IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2480

LOWER TRIBUNAL 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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

References in this brief will be consistent with those made in Appellant's Initial Brief, with the following addition:

"AB. at _____." Appellee's Answer Brief.

“IB. at _____.” Appellant’s Initial Brief.

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Appellant addresses several issues in his Reply Brief. Although Appellant will not reply to every issue and argument, he expressly does not abandon the issues and claims not specifically replied to herein. For arguments not addressed herein, Appellant stands on the arguments presented in his Initial Brief.

REPLY TO ARGUMENT I

In its response to the instant argument, Appellee contends that the Cronic[1] standard does not apply in this case. Specifically, Appellee argues that there is no factual or legal support for Mr. Fennie's argument that he is entitled to a presumption of prejudice based on trial counsel's ineffective performance. (AB. at 6) Appellee, however, fails to comprehend the factual basis for Mr. Fennie's claim, and Appellee's argument that there is no legal basis for relief is equally erroneous.

In his initial brief, Mr. Fennie argued that his trial counsel was functionally and constructively absent during Mr. Fennie's voir dire in that he failed to do the following: effectively question jurors on the issues of race and racial tensions in the community where Mr. Fennie's trial was held; request individual voir dire to ensure effective questioning of jurors on these race issues; and, request a change of venue due to the racially charged atmosphere in the community where the trial was held. (IB. At 15-37) Through his inaction, trial counsel failed to protect Mr. Fennie's Sixth and Fourteenth Amendment rights to an impartial jury, and Mr. Fennie is entitled to a presumption of prejudice as established in Cronic.

[1] United States v. Cronic, 466 U.S. 648 (1984).

Appellee asserts that the lower court was correct in finding that Mr. Fennie failed to "conclusively demonstrate" that the venue he was tried in (Brooksville, Florida) was experiencing racial hostility and turmoil at the time of Mr. Fennie's trial. (AB. At 7) Like the lower court's finding, Appellee's assertion is incorrect. During the evidentiary hearing, Mr. Fennie entered into evidence several media articles detailing the killing of the white teenager by several black men less than three years before Mr. Fennie's trial. The articles detail the severe impact the killing had on the community in the years that followed including the year of Mr. Fennie's arrest and the year his trial was held. (Defense Exhibit 1) The articles also detail many racially-charged incidents in Brooksville's history proceeding the killing of the white teenager, as well as other incidents that occurred after the killing (closer in time to Mr. Fennie's arrest and trial). During the evidentiary hearing, trial counsel even admitted 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)

Even Appellee admits that there was racial tension in the Brooksville area surrounding the killing of the white teenager, but Appellee then argues that Mr. Fennie failed to establish that this tension carried over to the time of Mr. Fennie's trial. (AB. at 8) Appellee's argument is disingenuous at best. The articles contained in Defense 1 detail decades of racial tension in Brooksville leading up to Mr. Fennie's trial. In fact, the articles explain that racial tensions were already near a

boiling point before the white teenager was murdered. The articles also show that Brooksville citizens, both black and white, were dissatisfied with the trial results of several individuals charged in this incident.

Appellee would have this Court believe that decades of racial tensions in the Brooksville community conveniently disappeared in time for Mr. Fennie's trial, but the information contained in Defense 1, as well as common sense, dictate otherwise. In fact, this Court should take note of the last article included in Defense 1 where trial counsel explains that it is his policy to ask jurors if they can judge defendants regardless of race: "That's one of my standard lines, **especially in Brooksville**." Clearly, trial counsel, nearly a decade after Mr. Fennie's trial, still believes that it is necessary to question jurors on these issues because of the racial tensions still present in Brooksville. Apparently, trial counsel forgot his own policy during Mr. Fennie's trial, and herein lies trial counsel's deficient performance.

Appellee, as well as the lower court, point to the fact that trial counsel conducted a long voir dire (AB. at 6), and that trial counsel watched the jurors for body language (AB. at 15) but trial counsel's deficient performance stems from **the crucial questions that he did not ask the potential jurors**. Trial counsel failed to explore the effects the long-running racial tensions had on Mr. Fennie's jurors. Of four groups of potential jurors, two groups were never asked any racial questions at all and several jurors in these groups sat on Mr. Fennie's jury. (R. 658-706; 843-883) Only a few jurors were asked generally if they could give Mr. Fennie a fair trial despite his race. (R. 268-70; 479-83) Only one potential juror was

asked about the interracial aspect of the crime and that individual did not serve on the jury.[2] (R. 482) Worst of all, none of the potential jurors were asked about the killing of the white teenager despite the impact the killing had on the Brooksville area. The length of a particular voir dire and observations of jurors' body language are irrelevant if the proper questions are not asked of jurors. Given what was established at the hearing below, trial counsel's failure to question potential jurors in order to protect Mr. Fennie's right to be judged by an impartial jury was clearly deficient performance.

