements were "not that great and are not especially significant." (PCR. 3622) On the contrary, the differences were significant to say the least. The State had already elicited testimony that the gun was found under a floor mat (R. 1179-1180), and the State's theory was that the gun belonged to Mr. Fennie. Properly cross-examining Rose would have called into doubt whether Mr. Fennie had the gun **on his person** the night he was arrested, whether Mr. Fennie ever had actual possession of the gun, and, most importantly, whether the gun was Mr. Fennie's at all. All of this information was consistent with the strategy of pointing the

30 Unfortunately, Mr. Fennie's trial attorneys never deposed Rose until Mr. Fennie's trial was in progress. In fact, it was during a recess in the state's case. (PC-T. 630)

finger at Frazier, and consistent with Fennie’s statements to police that the gun belonged to Frazier.

During Mr. Fennie's trial, the State also called Regina Rogers. Ms. Rogers was co-defendant Frazier's girlfriend. During the state's direct examination, Ms. Rogers testified to a fight between her and Frazier where Frazier had become violent. Frazier was arrested for the fight but Ms. Rogers ultimately dropped the charges. (R. 1683-85) The defense, during cross-examination, elicited from Ms. Rogers’ testimony regarding Frazier's temper. (R. 1692) The defense also elicited testimony regarding an ongoing relationship between Frazier and Ms. Rogers up to the time of trial in an effort to discredit her. (R. 1691; 1696; 1698)

Before trial, the defense had deposed Ms. Rogers. During the deposition, Ms. Rogers had claimed that the fight between her and Frazier was the only time he had become violent with her. (Defense Exhibit 8) The police report from that incident, however, reported that Frazier had been violent towards Ms. Rogers before that incident. (Defense Exhibit 9) The defense never questioned Rogers about this during the deposition or during the trial.

The lower court ruled that trial counsel was not ineffective in his cross-examination of Ms. Rogers. (PCR. 3623) The lower court relied on the fact that trial counsel did bring up the police report during the cross-examination, although the lower court acknowledges that trial counsel did

not bring up the previous acts of violence towards Ms. Rogers by Frazier mentioned in the report. (PCR. 3623) The lower court, though, did not fully consider Mr. Fennie's argument on this matter. Ms. Rogers's contradictory statements further cast doubt on the reliability (and objectivity) of her testimony. Bringing out this clear inconsistency in Ms. Rogers' version of events would have shown the jury that Ms. Rogers was willing to lie under oath for Frazier, someone whom she had an ongoing relationship with at the time of trial. This was essential for the defense case because, other than co-defendant Frazier, Ms. Rogers was the only witness who put Mr. Fennie in possession of the gun before the killing. Furthermore, this information would have also placed in front of the jury the fact that Frazier had a history of violent behavior towards women, information consistent with Mr. Fennie's statements that Frazier became violent towards the victim the night of the killing, and information the State was unable to produce regarding Mr. Fennie.

In order to effectively point the finger at Frazier for the killing of Ms. Shearin, the defense had to place before the jury all available information that would discredit Frazier and his version of events. Although the defense chose to call no witnesses, doing so resulted in a wealth of information helpful to Mr. Fennie going unheard by the jury.

Frazier testified during the State's case that the victim had bitten him on the hand when he reached into the trunk of

the car (at Mr. Fennie's direction) to pull the victim out. (R. 1490-91) Several times during cross-examination, the defense brought up the bite on Frazier's hand. (R. 1527-28; 1545-47) At one point, the defense wanted Mr. Fennie's jury to view the bite mark on Frazier's hand but changed their minds once the trial court ruled it would amount to presenting evidence. (R. 1555-58) Clearly, the defense was trying to put into the minds of the jurors the possibility that Frazier was the individual terrorizing the victim the night of the murder and, thus, the one responsible for killing her. After all, the victim bit Frazier, not Mr. Fennie.

