IN THE SUPREME COURT OF FLORIDA

CASE NO. SC-02-1410

LOWER TRIBUNAL No. 89-966C

DANIEL JON PETERKA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

AMENDED
INITIAL BRIEF OF APPELLANT

MICHAEL P. REITER
Capital Collateral Counsel
Northern Region
Florida Bar No. 0320234

LINDA McDERMOTT
Assistant CCC-NR
Florida Bar No. 0102857

OFFICE OF THE CAPITAL
COLLATERAL COUNSEL
1533-B S. Monroe Street
Tallahassee, Florida 32301

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Peterka's initial motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court denied several of Mr. Peterka's claims without an evidentiary hearing and held an evidentiary hearing on Mr. Peterka's claims of ineffective assistance of counsel at the guilt and penalty phases of Mr. Peterka's capital trial.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate volume and page number(s) following the abbreviation:

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

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

"PC-R." – record on appeal from denial of postconviction relief;

"PC-T." – transcript of proceedings from evidentiary hearing;

"Supp. PC-R." – supplemental record on appeal from denial of postconviction relief;

REQUEST FOR ORAL ARGUMENT

Mr. Peterka has been sentenced to death. The resolution of the issues involved in this action will therefore determine

whether he 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 more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Peterka, through counsel, urges that the Court permit oral argument.

STANDARD OF REVIEW

In Stephens v. State, 748 So. 2d 1028 (Fla. 1999), this Court addressed the proper standard of review in addressing a claim of ineffective assistance of trial counsel. This Court summarized that standard as: "The standard of review for a trial court's ruling on an ineffectiveness claim also is two-pronged: The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo." Bruno v. State, 807 So. 2d 55, 61-2 (Fla. 2001)(footmote omitted).

Furthermore, this Court has the inherent power to further justice. In Mr. Peterka's case, justice requires that this Court remand his case to the circuit court for further evidentiary development. See Happ v. State, Case No. SC 93121 (Order, Sept. 13, 2000)("[I]n an attempt to properly

administer justice, and recognizing the legislature's call for judicial oversight of collateral counsel, we hereby dismiss the above case without prejudice for allowing the appellant to further amend the underlying motion . . . and proceed in the trial court on certain limited claims.").

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

On August 10, 1989, Mr. Peterka was indicted and charged with the premeditated first-degree murder of John Russell in Okaloosa County, Florida (R. 1947-8).

Subsequently, Mr. Peterka was tried by a jury in the circuit court of the First Judicial Circuit, in and for Okaloosa County, Florida. Trial began on February 26, 1990, and on March 2, 1990, the jury found Mr. Peterka guilty of first-degree murder (R. 2042). The penalty phase was held the following day, on March 3, 1990, and on that same day the jury returned a recommendation of death (R. 2043).

On April 25, 1990, the trial judge sentenced Mr. Peterka to death (R. 2077-8). This Court affirmed Mr. Peterka's conviction and sentence. Peterka v. State, 640 So. 2d 59 (Fla. 1994).

On March 24, 1997, Mr. Peterka, who was represented by the former Office of the Capital Collateral Representative, timely filed a preliminary Rule 3.850 motion (PC-R. 1-148).

The State responded to Mr. Peterka's preliminary Rule 3.850 motion on January 21, 1998 (R. 246-64).

A few hours, before the State responded, on January 21, 1998, the circuit court entered an Order denying most of Mr. Peterka's claims (PC-R. 265-9).

In December, 1998, Robert Harper entered a Notice of Appearance on behalf of Mr. Peterka (Supp. PC-R. 46-7).

On July 6, 2000, Mr. Peterka filed an Amended Rule 3.850 motion (PC-R. 290-335). Thereafter, on February 1, 2001, Mr. Peterka filed an amended, corrected Rule 3.850 motion (R. 412-62).

On February 22, 2001, the court entered an order granting an evidentiary hearing on most of Mr. Peterka's ineffective assistance of counsel claims and denying an evidentiary hearing on other claims (PC-R. 463-6).

On June 28-29, and July 16, 2001, an evidentiary hearing was held regarding trial counsel's ineffectiveness. Following the hearing, written closing arguments were submitted (PC-R. 471-505, 506-50, 555-68).