Appellee also points to trial counsel's testimony that he discussed the jury panel with Mr. Fennie before making strikes or accepting the panel (AB. at 15-16), but this is also irrelevant to Mr. Fennie's claim. Mr. Fennie was not from the Brooksville area and, thus, could not provide input regarding the racial tensions and their effects on potential jurors. Furthermore, if trial counsel failed to ask the proper questions, Mr. Fennie was in no position to judge a potential juror's response or body language. Lastly, this Court should note that at no point during the evidentiary hearing did trial counsel testify that he informed Mr. Fennie about the racial tensions that every potential juror was exposed to leading up to the trial. Again, trial counsel's clearly deficient performance stems from what he failed to do throughout Mr. Fennie's entire voir dire.

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[2] This Court should note Appellee's concession regarding Mr. Fennie's case that "there is the inherent possibility of racial bias given the nature of the crime and the principals involved". (AB. at 10)

Appellee argues that the lower court correctly found that trial counsel made a strategic decision not to offend potential jurors by asking questions regarding racial issues.[3] (AB. at 18) Like the lower court's finding, Appellee's argument has no basis in the record. At no time did trial counsel testify below that it was his strategic decision in Mr. Fennie's case not to ask the jurors questions regarding racial tensions in the Brooksville community. This may explain why Appellee provides no record cite for this assertion in the answer brief. Furthermore, this assertion is inconsistent with trial counsel's quote in the last article contained in Defense 1, where trial counsel states that it is his policy to do so, "especially in Brooksville." Clearly, trial counsel had no strategic reason[4] for not asking the questions during the critical voir dire stage of Mr. Fennie's trial. Mr. Fennie clearly established below that his trial counsel was ineffective during voir dire.

Appellee's argument that the Cronic standard should not apply, and that Mr. Fennie's claim should be judged under the traditional Strickland standard, is also

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[3] It is interesting to note that Appellee cites Spencer v. Murray, 18 F.3d 229, (4th Cir. 1994) in support of his contention that trial counsel was not ineffective for failing to question the jurors on racial issues. In Spencer, the court denied relief on a Strickland claim, in part, because the trial attorneys never had reason to suspect that a prospective juror could harbor a racial bias. Id at 234. Based on the information and testimony presented at the hearing below, the same cannot be said of Mr. Fennie's trial attorney.

[4] Although trial counsel never specifically testified below that he made a strategic decision not to question jurors on these matters, doing so would not have automatically shielded him from a finding of deficient performance. See Stevens v. Zant, 968 F.2d 1076, 1083 (C.A. 11, 1992): "[T]he mere incantation of 'stategy' does not insulate attorney behavior from review...and that choice must have been reasonable under the circumstances." See also Cave v. Singletary, 971 F.2d 1513 (C.A. 11, 1992).

misplaced. (AB. at 6-7) Appellee argues that Mr. Fennie's trial counsel was not functionally or constructively absent during voir dire simply because he did conduct a voir dire. Appellee relies on Bell v. Cone, 122 S. Ct. 1843 (2002) to support his argument but that reliance is misplaced. In Bell, the Court refused to apply the Cronic standard when an attorney waived a defendant's mitigation presentation and also waived a closing argument. In Cronic, the Court identified three situations where a presumption of prejudice could be made. One of those situations was when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." Cronic, at 659. This was the situation at issue in Bell. Mr. Fennie, however, is relying on another situation identified by the Court in Cronic: prejudice can be presumed when a defendant is denied counsel at "a critical stage" of his trial. Id, at 659, 662. It cannot be denied that voir dire is a critical stage of a defendant's trial[5]. It is at voir dire where jurors who cannot fairly judge a defendant are weeded out but the manner in which this is done must be tailored to

[5] "To justify a particular stage as 'critical,' the Court has not required the defendant to explain how having counsel would have altered the outcome of the specific case. Rather, the Court has looked to whether "the substantial rights of a defendant may be affected" during that type of proceeding. United States v. Taylor, 933 F.2d 307, 312 (5th Cir. 1991)(citing Mempa v. Rhay, 389 U.S. 128, 134, 88 S.Ct. 254, 256, 19 L.Ed.2d 336 (1967); Gideon v. Wainwright, 372 U.S. 335, 342-43, 83 S.Ct. 792, 795-96 (1963)); see also United States v. Gouveia, 467 U.S. 180, 189, 104 S.Ct. 2292, 2298, 81 L.Ed.2d 146 (1984)(suggesting that a proceeding is critical when the accused is confronted by the legal procedural system or the expertise of a state adversary)." Burdine v. Johnson, 262 F.3d 336, 347 (5th Cir. 2001). Clearly, voir dire is a proceeding where substantial rights (the right to be tried by an impartial jury) may be affected.

the individual defendant, the specific facts of the crime and, most importantly to this case, **the kind of jurors that a community produces**.