Before trial, the State had elicited the expert assistance of Dr. Kenneth Martin, DDS, to identify who had bitten Frazier. (Defense Exhibit 14) Dr. Martin had determined that the victim was the individual who had left the bite mark on Frazier's hand. Dr. Martin, however, also opined that the bite mark was consistent with Mr. Frazier's hand coming from behind Ms. Shearin in an upright position and being placed against her mouth, and that the bruising on the bite was consistent with an aggressive, defense-type bite. Dr. Martin's deposition, which trial attorney Fanter attended, was consistent with his report. At the evidentiary hearing, Fanter agreed that Dr. Martin's expert opinion would have discredited Frazier's story in the eyes of the jury regarding how the bite occurred. (R. 647) Furthermore, Dr, Martin's opinion would have been even stronger in the eyes of the jury

because he was contacted by the State to make the bite mark comparison, not the defense. At trial, however, the State did not need Dr. Martin because of Frazier's testimony regarding the bite, testimony the defense did little or nothing to challenge. Given the defense strategy of pointing the finger at Frazier, this strong testimony was essential to attack the State's case and should have been heard by the jury.

Other witnesses could have been called by the defense to attack the credibility of Frazier's version of events. Co-defendant Colbert would have been willing to testify to a version of events different than what Frazier testified to, as well as the fact that she never knew Fennie to be violent or carry a gun. (R. 445; 447; 449) Dwayne Jones could have been called to provide testimony regarding Frazier's violent felony past, as well as Frazier's history with guns. (R. 231-234; 239)

In denying Mr. Fennie relief, the lower court found that Dr. Martin's testimony "was not a significant issue upon the [sic] which the defense could build a solid case." (PCR. 3623) Mr. Fennie, however, never argued in the lower court that trial counsel should have used Dr. Martin's opinions as the foundation for Mr. Fennie's case. Instead, Mr. Fennie is arguing that trial counsel should have used this critical testimony because it was consistent with their chosen defense: that Frazier was the real killer. Furthermore, contrary to the lower court's finding, this testimony was significant for

several reasons: it calls into doubt the veracity of Frazier's testimony regarding the circumstances under which he received the bite; it provides evidence that Frazier himself acted out violently towards the victim which was inconsistent with Frazier's testimony; and, the testimony was consistent with the statements Fennie made to the police regarding what happened to the victim, statements the jury were made aware of through the testimony of police witnesses. Unfortunately for Mr. Fennie, the defense failed to effectively get this critical information to the jurors despite the fact that it was consistent with their overall strategy for Mr. Fennie's trial.

Additionally, the lower court found that none of co-defendant Colbert's testimony was "truly exculpatory", but the record of her testimony below suggests otherwise. Colbert testified that she never saw Mr. Fennie with a gun in her house as she did not allow guns in her home. (PC-T. 477-78) This testimony is exculpatory because it contradicts the testimony of State witnesses Frazier and Regina Rogers, both of whom put Mr. Fennie in possession of the gun at Colbert's house before the murder. At the time of trial, Rogers and Frazier were in an ongoing relationship which provided Rogers with a clear motive to lie for Frazier. Colbert, on the other hand, had a close relationship with both Frazier and Fennie, and had no greater motive to lie for one than the other. Clearly, her testimony was exculpatory. The lower court

further excuses trial counsel's ineffectiveness for not calling Colbert by finding that trial counsel was in constant touch with Colbert's counsel and he was informed that Colbert would have nothing good to say on Fennie's behalf. (PCR. 3624) This, however, is inconsistent with Colbert's testimony at the hearing below where she stated that she was never actually approached to testify on Mr. Fennie's behalf but would have been willing to do so. (PC-T. 448-49)

Trial counsel's failure to adequately investigate and prepare denied Mr. Fennie the effective assistance of counsel he was entitled to, see Vela, Davis, and Goodwin, *supra*, and prevented Mr. Fennie from presenting a knowledgeable defense. See Caraway, supra. See also Chambers and Gaines, *supra*. Mr. Fennie was prejudiced by the actions and inaction of trial counsel detailed above. Given the statements Mr. Fennie had made to police, as well as the statements and testimony of the co-defendants leading up to Mr. Fennie's trial, the defense strategy of pointing the finger at co-defendant Frazier was the clear choice. Unfortunately, due to trial counsel's ineffectiveness, the jury never heard compelling evidence and testimony that was exculpatory as to Mr. Fennie, as well as evidence and testimony that would have raised doubt in the minds of the jurors regarding the veracity of co-defendant Frazier and other state witnesses.