On May 2, 2002, the circuit court denied Mr. Peterka's Rule 3.850 motion (PC-R. 569-92).

Mr. Peterka timely filed a notice of appeal (PC-R. 742-44).

On September 6, 2002, Mr. Peterka, pro se, filed a motion to dismiss counsel. On September 19, 2002, postconviction counsel moved to withdraw.

On October 7, 2002, this Court granted Mr. Peterka's motion to dismiss counsel and appointed the Capital Collateral

Counsel for the Northern Region to represent Mr. Peterka in this appeal.

STATEMENT OF THE FACTS

TRIAL

At trial, the State maintained that Mr. Peterka was guilty of the premeditated first-degree murder of John Russell. The State told the jury that Mr. Peterka executed his roommate in order to assume his identity because Mr. Peterka was a fugitive from Nebraska and did not want to serve his sentence of two consecutive one year terms of incarceration that resulted from his felony convictions of theft and retaining stolen property (R. 1119-20).

The State presented testimony that Mr. Peterka was convicted of theft and retaining stolen property on February 10, 1989 in Scottsbluff, Nebraska (R. 1135-6). He was required to report to a Nebraska penitentiary two days later (R. 1135-6). On the day Mr. Peterka was supposed to report to begin serving his sentence, he spent the morning with his girlfriend, Cindy Rush (R. 1144). Mr. Peterka told Ms. Rush that he did not want to report to prison that he “couldn’t handle the things there”, “it would be rough there” (R. 1150). He told her that he wanted to reestablish himself somewhere else, get a job and work (R. 1148).

Thereafter, Mr. Peterka arrived in Okaloosa County and was employed at the Okaloosa Plaster and Supply Company, the

business of Ruben Purvis (R. 1671). For a short time, Mr. Peterka lived with Ronald and Connie LeCompte and their children (R. 1572).

While living with the LeComptes, Mr. Peterka asked Mr. Lecompte to purchase a handgun in his name for Mr. Peterka (R. 1573). Mr. LeCompte purchased a handgun for Mr. Peterka (R. 1573).

When the LeComptes were forced to move from their home, farther from Mr. Peterka's job, Mr. Peterka looked for another place to live (R. 1879).

Mr. and Mrs. Purvis also owned rental properties and knew that one of their tenant's, John Russell, was behind in his rent (R. 1656). Mr. Purvis suggested that Mr. Peterka and Mr. Russell share the rental house together so that Mr. Peterka could be closer to work and Mr. Russell could catch up on his rent payments (R. 1656). Mr. Peterka moved into the house in May, 1989 (R. 1649).

When Mr. Peterka paid his first month of rent to Mr. Russell, Mr. Russell spent the money and did not pay the Purvises (R. 132). Thereafter, Mr. Peterka paid his share of the rent directly to Jean Purvis, Mr. Purvis' wife. Mr. Russell not only failed to pay the rent, but also failed to pay the utility bills (R. 132).

On June 27, 1989, Mr. Peterka cashed a $300.00 check that was sent to Mr. Russell from his aunt (R. 2445).

That same day, Mr. Peterka obtained a drivers license from the Department of Motor Vehicles which had his photograph and Mr. Russell's identifying information on it (R. 2445). Mr. Peterka told the police in his confession that he had paid Mr. Russell $100.00 for use of his social security card so that he could obtain a driver's license (R. 2446).

Mr. Russell learned of the check that his aunt had sent him and believed that Mr. Peterka had stolen the check (R. 1445). The jury was allowed to hear testimony that Mr. Russell told his friend, Lori Slotkin, his cousin, Deborah Trently, and a bank employee, Kim Cox, that he would not confront Mr. Peterka about the check (R. 1434, 1457, 1604-5).

On July 13, 1989, Mr. Russell did not appear for work (R. 1276). His friend, Gary Johnson, was nervous because it was pay day and Mr. Russell usually came to work on pay day to collect his paycheck (R. 1276). Mr. Johnson traveled to Mr. Russell's house and entered the house through a window (R. 1280). Mr. Johnson saw Mr. Russell's car keys, cigarettes and eye glasses in the house (R. 1281). Mr. Johnson told the jury that Mr. Russell was so financially strapped that he was surprised to see that Mr. Russell had left a pack of

cigarettes with a few cigarettes in the pack at the house (R. 1281).