As was established below, Mr. Fennie was tried in a community where racial tension was the norm. In fact, as was also established below, racial tensions were at a heightened state around the time of Mr. Fennie's arrest and trial. As Appellee concedes, Mr. Fennie's state-provided attorney had lived and practiced in the Brooksville area for several years leading up to Mr. Fennie's trial. (AB. at 14-15) At the hearing below, trial counsel reluctantly conceded that he had knowledge of racial tensions in the Brooksville community. (PC-T. 26-27) Trial counsel's quote in the last article contained in Defense 1 provides even greater proof that he knew about racial tensions in Brooksville at the time of Mr. Fennie's trial. Despite this, Mr. Fennie's appointed counsel, for no apparent reason, failed to voir dire jurors on these matters in order to ensure that Mr. Fennie would receive an impartial jury. Trial counsel compounded this failure by failing to move for individual voir dire[6] to explore these matters discretely, and failing to move for a change of venue[7] despite

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[6] Appellee seems to argue that because trial counsel requested individual voir dire for reasons other than exploring matters of racial bias (pretrial publicity) that this somehow makes up for trial counsel's failure to request individual voir dire in order to discover possible racial bias. (AB. At 21-22) This argument makes no sense, and Appellee cites no law to support it. Instead, this is one more example of how trial counsel failed to tailor a defense for Mr. Fennie that took into account the racial tensions existing in the Brooksville community at the time, racial tensions that trial counsel was more than aware of.

[7] Appellee defends the lower court's ruling that trial counsel was not ineffective for failing to move for a change of venue because he was able to seat a jury. (AB. at 21-23) However, as previously stated, trial counsel failed to ask potential jurors any questions at all regarding racial problems occurring in Brooksville around the

knowing what he did about the Brooksville area. Thus, although he was present[8] during voir dire, Mr. Fennie's state-appointed trial counsel was functionally and constructively absent during a critical stage of the trial. Under these facts, prejudice must be presumed.

REPLY TO ARGUMENT II:

Appellee argues that Mr. Fennie's sisters are incredible, and even goes so far as to accuse them of perjury.[9] If appellee truly believed that there were serious discrepancies in the ladies' testimony,[10] appellee had the opportunity to cross examine both sisters on these matters at the evidentiary hearing. To attack their veracity in this fashion when Ms. Fennie and Ms. Reed are no longer present to defend themselves is not only speculative, it is improper and unprofessional.

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time of Mr. Fennie's trial. The fact that a jury was chosen does nothing to offset the deficient performance Mr. Fennie is complaining of because trial counsel's actions (or lack thereof) could have easily resulted in a jury consisting of one, four or even twelve jurors who held racial biases that effected their guilt or sentencing determinations.

[8] Trial counsel's presence during voir dire does not, by itself, satisfy Sixth Amendment requirements. See Holloway v. Arkansas, 435 U.S. 475, 490 (1978).

[9]From the State's Answer Brief, p. 30, "Because of [deceased mother Annie Fennie's] unavailability, appellee questions whether Kathy Reed and Deborah Fennie would have testified the same way regarding their family upbringing had Annie Fennie been alive to rebut their allegations. . . . The State further questions the veracity of the evidence presented at the evidentiary hearing from the sisters given the present record." Note that information gleaned from the sisters was included in Mr. Fennie's 3.850 motion, filed well before Annie Fennie's death. Also recall that Annie Fennie was herself listed as a defense witness for the evidentiary hearing**.** (PC-R. 3140.)

[10]While the time frames in the sisters' testimony contradict their mother's trial testimony, their time lines taken together are consistent.

Further, appellee mischaracterizes much of their testimony to minimize Mr. Fennie's role. Appellee says that Kathy Reed never testified that she saw Mr. Fennie beaten with any implements. However, Kathy Reed testified of her mother, "Oh, she would **beat us** with anything she had her hand on.... She **whipped us** with extension cords. She got a fan belt off a car and **whipped us.** She **whipped us** with hangers, boards, or she'll **hit us** with her hand." (PC-T. 512, emphasis added.) Appellee also says that Mr. Fennie was only beaten on one occasion for wetting his bed. However, a review of the testimony makes it clear that this happened on more than one occasion, that it was an ongoing occurrence. (PC-T. 538.)