D. TRIAL COUNSEL'S INEFFECTIVENESS FOR FAILING TO CALL DEFENDANT FENNIE TO TESTIFY

Lastly, trial counsel was ineffective for not calling Mr. Fennie himself to testify. There is no question that Mr. Fennie wanted to testify and allow the jury to judge his credibility against Frazier's. (See Defense 15; R.I. 481-489) The perils of calling Mr. Fennie to testify were no different than the perils faced by the State in calling Frazier. Both had made inconsistent statements between the times of their arrests and their trials, and both had felony convictions in their past, although Mr. Fennie's, unlike Frazier's, were all nonviolent. Calling Mr. Fennie would have also allowed him to explain inconsistencies in his various statements, something Frazier had the opportunity to do when he testified. Lastly, although not effectively advisied of this by his defense team, Mr. Fennie could have been the sole witness presented by the defense without the defense sacrificing their right to first and last arguments during closing. (See Argument VI, *infra*)

The lower court finds no error relying on the fact that Mr. Fennie ultimately followed trial counsel’s advice and chose not to testify, and trial counsel cannot be faulted for failing to call the defendant when he did not want to testify. (PCR. 3624-25) What the lower court does not consider is that trial counsel failed to properly advise Mr. Fennie regarding the possibility of testifying. The lower court never considers the fact that the attorneys failed to inform Mr. Fennie that he could testify on his own behalf without giving

up the first and last argument. Nor does the lower court discuss the fact that Mr. Fennie's trial counsel failed to fully explain to him how his prior convictions could and could not be used against him. Furthermore, at the hearing below, trial counsel offered no testimony to contradict Mr. Fennie's assertions, and offered no explanation for not fully explaining Mr. Fennie's rights to him. Clearly, Mr. Fennie's "decision" regarding testifying was not fully informed, knowing or intelligent, and this Court should reject the lower court's finding that Mr. Fennie's decision was made freely and voluntarily because trial counsel's advice was ineffective.

E. THE LOWER COURT FAILED TO PERFORM A CUMULATIVE ANALYSIS

The lower court denied Mr. Fennie relief on all of the individual points of this claim but failed to conduct a cumulative analysis of trial counsel's many errors. By not doing so, the lower court failed to consider how the many errors cited by Mr. Fennie worked together to deny him the fair adversarial testing he was entitled to. Nearly all of the instances of ineffectiveness cited by Mr. Fennie relate to trial counsel's failure to put available information before the jury that was consistent with their chosen strategy: pointing the finger at co-defendant Frazier. This included not only information to challenge the credibility of Frazier and his version of events but also challenge the credibility of the State witnesses whose testimony bolstered Frazier's version of events.

Many of trial counsel's errors detailed above are so closely connected to one another that, taken together, they rise to a level of ineffectiveness that destroys any confidence in the outcome of Mr. Fennie's guilt phase. For example, the defense attempted to dispute whether the murder weapon belonged to Mr. Fennie or was ever in his actual possession. State witnesses Ansell Rose and Regina Rogers were the only people (other than co-defendant Frazier) who put Fennie in actual possession of the gun both before and after the murder. Despite this, defense counsel failed to elicit from Rose and Rogers information that would clearly call into question the veracity of their testimony in the eyes of the jury. To make matters worse, trial counsel failed to call co-defendant Colbert who would have provided testimony contradicting Rogers' testimony. Lastly, trial counsel failed to put available information before the jury that Frazier had supplied guns in the past for criminal undertakings.

Trial counsel also attempted to convince the jury that co-defendant Frazier was the individual who terrorized and killed the victim based on, among other things, the fact that the victim had bitten him and not Mr. Fennie. What the defense failed to do was put forth any testimony that would support their theory despite having it available. Dr. Martin's testimony regarding the bite mark would have cast serious doubt on Frazier's version of events, and his opinion would have come across without appearing to be biased for the

defense because he was originally a State expert. Furthermore, the defense ineffectively cross-examined State witness Rogers regarding the number of times Frazier had inflicted violence upon her. Together with the bite mark testimony, as well as the fact that Fennie had no history of violence towards women, this would have shown the jury that Frazier was the more likely defendant to have attacked and killed the victim. Lastly, as detailed above, several witnesses were available to testify regarding Fennie's well known character trait of non-violence.

Combining the errors detailed in the above two paragraphs with the ineffective cross-examination of Frazier, as well as other instances of ineffectiveness detailed in this pleading, the cumulative affect of all of the errors is too great for this Court to ignore.