After work, Mr. Johnson went back to Mr. Russell's house and spoke to Mr. Peterka who was home with his girlfriend, Frances Thompson (R. 1285). Mr. Peterka told Mr. Johnson that Mr. Russell left the house the previous evening with another individual (R. 1285).

Later that afternoon, Mr. Johnson and Ms. Slotkin filled out a missing persons report and spoke to Deputy Daniel Harkins of the Okaloosa County Sheriff's Department (R. 1288). Deputy Harkins traveled to Mr. Peterka's house along with Mr. Johnson and Ms. Slotkin (R. 1289, 1350). Deputy Harkins interviewed Mr. Peterka, who again stated that Mr. Russell left the house the previous evening with another individual (R. 1352). Deputy Harkins requested identification and Mr. Peterka provided his birth certificate (R. 1353).

After Deputy Harkins left, Mr. Peterka told Ms. Thompson that she should leave because the police would be back to arrest him due to his fugitive status in Nebraska (R. 1629). Ms. Thompson left the house (R. 1629).

At approximately 1:30 a.m., on July 14, 1989, Deputy Harkins and other law enforcement officers returned to the house to arrest Mr. Peterka on a fugitive warrant from

Nebraska (R. 1355). During Deputy Harkins testimony, over a defense objection, he was allowed to tell the jury that the teletype of the warrant stated that Mr. Peterka was "armed and dangerous" (R. 1355). He was also allowed to testify, over defense objection, that the officers believed Mr. Peterka may have weapons in the house (R. 1361).

After arresting Mr. Peterka outside of his home, the officers entered and searched Mr. Peterka's home. While inside, one of the officers looked in Mr. Peterka's wallet and found: approximately $407.00, a Florida driver's license with Mr. Peterka's picture and Mr. Russell's name; Mr. Russell's social security card, video card, bank card and insurance card, Mr. Peterka's Nebraska driver's license and birth certificate and a clipping for a job in Alaska (R. 1369-72). The contents of the wallet were introduced as evidence (R. 1374).

The officers also located a handgun, for which Mr. Peterka produced a bill of sale (R. 1364-5). The officers did not take custody of the handgun at that time (R. 1366).

That afternoon, officers returned to the house and Mr. Purvis allowed them to enter. During the search, Investigator Vinson, found what he believed were blood stains on the couch cushions and beneath the couch on the carpet (R. 1311-2). The

officers also seized cushions that were damp and outside (R. 1314).

Officers also found sand and a shovel in the trunk of Mr. Russell's car (R. 1314).

The Florida Department of Law Enforcement sent agents to assist in the evidence collection (R. 1506-12). Six blood samples – four from the trunk of the car and two from the couch cushions were different from Mr. Peterka's blood grouping and consistent with the victim's blood grouping (R. 1540-3). Other samples from the house were consistent with both Mr. Russell and Mr. Peterka's blood groupings (R. 1540-3).

On July 18th, 1989, in the late afternoon, Investigator Vinson interviewed Mr. Peterka (R. 246). Mr. Peterka asked Inv. Vinson to arrange a phone call with Mr. Purvis (R. 250). Mr. Peterka spoke to Mr. Purvis and requested that he come to the jail to meet with Mr. Peterka that evening (R. 1674). Alan Atkins, an officer at the jail, agreed to allow Mr. Purvis to meet with Mr. Peterka (R. 1661).

When Mr. Purvis arrived at the jail, Mr. Peterka was upset and crying and confessed to Mr. Purvis that he shot Mr. Russell (R. 1676-8). Mr. Purvis asked Officer Atkins to enter the room and Ofc. Atkins instructed both Mr. Purvis and Mr.

Peterka to write down what Mr. Peterka had told Mr. Purvis about his roommate (R. 1680).

Later that evening, Inv. Vinson and Sheriff Gilbert arrived and spoke to Mr. Peterka (R. 1323). Mr. Peterka confessed to shooting Mr. Russell and explained what happened on the late afternoon of July 12th. Mr. Peterka agreed to show law enforcement where he placed Mr. Russell's body (R. 1323).