Appellee also compares postconviction counsel's failure to perpetuate Annie Fennie's testimony prior to her death to trial counsel's failure to perpetuate Deborah Fennie's testimony prior to trial. Of course, appellee finds no fault with trial counsel for failing to perpetuate Deborah Fennie's testimony while she was recovering from an accident, but finds fault with postconviction counsel for failing to perpetuate mother Annie Fennie's testimony before she died unexpectedly from health problems that testimony at the evidentiary hearing establishes she had suffered from for most of her life.

Appellee admitted in its own Closing Arguments following the evidentiary hearing that, "Apparently, **counsel was unaware that Deborah was unavailable** at the time of the penalty phase based on an injury. ®. 1965)." (PC-R. 3499-3500, emphasis added.) Obviously if trial counsel did not know his witness was

unavailable until he called her name in open court, his decision not to perpetuate her testimony, assuming such a decision was even made, could not have been strategic. Appellee argues that it doesn't matter if trial counsel didn't know Ms. Fennie was unavailable because, "Mr. Lee, however, having spoken with the Fennie family numerous times prior to trial, knew the gist of their statements and determined that Deborah Fennie was not a critical witness given the fact that her sister and mother both testified." A.B. at 33.[11] In other words, trial counsel was able to instantly determine, while the eyes of the jurors, the court, and presumably co-counsel were upon him, that the testimony of a woman he had never personally met wasn't important enough to ask for a continuance to perpetuate her testimony. This argument verges on the preposterous, and it ignores the question of why trial counsel Mr. Lee did not know Deborah Fennie was unavailable. Recall that Annie Fennie had informed lead counsel, Mr. Fanter, that her daughter was in the hospital. ®. 1965.) Mr. Fanter's failure to inform co-counsel that their witness was

[11]Mr. Lee never testified that he recalled making a determination that Deborah Fennie was not a critical witness. In fact, during the State's cross of Mr. Lee, he said that he had no recollection of meeting Deborah Fennie; he knew he had met with one sister, but he doesn't know which one. (PC-T. 807.) Appellee continued:

> Q. If you felt [Deborah Fennie] was a critical witness would you have tried to perpetuate her testimony in any form?
>
> A. If I thought she was a critical witness, yes, sir.

Such a question did not elicit Mr. Lee's recollection of any decisions, strategic or otherwise, made during Mr. Fennie's case. Instead it simply elicited Mr. Lee's answer to what an effective attorney should have done in a hypothetical situation.

unavailable prior to attempting to call her to the stand precluded any discussion of whether to perpetuate her testimony. Appellee fails to address this issue, just as the trial court did in his order denying relief.

As for Annie Fennie's testimony, appellee argues that, "Counsel cannot be deemed ineffective when a witness gives testimony that is unexpected." (A.B. at 32.) In fact, counsel is ineffective if the answer is unexpected because he never bothered to ask his witness the question before she got to the courtroom, never bothered to prepare his witnesses and investigate mitigation for his client.[12] Unlike the State's characterization of his testimony, Mr. Lee never said that he spent several hours speaking with Annie Fennie about her testimony. His testimony was as follows:

> Q. Did you expect Ms. Lee, excuse me, Ms. Fennie, to give that response? I guess you did not, did you?
>
> A. No sir, I did not.
>
> Q. How much time do you think you spent with Mr. Fennie's mother?
>
> A. **I don't have a specific recollection**. Throughout the course, from start to finish, I'm sure, several hours either on the phone or in-person. I talked to her on the phone more than I saw her in person.

(PC-T. 751, emphasis added.) Recall that Kathy Reed testified that trial counsel didn't discuss what was happening in the case and never explained the concept of

[12]This lack of preparation may also explain why Annie Fennie was mistaken about the dates she and her children lived in the projects.

mitigation, that trial counsel just pressured the family to make Mr. Fennie take the plea bargain. (PC-T. 523-25.) The pressuring phone calls made Annie Fennie sick and caused her to shed many tears. (PC-T. 521.)