In Jones v. State, 569 So. 2d 1234 (Fla. 1990), this Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "**cumulative errors affecting the penalty phase**." Id. at 1235 (emphasis added). In Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990), cumulative prosecutorial misconduct was the basis for the new trial granted by this Court. See also Jackson v. State, 575 So. 2d 181, 189 (Fla. 1991).

The severity of Mr. Fenie's sentence "mandates careful scrutiny in the review of any colorable claim of error." Zant v. Stephens, 462 U.S. 862, 885 (1983). Accordingly, the

cumulative effects of the errors detailed above should have been given careful scrutiny by the lower court in determining whether Mr. Fennie deserves a new trial.

ARGUMENT V

THE LOWER COURT ERRED IN DENYING MR. FENNIE A HEARING ON TWO OF HIS POSTCONVICTION CLAIMS.

Mr. Fennie was entitled to a hearing on the claims listed below because the files and records in the case do not conclusively show that he was entitled to no relief. See Fla. R. Crim. P. 3.850; Lemon v. State, 498 So.2d 923 (Fla. 1986).

A. MR. FENNIE'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS DENIED BY THE STATE ATTORNEY'S MISCONDUCT IN REPEATEDLY REFERRING TO RAPE IN A DELIBERATE ATTEMPT TO AROUSE THE JURY'S DEEP-ROOTED FEARS OF AFRICAN-AMERICAN MEN. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE'S FUNDAMENTALLY PREJUDICIAL ARGUMENTS.

Claim 1 of Mr. Fennie's postconviction motion contained a sub-claim that he was denied a fair trial by the state attorney's misconduct in repeatedly referring to an uncharged rape in a deliberate attempt to arouse deep-rooted racist fears in jurors regarding black men attacking white women. (PCR. 2310) The state attorney focused the jury's attention on the uncharged rape during questioning of several witnesses despite the fact that the medical examiner testified to no evidence of forced sex on the victim. (R. 1091-1122; 1148-51; 1177) This Court cannot presume that the state attorney's prejudicial questioning "did not remain embedded in the minds of the jurors and influence their recommendations. Because [this Court] cannot say beyond a reasonable doubt that the jury's recommendation was not motivated in part by racial

considerations, [this Court] cannot deem the error harmless." Robinson v. State, 520 So.2d 1, 8 (1988); See also Chapman v. State, 417 So.2d 1028 (Fla. 3rd DCA 1982). The lower court should have granted Mr. Fennie a hearing to prove that the state attorney deliberately acted to arouse racial animosity and that trial counsel was ineffective for failing to object to the state attorney's fundamentally prejudicial comments.

B. MR. FENNIE'S DEATH SENTENCE IS FUNDAMENTALLY UNFAIR AND UNRELIABLE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS DUE TO THE STATE'S INTRODUCTION OF NON-STATUTORY AGGRAVATING FACTORS AND THE STATE'S ARGUMENTS UPON NON-STATUTORY AGGRAVATING FACTORS. DEFENSE COUNSEL'S FAILURE TO OBJECT OR ARGUE EFFECTIVELY CONSTITUTED INEFFECTIVE ASSISTANCE.

In a related claim, the lower court erred in denying Mr. Fennie a hearing on his claim that trial counsel was ineffective for failing to object to and effectively argue against the introduction of non-statutory aggravating circumstances by the state attorney. (PCR. 2404) Specifically, during the guilt phase, trial counsel was ineffective for failing to prevent the State from repeatedly referring to an uncharged rape in a deliberate attempt to arouse deep-rooted racist fears in jurors regarding black men attacking white women. The State presented nothing during the penalty phase. (R. 1947) Thus, absent objections or argument from trial counsel during the guilt phase, the jury was free to consider the uncharged and unproven rape as a non-statutory aggravating circumstance in the penalty phase.

The sentencers' consideration of improper and

unconstitutional nonstatutory aggravating factors violated the Eighth Amendment to the United States Constitution, and prevented the constitutionally required narrowing of the sentencers' discretion. See Stringer v. Black, 112 S. Ct. 1130 (1992); Maynard v. Cartwright, 486 U.S. 356 (1988). These impermissible aggravating factors resulted in a sentence that was based on an "unguided emotional response," in violation of Mr. Fennie's constitutional rights. Penry v. Lynaugh, 492 U.S. 302 (1989).