After leading law enforcement to Mr. Russell's body, Mr. Peterka returned to the police station and provided a videotaped statement about what had occurred on July 12, 1989 (R. 2441-57). The jury watched and heard the entire videotaped confession:

> Q: Dan, what I want you to do, or what I would like for you to do is start on Wednesday, the 12th, what happened when your roommate, John Russell came in – came in from work?
>
> A: He came in through the front door, appeared to be a little bit upset. I didn't say much. Said, "howdy", pretty much the usual greeting, I guess. He just was acting kind of strange and that – just started wanting to know about some money and that. I asked him what he was talking about and he got to screwing around. I got up and walked into the kitchen and grabbed a beer. He followed me into the kitchen, came up behind me, and grabbed a beer out of the refrigerator, and he said, "where is it? Where's the money?", and we started getting into it a little bit more. I knew what he was talking about.
>
> Q: You did know what he was talking about?
>
> A: Yes, sir.

Q: Okay.

A: I said – it just escalated into an argument, started talking back to him. I said – started arguing back with him about the money, how all he could do was go out and party, and this and that, and I couldn't pay the bills, how I paid half the bills and the next thing I know people are coming to the door because they didn't get their money. He would go out and spend it, and I was yelling at him, and he was yelling at me, and I turned to walk back into the living room. About the time I got to the doorway, he pushed me and I turned around and it just became a struggle. It probably didn't last too long. We struggled around through the living room. We got over by the T.V. set. We were still pretty much just wrestling. It wasn't really a fight, it just – it just became more and more of a struggle. He was behind me, more or less hugging me from behind, and I pretty much fell across the coffee table. The gun had been laying on the coffee table. I had been working on it.

Q: Was it loaded?

A: Yes, sir, it was.

Q: Was it out – I mean, it wasn't in the case or anything, is that correct?

A: No, sir. I had just put it back together. Seemed like we both started grabbing for it, just really – we just – it was in a flash. I don't know how long we really struggled for the gun or anything like that, but I pushed him off behind me, and I had the gun, and I turned around and he was pushing up off the couch, pretty much from a seated position, and he – and he was coming at me kind of head down and I fired the weapon. I couldn't even believe it, it's almost like I didn't even really know it – just fired the weapon, and he sat back down on the couch and just fell over backwards, just laid down, down on the couch. I stood there probably a couple of seconds. I – I got up to him and he was really and he was really bleeding. He was bleeding really bad, and I ran and got some towels, and I pulled him

towards me and there was blood everywhere. He was alive, he was breathing. That's all I could really think about was stopping the blood at the time, and I tried to put towels by his head. I didn't know what to do and he stopped breathing and then I really panicked. I didn't know – I really didn't know what to do. I knew he was dead. I did everything I could really think of – I tried moving his head, everything. All I could think of was moving him somewhere, hiding him.

Q: So what did you do next?

A: Carried him into the kitchen. I set him on the floor and stood there and looked. He was dead. I rolled him up in the carpet and put him in the trunk of his car and took him where we found him tonight.

* * *

A: Yes, sir. It was some money that he was expecting in the mail and I knew about it 'cause he asked me to keep watching for it. . . . Probably two or three days after he quit asking about it, it came in the mail and I knew what it was and I cashed it.

Q: What kind of I.D. did you use to cash it, Dan?

A: Used his driver's – his driver's license.

Q: And whose picture is on the driver's license?

A: Mine is.

Q: Had you gone down to the driver's license bureau and told them you needed a duplicate license?

A: Yes, sir, I did.

Q: And did they ask you certain questions like where did you get this license and stuff like this, prior to them giving you a duplicate?

A: No, sir. They asked me for some kind of identification.

Q: What did you produce?

A: Produced a social security card, sir.

Q: Of John Russell?

A: Yes, sir.

Q: When did you take the social security card?

A: He gave that to me so I would have some kind of identification and that was about two days before I got the license.

Q: John gave you the social security card?

A: Yes, sir.

Q: Did he know that you were going to get a duplicate license in his – in his name?

A: Yes, sir. He did.

Q: Were you going to pay him any money to do that?

A: Yes, sir.

Q: Did you pay him any money?

A: I paid him more than my share of the utility bills.

Q: Okay. The – back to Wednesday, approximately what time did he get home?

A: Approximately 5:15 to 5:30.