Appellee further opines that, "Arguably, counsel could have cut off Ms. Fennie on these occasions, but such action would risk alienating the jury." (A.B. at 32-3.) This is sheer speculation. Appellee had an opportunity to cross-examine Mr. Lee and never elicited any such testimony as a reason, strategic or otherwise, for his actions. Finally, Mr. Fennie would refer the Court to the trial transcript, which demonstrates that in fact Mr. Lee did interrupt Annie Fennie, so evidently he was not concerned about alienating the jury ®. 1949-65)

Appellee argues that trial counsel cannot be deemed ineffective for failing to call Pamela Colbert because she would have testified that Mr. Fennie was solely responsible for killing the victim. At both Mr. Fennie's evidentiary hearing and Ms. Colbert's own trial, Ms. Colbert testified that, contrary to Mr. Frazier's testimony, both Mr. Fennie and Mr. Frazier walked down the dirt road with the victim. (PC-T. 472, 491; State Exhibit 4.) According to appellee, "Colbert reiterated this story [that Frazier was in the car with her when the victim was shot] during Appellant's trial when she was asked by her own attorney, Chip Harp, on behalf of Mr. Fanter, if she would testify on behalf of Appellant." (A.B. at 42.) There is no evidence to support this statement, not even the third-hand hearsay of trial counsel. Mr. Fanter testified at the evidentiary hearing that, "If I believe correctly, David talked to Chip and the comment that was relayed to me is all she's going to do is put your client in

the electric chair.... **I got the impression that Chip went down to see her, but I don't know for a fact that that's true**." (PC-T. 661, emphasis added.) Ms. Colbert's uncontroverted testimony at Mr. Fennie's evidentiary hearing was that she was never approached by anyone about testifying for Mr. Fennie at his trial, and that she would have been willing to do so. (PC-T. 448)

Appellee and the trial court are wrong when they say that Ms. Colbert gave conflicting testimony as to who was the actual shooter. (A.B. at 42, PCR. 3619-23.) Ms. Colbert gave two statements to law enforcement the night she was arrested, one in Tampa and one in Hernando County. (PC-T. 465.) In the second of those statements, Ms. Colbert said that Mr. Fennie was one who took the victim down the road because she was tired and she thought that was what the detectives wanted to hear. (PC-T. 466-472, 492.) Ms. Colbert always, in her testimony under oath, said that both men walked down the dirt road with the victim. (PC-T. 472, 491; see also State Exhibit 4.) She maintained this position despite vigorous cross-examination by appellee during Mr. Fennie's evidentiary hearing. (PC-T. 450-478.)

Mr. Fennie notes that the trial court's assessment of Ms. Colbert giving conflicting testimony, relied upon by appellee, occurs during the trial court's evaluation of Mr. Fennie's **guilt phase** claims. The trial court never evaluated any of Ms. Colbert's testimony in the context of mitigation, nor did appellee address Ms. Colbert's testimony in that context. Ms. Colbert gave compelling testimony about Mr. Fennie's character (PC-T. 441-448), his nonviolent nature (PC-T. 445,

446-8), and his efforts to help her with her addiction (PC-T. 443-4), all of which appellee and trial court ignored.

With regard to Dwayne Jones, appellee says that Mr. Jones' testimony that Frazier had possessed a .357 was irrelevent because of the "overwhelming evidence that Defendant possessed and utilized a .25 semiautomatic to murder Mary Shearin." (State's Closing p. 32.) However, there was no overwhelming evidence that Mr. Fennie is the one who murdered Ms. Shearin. The only evidence was the self-serving testimony of Mr. Frazier. Appellee also says that Mr. Fennie was seen in possession of "the murder weapon" only days before the murder. Appellee is referring again to the self-serving testimony of Michael Frazier and that of his long-time girlfriend Regina Rogers. Both testified that they had seen a gun at Ms. Colbert's home within the reach of her child, and that Ms. Colbert asked Mr. Fennie to put it away. That is hardly seeing a weapon within Mr. Fennie's possession. Further, at the evidentiary hearing, Ms. Colbert testified that the incident Ms. Rogers and Frazier spoke of never took place, that she has never had a gun in her house. (PC-T. 477.)

Appellee and the trial court reject Mr. Jones testimony as incredible. The trial court fails to give any support for its conclusory assessment. (PC-R. 3625.) See Fla.R.Crim.P. 3.851(f)(5)(D), which requires the trial court to make detailed findings of fact and conclusions of law and to attach and/or reference portions of the record as necessary to allow for meaningful appellate review following an evidentiary hearing. Mr. Jones testified that he had between 10 and 20 felony

conviction, probably 11-13, but it could be as many as 18 felony convictions. (PC-T. 234.) This alone certainly does not make him incredible. During his testimony against Mr. Fennie, the State's star witness Mr. Frazier admitted to 13 felony convictions of his own (10 priors plus his convictions for murdering, robbing and kidnaping Ms. Shearin). (R. 1512.)

Mr. Jones was a friend and associate of Mr. Frazier's, and they were convicted of robbing a Kentucky Fried Chicken together. (PC-T. 233). It seems likely and certainly not incredible that these friends would have committed other crimes together, crimes for which they were never apprehended. Mr. Jones' story about Mr. Frazier stealing a gun from a police officer's house (PC-T. 232) is corroborated by what Mr. Fennie told his attorneys in a "confidential" conversation Mr. Fennie's attorneys had recorded at the time of trial. [See Defense Exhibit 15, p. 8-9.]