Aggravating circumstances specified in the statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla. 1979). Limitations on the sentencers' ability to consider aggravating circumstances other than those specified by statute is required by the Eighth Amendment. Maynard v. Cartwright, 486 U.S. 356 (1988).

ARGUMENT VI

MR. FENNIE'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION, WERE VIOLATED WHEN HE WAS NOT ALLOWED TO TESTIFY ON HIS OWN BEHALF. THE LOWER COURT ERRED IN DENYING MR. FENNIE RELIEF ON THIS CLAIM.

Towards the end of the State's case at Mr. Fennie's trial, his trial attorneys made an almost unheard of decision. They chose to have the court reporter act as their agent and transcribe their confidential conversation with Mr. Fennie.

(See Defense Exhibit 15) During this conversation, Mr. Fennie and his attorneys discussed what witnesses Mr. Fennie would like to call and the testimony he expected to elicit. More importantly, they also discussed on the record the pros and cons of Mr. Fennie testifying. When attorney Fanter asked Mr. Fennie if he had made his decision, Mr. Fennie discusses his desire to testify in order to give the jury a version of events different than what co-defendant Frazier testified to until he was interrupted by one of his trial attorneys. (Defense Exhibit 15, p. 14) It's clear that the trial attorney no longer wanted to discuss this decision on the record, when he stated, "Well, absent you testifying, other witnesses besides yourself at this point that you would consider." Id.

Mr. Fennie made other references in the recorded conversation to why he wanted to testify. At one point, he discussed how he wanted to bring to the court's attention why a shell casing wasn't found at the murder scene. (Def. Ex. 15, pp. 12-13) Later, when when one of his trial attorneys asked about potential witnesses other than himself, Mr. Fennie stated the following: "Basically that would be about it. Other than that, I mean, I got to try to convince them I had no motive for robbery. I mean, what would I obtain out of robbing this person?" (Def. Ex. 15, pp. 14-15) He went on to explain that he had access to and spent a lot of money at the track. (Def. Ex. 15, p. 16)

Mr. Fennie was right. Who but he could explain the contradictions in the evidence, rebut the damaging testimony of co-defendant Frazier, and, most importantly, explain the contradictions in his own statements to the police just as co-defendant Frazier was able to do when he testified against Fennie?

Although trial counsel spoke of the importance of retaining the right to a rebuttal argument as well as an initial closing, at no time during the recorded discussion did they advise Mr. Fennie that he could testify on his own behalf and still retain the benefit of arguing first and last to the jury. Trial counsel also said it was their decision that Mr. Fennie should not testify based on his prior record (Defense Exhibit 15, p. 18), but at no point did they explain to Mr. Fennie how his prior convictions could be used and how they could not be used as impeachment.

Mr. Fennie had a constitutional right to testify in his own behalf, under the Due Process Clause of the Fourteenth Amendment, the compulsory process clause of the Sixth amendment, and the Fifth amendment privilege against self-incrimination. See also Article I, section 16, Florida Constitution. The law is also clear that trial counsel bears the responsibility for fully informing and advising a defendant of his right to testify, as well we the strategic implications of doing so. United States v. Teague, 953 F.2d 1525 (11th Cir. 1992); Everhart v. State, 773 So.2d 78 (Fla.

2d DCA 2000).

In this case, trial counsel denied Mr. Fennie this right, either by refusing to let him testify outright or by failing to fully explain his rights, forcing Mr. Fennie to make an uninformed decision to forgo a constitutional right. This was fundamental error.

The lower court never considers the fact that the attorneys failed to inform Mr. Fennie that he could testify on his own behalf without giving up the first and last argument. Nor does the lower court discuss the fact that Mr. Fennie's trial counsel failed to fully explain to him how his prior convictions could and could not be used against him. Mr. Fennie's "decision" regarding testifying was not fully informed, knowing or intelligent, as the lower court finds.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, appellant, ALFRED LEWIS FENNIE, urges this Court to reverse the lower court's order and grant Mr. Fennie Rule 3.850 relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to Stephen D. Ake, Assistant Attorney General, Department of Legal Affairs, 2002 North Lois Avenue, Westwood Center, Suite 700, Tampa, Florida 33607, on May _____,

2002.

CERTIFICATION OF TYPE SIZE AND STYLE

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