Q: When did the scuffle, and the fight and gunshot – what time was that? How long – how long did it take, if you can tell me, five minutes, ten minutes?

A: From the time he got home till the time it was over, it was less than fifteen minutes.

* * *

Q: And where – where was the car that you loaded him into? Was it his car?

A: Yes, sir.

Q: In the trunk of his car?

A: Yes, sir.

Q: And what – what gate did you take him out of, the front gate to the back gate?

A: The back gate, sir.

Q: Wasn't it daylight?

A: Yes, sir.

Q: You didn't see anybody – any neighbors or anybody across the street?

A: No, I was just panicking, sir. I don't know.

* * *

Q: After you did this, what did you do? Was there anything in the house you had to clean up? Did you have to vacuum or anything? Did you have to straighten up? Did you break anything during the fight or scuffle?

A: There wasn't anything really broken, sir, just pushed some furniture back in place – just so excited. I wasn't really thinking, sir. I just pushed everything back pretty much straight. All I could think about doing was doing something with John. I mean after I took them to where we found him, I went back into the house and I didn't know what to do. I went to talk to Frances.

* * *

A: I explained to her about leaving Nebraska, told her all my feelings for her, things like that, sir.

Q: Did you ever mention John?

A: No, sir. I didn’t.

(R. 2442-57).

Thereafter, Mr. Peterka also told Ronald and Connie LeCompte and Frances Thompson that he had shot Mr. Russell and the events that transpired on July 12, 1989 (R. 1576-7, 1592-3, 1624-6).

At trial the State argued that Mr. Peterka was claiming self-defense or accident due to his confession (R. 1165-9, 1180-3, 1298-9). The judge allowed the State to repeatedly introduce testimony about Mr. Russell’s character and reputation for peacefulness.

The State called a relative of Mr. Russell's, Kevin Trently, to testify in its case in chief. During Mr. Trently's direct examination testimony the State asked:

Q: You knew John then for around two years; is that correct?

A: No, I'd say it was close to maybe thirteen months or so.

Q: A little over a year?

A: Yes.

Q: Were you familiar with his reputation in the community for nonviolence or peacefulness?

A: I don't think I understand your question.

Q: Do you think you were familiar with John Russell's reputation?

A: As far as his character?

Q: Yes, sir. I don't want you to get into generally his character, but do you think you knew his reputation?

MR. LOVELESS: Your Honor, I would note an objection at this time to the entire line of questioning.

JUDGE FLEET: Objection sustained.

MR. ELMORE: May we approach the bench, Judge?

JUDGE FLEET: Yes.

(WHEREUPON, a sidebar conference was held.)

MR. ELMORE: Judge, it's the State's position that under the Florida Evidence Code the victim's character as it relates to nonviolence **has been made relevant by the Defense assertions in the statements that he gave that the victim was the aggressor in this case**. Therefore, the character traits of the victim for nonviolence are placed in issue by the defendant's statements.

JUDGE FLEET: The proper question hasn't been asked yet. The Court has sustained the objection to the question that you asked.

MR. ELMORE: Oh, I see. I'm trying to get to the proper question.

MR. LOVELESS: Your Honor, may I note an objection at this time, even if it is admissible, it's premature until the issue is proper for the jury.

JUDGE FLEET: I think you raised it in the motion, counselor.

(WHEREUPON, the sidebar conference was concluded.)

Q: Mr. Trently, are you familiar with the representation of John Russell in general? Just yes or no. Are you familiar with his representation?

A: Yes.

Q: Are you familiar with the reputation of John Russell as it relates to peacefulness or nonviolence?

A: Yes.

Q: Would you say he has a reputation for --

MR. LOVELESS: Your Honor, objection.

JUDGE FLEET: Objection to the form of the question sustained.

Q: (By Mr. Elmore) What is his reputation for peacefulness?

MR. LOVELESS: Same objection.

JUDGE FLEET: Objection is overruled.

The Witness: He was never violent while I was with him.

MR. LOVELESS: Your Honor, may we approach the bench, please?

JUDGE FLEET: Yes, you may.

(WHEREUPON, a sidebar conference was held.)

JUDGE FLEET: Mr. Elmore, the only admissible answer by this witness is whether or not he knows what the deceased's reputation in the community in which he lived was for nonviolence and not the personal opinion of this witness.