In addition to the uncharged crime, Mr. Jones testified about Mr. Frazier's common possession of guns and propensity for violence, a propensity which was exacerbated by Mr. Frazier's use of crack and powder cocaine. (PC-T. 228-30, 231-2.) Mr. Jones indisputably had a basis for knowledge of this type of information about Mr. Frazier, and there is no reason to find him incredible. Mr. Fennie reiterates that all of this testimony goes to relative culpability, and none of it was addressed by appellee or the trial court.

Appellee claims that Dr. Martin's testimony was not expressed in absolute terms, would not necessarily have contradicted Frazier's testimony, and would not

have established any fact not already known by the jury. (A.B. at 39.) In fact, Dr. Martin expressed his opinion "with all degree of medical certainty." (PC-T. 646. See also Defense Exhibit 13, p. 20.) It is unclear how any responsible expert could express his opinion in terms any more absolute. Mr. Fennie reiterates that Dr. Martin's opinion does clearly contradict Mr. Frazier's testimony from Mr. Fennie's trial where Frazier 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). Thus the trial court's finding that, "For reasons of trial strategy, trial defense counsel decided not to call Dr. Martin, as they apparently did not believe that his testimony was worth using, based on their strategic decisions and plan for the trial at that time," (PC-R. 3622-23), is pure speculation and inconsistent with the record.

Appellee, in arguing that trial counsel was not ineffective in failing to use expert testimony to place mitigation before the jury, asserts that the decision not to call Dr. Peal was a strategic one on the part of trial counsel. Appellee relies on the testimony of trial counsel Hugh Lee in support of this assertion. (A.B. at 39.) Mr. Lee's testimony, however, is not consistent with the rest of the evidence presented at the evidentiary hearing. According to Mr. Lee, "We were scared of getting into any statements made by Alfred in the course of performing that evaluation or performing (sic) that opinion, and I don't have a specific note, but I suspect that there was more to it that probably would have precluded that testimony." (PC-T. 810.)

In fact, no such incriminating information came out through Dr. Peal's testimony or his report admitted into evidence. Mr. Lee's testimony was obviously sheer speculation, particularly since Mr. Lee testified that he never worked with Dr. Peal and doesn't recall ever speaking to him regarding this case. (PC-T. 753.) Not only did Mr. Lee never work with Dr. Peal, he was unfamiliar with the memo written by Billy Nolas (Defense Exhibit 10) suggesting that another expert evaluate Mr. Fennie for evidence of brain damage.

If appellee (or Mr. Lee) is referring to the inherent dangers of calling Dr. Peal and having him question Mr. Fennie's credibility, Mr. Fennie's credibility was already questionable (as was Frazier's). Dr. Peal spoke of Mr. Fennie making different statements, but many of those statements came in for the jury to judge his credibility anyway. Further, Dr. Peal testified that Mr. Fennie's role in the crime remained essentially the same throughout his different versions of events. Only the details changed. (PC-T. 275.) Thus concerns about the defendant's credibility are no justification for failing to introduce mitigation.

Appellee further states that trial counsel clearly conducted a reasonable investigation "when they hired Dr. Peal to evaluate Appellant and counsel provided Dr. Peal with Appellant's mother's telephone number so he would be able to obtain any necessary background information on Appellant." (A.B. at 40.) If that is all that is required of trial counsel, then standards for effectiveness are very low indeed. Trial counsel cannot, by giving their mental health expert a phone number, delegate the responsibility for performing an adequate investigation into their

client's background. "[A]n attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000), quoting Rose v. State, 675 So. 2d 567, 571 (Fla. 1996). Trial counsel should be providing the background information to his expert, not the other way around. See Cunningham v. Zant, 928 F.2d 1006 (11th Cir.1991).

Appellee relies on Asay v. State, 769 So. 2d 974 (Fla. 2000), to urge this Court to deny Mr. Fennie relief. However, the State's focus is misplaced. In Ragsdale v. State, 798 So. 2d 713, 720 (Fla. 2001), this Court distinguished Asay from a situation where trial counsel was ineffective during the penalty phase: "Furthermore, unlike the situation in Asay, since counsel did not conduct a reasonable investigation, he was not informed as to the extent of child abuse suffered, and thus he could not have made an informed strategic decision not to present mitigation witnesses." Likewise, in the instant case, trial counsel did not investigate Mr. Fennie's background, his life in the projects, did not learn the extent and severity of the physical abuse and neglect he suffered as a child, and thus could not and did not discover the implications his childhood had on his adult lifestyle and behavior, particularly his susceptibility to duress by the likes of Michael Frazier. See also Rose v. State, 675 So. 2d 567, 572-73 (Fla. 1996) ("It is apparent that counsel's decision . . . was neither informed not strategic. Without ever investigating his options, counsel latched onto a strategy which even he

believed to be ill-conceived.") Mr. Fennie's trial attorney neglected to investigate his background, and such a decision is neither informed nor strategic.

Appellee argues that this evidence is cumulative because the Court found most of the things testified to as nonstatutory mitigation in his sentencing order. However, because the Court failed to independently and individually weigh the mitigating factors as required, we have no way of knowing how little weight he gave to the evidence at trial. (See Habeas Claim I.) The Court simply acknowledged that some minimal evidence had been presented. Further, the evidence presented at the evidentiary hearing was never presented to the jury, who would have found it compelling in making their recommendation to the Court.

"Counsel's errors deprived [Mr. Fennie] of a reliable penalty phase proceeding." Hildwin v. Dugger, 654 So. 2d 107, 110 (Fla.), cert. denied, 516 U.S. 965 (1995). Mr. Fennie respectfully requests that this Court reverse the lower court's order and order a new penalty phase.

REPLY TO ARGUMENT III

In its response to the instant argument, Appellee first asserts that Mr. Fennie is procedurally barred from raising this claim. Appellee, however, misconstrues Mr. Fennie's argument. Appellee cites three cases from this Court for the proposition that a constitutional challenge to the rule[13] restricting juror interviews must be raised during a defendant's direct appeal. (IB. at 45-46) Mr. Fennie's

[13] See Rule 4-3.5 (d)(4), Rules Regulating the Florida Bar.

argument, however, is not a constitutional challenge to the rule itself. Instead, Mr. Fennie argues that he was denied due process during the postconviction hearings below because the lower court refused to allow Mr. Fennie's counsel permission to interview jurors.

In the court below, 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 in Initial Brief). Mr. Fennie further argued that it would be necessary to interview the jurors to establish whether he suffered harm and/or prejudice from the errors. See Strickland. Mr. Fennie needed to ask the jurors the questions that trial counsel failed to ask. The lower court, however, denied Mr. Fennie's request. (PCR. 2458) Mr. Fennie renewed his motion to interview jurors during the evidentiary hearing and was again denied. (PC-T. 193-94)

The lower court's actions denied Mr. Fennie the ability to establish the prejudice prong of Strickland. This, in turn, has limited Mr. Fennie to arguing the presumed-prejudice standard from Cronic.[14] Thus, Mr. Fennie's claim is that the lower court denied him due process during his postconviction proceedings, and not a constitutional challenge to the rule prohibiting interviews of jurors. It is

[14] In his postconviction motion, Mr. Fennie pled that he was entitled to relief under both the Strickland and Cronic standards.

indisputable that defendants, like Mr. Fennie, are entitled to due process in their postconviction proceedings. See, Holland v. State, 503 So. 2d 1250 (Fla. 1987); Easter v. Endell, 37 F. 3d 1343 (8th Cir. 1994). By refusing to allow him to interview the jurors from his case, the lower court denied Mr. Fennie the due process he was entitled to.

REPLY TO ARGUMENT IV

Appellee makes much in their "Background" of Mr. Fennie's difficulty as a client, specifically his lying[15] and testifying before the Grand Jury[16]. Attorneys have an independent duty to investigate and prepare for trial. See Magill v. Dugger, 824 F.2d 879 (1987); House v. Balkcom, 725 F.2d 608 (1984); Weidner v. Wainwright, 708 F.2d 614 (1983); Goodwin v. Balkcom, 684 F.2d 794 (1982). If "counsel's duty to be prepared is, of course, not lessened by the fact that his client admits to committing the acts alleged in the indictment," Magill v. Dugger, 824 F.2d 879, 886, then certainly his duty is not eliminated or lessened because his client is not always truthful with him. Furthermore, at issue in this case is not what trial counsel actually

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[15]Appellee cites heavily to Mr. Fanter's complaints about Mr. Fennie's lies, and the difficulties it caused them. However, during the evidentiary hearing appellee asked Mr. Lee to explain the meaning of a memo he had written to the file, one saying that they (defense team) did their best, but they simply couldn't prevail over the facts. Mr. Lee's explanation was not that Mr. Fennie's lies had cost them the case. Instead, he explained that, "The facts being this statement of Frazier, the codefendants flipping. The evidence was just very strong." (PC-T. 807.)