MR. ELMORE: I understand, Judge.

JUDGE FLEET: The objection is going to be sustained and the jury will be instructed to disregard the last answer of the witness. So you need to lead him in the

right direction. If he doesn't know the reputation in the community, then he can't testify.

(WHEREUPON, the sidebar conference was concluded.)

JUDGE FLEET: The objection to the last question and answer of the witness is sustained. The jury is instructed to disregard the last answer of the witness and you will not consider that in arriving at your verdict in this case. You may proceed counselor.

Q: (By Mr. Elmore) Mr. Trently, my question to you is whether you are familiar with John Russell's reputation in the community, that is in the community in which he lives or works, people that know him or know of him. Are you familiar with his reputation in that community for peacefulness?

A: Yes.

Q: Can you tell me what that reputation would be without telling me about any personal observations you made of John Russell?

A: A reputation for nonviolence.

MR. LOVELESS: Your Honor, my objection was as to that particular entire line of questioning.

JUDGE FLEET: The objection is overruled subject to your right to cross, counselor.

(R. 1165-69). The State also presented character evidence during the direct examination of Mr. Russell's cousin, Deborah Trently (R. 1180-83), and Gary Johnson (R. 1298-1300).

The medical examiner testified at trial that the cause of death was “a bullet wound to the brain” (R. 1201). He identified an entrance wound at the top of the skull (R. 1198). As to the exit wound, he originally believed that the bullet exited through the

bridge of the victim's nose (R. 1225). However, during his pretrial deposition, defense counsel questioned him about Mr. Peterka's account of events and Dr. Kielman reconsidered his conclusions (R. 1232). Before trial, Dr. Kielman reconstructed the victim's skull and displayed the skull to the jury (R. 1232). Dr. Kielman determined that the bullet most likely traveled straight down in the victim's spinal area and that explained why no shell casing was ever recovered (R. 1232-4). Dr. Kielman testified that the path of the bullet was consistent with Mr. Peterka's account of the how the victim was shot (R. 1256-7).

Dr. Kielman also opined that the position of the gun to the wound was very close – between a contact wound and one inch from the victim's head (R. 1218).

Donald Champagne, a firearms expert, testified that the weapon used to shoot Mr. Russell was in functioning condition and that the trigger pull was two and a half pounds when used as a single action and nine pounds when used as a double action weapon (R. 1555-6).

During closing argument, the State argued:

> Mr. Loveless is right. I am going to tell you that Daniel Peterka is a liar and a thief. That is what he is, ladies and gentleman. That is something you can look at as you attempt to determine the credibility of his statements.

(R. 1779). And:

> The truth in this case is that John Russell lay there sleeping. He didn't have his glasses on. He was waiting

> to go to the Sheriff's Department to have Daniel Peterka arrested like the thief he is. He lay there sleeping because he had been out to three A.M. the night before with his girlfriend Lori.
>
> . . . He lay there sleeping with his head on the pillows that Daniel Peterka washed so thoroughly that you can't see much of a stain on them. It's not dark red like the stain on the inside. . . .
>
> You are laying there with your head on a pillow, ladies and gentleman, and it's not the back of your head that shows as somebody walks up to the back of that couch. It's not the back. It's the top. You are laying there on that couch. If they walk up with a .357 magnum handgun and they lay it against your head and pull the trigger, it goes straight down through your skull, it goes straight down through the head as Dr. Kielman eventually told you is exactly what happened. . . .
>
> The truth is that John Russell never ever would have let Dan Peterka, a man he didn't even like, a convicted felon, have his identification. That is how we know, ladies and gentleman, what Dan Peterka was doing. You take it, you take the facts and you can't come up with any other conclusion. Dan Peterka didn't give John Russell a hundred dollars. He gave him a bullet in the top of his head.

(R. 1798-1800).

As to Mr. Russell's character, the State argued: "[i]f John had been in other fights you would have heard about it in this courtroom. He hasn't ever been in one" (R. 1780-81).

To begin his closing, Mr. Peterka's counsel stated:

> What have we got in this case? Everything of any value in this case is circumstantial except one thing and that's Daniel Peterka's statement. All of the physical evidence that you have seen introduced is nothing more than the evidence of a series of events for those circumstance that we have talked about.

(R. 1764). Trial counsel also argued:

> But if you recall Dan's statement, they struggled around the room over towards the television, they bumped into and probably fell across the coffee table. you will note in this picture the coffee table is up against the one of the couches. It's not the couch on which the blood stains are, but the opposite-side couch. During the struggle John Russell was basically behind Dan. Dan knocked him off, John fell backwards onto the couch. Dan turned around with the gun in his hand and the gun fired or went off or whatever.

(R. 1767-68).

The jury found Mr. Peterka guilty of premeditated first degree murder (R. 1844).

The following day, a brief penalty phase was conducted. The State relied on the testimony presented at the guilt phase. Mr. Peterka presented the testimony of his mother, Ruben Purvis, Connie LeCompte and Cindy Rush (R. 1870-1903). Mr. Peterka also testified in his own behalf (R. 1905).

Mrs. Peterka told the jury that Dan, was the eldest of five children. Dan was a good athlete and older brother (R. 1890). When asked why the jury should recommend life, Mrs. Peterka made an emotional plea to the jury:

> Because he is a human being, because he is my son, because he is good, because God created him, because I love him, because his whole family loves him, because he’s a friend, because he helps people. It’s such a difficult question. It’s everything I believe in. He is a child of God. He needs your help. You have my son’s life in you hands. I’m not trying to justify anything. I”m trying to beg you to help him and not to destroy him. He has life. He has good to give; he has good to share; and I

> love him with all of my heart. My words come from my heart.

(R. 1896). Finally, Mrs. Peterka offered the jury a photo album that contained photographs of the Peterka family and Dan when he was younger (R. 1892).

On cross examination, the State asked Mrs. Peterka: "When he was a child he got into quite a bit of trouble with the law?" (R. 1897). The defense objected, but the trial court overruled the objection. The State proceeded to question Mrs. Peterka about Dan's non-violent juvenile record (R. 1897-9, 1901-2).

Cindy Rush described Mr. Peterka and told the jury that he was a "caring and understanding" person (R. 1882).

Ruben Purvis testified that Mr. Peterka was a responsible, excellent employee (R. 1871).

Connie LeCompte testified that Mr. Peterka was wonderful with her children and helped her and her husband a great deal while he lived with them (R. 1876). In fact, Mr. Peterka took care of her children when she was admitted in the hospital for emergency surgery (R. 1877).

Mr. Peterka told the jury: "I feel I have something, something that I can share with society and I would like to keep my life" (R. 1905). He also stated: "I would like to say

to John's family and friends, if I thought I could bring him back, John, I would be glad to give you my life (R. 1905).

The jury recommended that Mr. Peterka be sentenced to death by an eight to four vote (R. 1930).

A sentencing hearing was held on April 25, 1990. Prior to the hearing, the State submitted a memorandum arguing in favor of the death penalty. At the hearing, defense counsel requested that the court consider the numerous letters from Mr. Peterka's family and friends in determining whether Mr. Peterka should be sentenced to death (R. 2056-75). The court sentenced Mr. Peterka to death (R. 2077-8). The court's sentencing order which was read in open court stated, in its entirety:

> The Court finds the following aggravating circumstances to have been proven beyond a reasonable doubt:
>
> (1) The crime for which DANIEL JON PETERKA is to be sentenced was committed while he was under sentence of imprisonment;
>
> (2) The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
>
> (3) The crime for which the defendant is to be sentenced was committed for pecuniary gain;
>
> (4) The crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;
>
> (5) The crime for which the defendant is to sentenced was committed in a cold, calculated and premeditated manner without

> any pretense of moral or legal justification.
>
> The Court also found the following mitigating circumstances to exist:
>
> (1) The defendant has no significant history of prior criminal activity.
>
> While there was evidence tending to show other mitigating circumstances, the Court did not find any to exist.
>
> The Court has considered the aggravating and mitigating circumstances presented in the evidence in this case and determines that sufficient aggravating circumstances exist, and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

(R. 2077-8).[1]

Direct Appeal

During Mr. Peterka's direct appeal, this Court identified numerous errors that occurred at the penalty phase of Mr. Peterka's capital trial. This Court found that it was error for the State to introduce testimony about Mr. Peterka's prior juvenile convictions, because defense counsel did not open the door to offer this evidence. Peterka v. State, 640 So. 2d 59, 70 (Fla. 1994). However, this Court found the error harmless. Id.