[16]The State's argument, and the trial court's similar finding, that Mr. Fennie went "behind Mr. Fanter's back," to testify before the Grand Jury is irrelevant and ridiculous. If appellee had not been complicit in the events that led to Mr. Fennie testifying before the Grand Jury, the court would not have suppressed Mr. Fennie's testimony at trial.

did, but instead the very significant things that they failed to do. These things had nothing to do with Mr. Fennie's veracity.

Trial counsel's failure to prepare for Mr. Frazier's testimony cannot be blamed on "Mr. Fennie's lies." Everything trial counsel needed to effectively discredit Frazier was in Frazier's own statements and criminal records, provided by appellee during discovery. According to Mr. Fanter, Mr. Lee was to handle the penalty phase. According to Mr. Lee, he was to act as a second chair to Mr. Fanter. Either way, Mr. Lee testified that he believes he did the cross examination of Mr. Frazier, the major State witness, because "[Michael Frazier's] statement came in at the very last, and I assume I had more time than Alan [Fanter] to actually review it and go into more detail with it, but I can't say for certain." PC-T. 757. Thus neither attorney prepared for the possibility of Mr. Frazier's testimony prior to **the day before trial** when Mr. Frazier gave a sworn statement and became the State's star witness. This becomes even more clear during the State's cross of Mr. Lee.

> Q. Counsel, on Page 1448 of the trial transcript and then on Page 1461 it indicates that that is the date that Michael Frazier began his testimony in the afternoon session on Wednesday, November 11. So by my account you had almost a full week to prepare for Mr. Frazier's testimony once you began your involvement with him, correct? By that count?
>
> A. By that count, but we're in the midst of a first-degree murder trial. It's not that I had a week to devote to Michael Frazier's testimony.

(PC-T. 794-795.)

Appellee argues, and the trial court found in his order denying relief, that trial counsel, despite histrionics before the court, was not surprised by Mr. Frazier's decision to testify. Trial counsel had known for two months prior to trial that appellee was trying to convince Frazier to testify. If, as appellee says and the trial court found, trial counsel was not surprised by Frazier, then there can be no strategic or tactical reason for failing to investigate and prepare for the State's star witness prior to trial. Accepting this position, the Defense Trial Team had an unfettered ability and opportunity to prepare prior to trial; they just failed to do so, and that failure was inexcusable.

Trial counsel's failure to prepare for the testimony of Regina Rogers, John Shearin, and Ansel Rose likewise cannot be blamed on Mr. Fennie's lies. Appellee characterizes Regina Rogers as "a one-time girlfriend of co-defendant Michael Frazier." In fact, she testified at Mr. Fennie's trial that she had dated Frazier for 8 years, up to and including the time of Ms. Shearin's murder. (R. 1682-3) Appellee is correct that the incident in the T.P.D. report is the same one that Mr. Fanter questioned Ms. Rogers about at trial. However, appellee actually preemptively brought out the incident on direct examination, and Mr. Fanter failed to bring out the most important aspect of the report in his cross. According to the T.P.D. report, Frazier had been violent toward Ms. Rogers prior to this altercation. Despite the minimizing by Ms. Rogers at trial, this was not an isolated incident, and Frazier has a history of violence toward women.

As for Mr. Shearin and Mr. Rose, appellee characterizes the discrepancies in their testimony demonstrated by Mr. Fennie as having no material difference. Mr. Fennie would reiterate that Mr. Shearin's 30-45 minute time discrepancy at trial impeaches Mr. Frazier's story, not Mr. Shearin. Further, contrary to ppellee's assertion (A.B. at 57), Mr. Fanter never testified that he believed it would be risky to cross-examine Mr. Shearin about the time difference. He testified that it would be risky to cross Mr. Shearin generally about "an insignificant detail," but he was never asked about cross-examination as to inconsistencies in the reported time, or whether he considered the time discrepancy to be an insignificant detail. (PC-T. 719.) Just because appellee finds the time discrepancy to be insignificant, one cannot infer that trial counsel would have as well.

There is a significant difference (per Mr. Rose's testimony) between Mr. Fennie having actual possession of the murder weapon, holding it in his hand, and having constructive possession by driving the victim's car, in which Mr. Frazier and Ms. Colbert had also been traveling, with the gun under the floor mat. Mr. Fennie would also reiterate that Mr. Rose is yet another witness that trial counsel failed to depose until during Mr. Fennie's trial.

Mr. Fennie's lies certainly cannot be blamed for trial counsel's failure to call Pamela Colbert, Dwayne Jones, and Dr. Martin. Mr. Fennie refers the Court to his Reply to Argument II, supra, for his arguments regarding these witnesses.

Mr. Fennie reiterates that all of these errors should be considered cumulatively, and that he should be granted a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS** 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, counsel of record on this 7th day of November, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

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