This Court also found that the trial court had improperly doubled the aggravating circumstances of avoiding a lawful arrest and hindering the lawful exercise of a governmental

---

[1]All of the aggravators found by the court were considered by the jury. Also, the aggravators were read to the jury without any limiting instructions.

function or enforcement of the laws. Id. at 71. This Court also found that "the trial court improperly considered the pecuniary gain aggravating circumstance." Id.

This Court found these errors that occurred at the penalty phase to be harmless. Id at 71-2.

3.850 Proceedings

Following his direct appeal, the former Office of the Capital Collateral Representative (CCR), was appointed to represent Mr. Peterka in his postconviction appeal. In March, 1997, postconviction counsel filed a preliminary Rule 3.850 motion which only included claims which were apparent from the record (PC-R. 1-148). In fact, Mr. Peterka's postconviction counsel specifically informed the lower court that the motion was incomplete and was being filed to invoke the court's jurisdiction to assist in records collection and to comply with the federal court deadlines under the Antiterrorism and Effective Death Penalty Act (AEDPA) (PC-R. 2-3). Postconviction counsel stated in no uncertain terms that no investigation had been conducted in Mr. Peterka's case:

> Under Rule 3.851, Florida Rule of Criminal Procedure (1996), and the order of the Florida Supreme Court, Mr. Peterka's Rule 3.850 motion is due to be filed March 24, 1997. This motion is timely filed; however, Mr. Peterka requests leave to amend this motion. Counsel in good faith represents

> at the outset that this pleading is incomplete. This untenable predicament is caused by the underfunding of the Capital Collateral Representative (CCR); that all clients with initial 3.850 motions due after January 1, 1997, have been denied any funding to obtain the assistance of expert witnesses; that the workload of Mr. Peterka's attorney, investigator, as well as that of the entire staff of the CCR, prevents counsel from providing effective assistance; that CCR is underfunded and unable to fill present vacancies; and that there is a general uncertainty about the future of the provision of postconviction counsel to death sentenced inmates in Florida by CCR.

(PC-R. 2). Postconviction counsel informed the court that no investigation had been conducted, no experts had been retained and public records production was incomplete (PC-R. 7-17). Due to the circumstances that existed in early 1997, postconviction counsel requested leave to amend Mr. Peterka's Rule 3.850 motion once public records collection was completed, and once counsel was able to investigate Mr. Peterka's case.

On or about December 2, 1998, Robert A. Harper filed a notice of appearance on behalf of Mr. Peterka (Supp. PC-R. 46-7). Mr. Harper was retained by Mr. Peterka's family. Despite entering his appearance in late, 1998, Mr. Harper did not obtain Mr. Peterka's case files that were maintained by the Office of the Capital Collateral Counsel for the Northern Region (CCC-NR), until late May, 1999.

On December 16, 1999, a hearing was held and the court granted Mr. Harper forty-five days to file an amended Rule 3.850 motion. (Supp. PC-R. 168-9).

On January 19, 2000, Mr. Harper filed a Motion for Extension of Time to File Amended Motion for Post Conviction Relief (PC-R. 275-8). Mr. Harper informed the court that "[t]he law requires sufficient pleading and argument of law to support an allegation of ineffective assistance of counsel", he had hired an investigator and:

> [t]he allegation set forth in [the ineffective assistance of counsel at the penalty phase claim] requires substantial additional investigation and research to determine what specific mitigation evidence existed at the time of trial.

(PC-R. 275-6)

On February 4, 2000, Mr. Harper supplemented his motion and informed the court that his capital litigation experience "is somewhat dated" (PC-R. 280). He went on to argue: "It is the opinion of undersigned counsel that the Legislature has now created a right to counsel in capital collateral representation. If undersigned is not adequately educated, any work on an expedited basis or otherwise is going to lend to future litigation rather than future resolution of issues." (PC-R. 281). Mr. Harper also detailed his work schedule for the preceding six months (PC-R. 279-82).

On March 7, 2000, the lower court denied Mr. Harper's motion for extension of time (PC-R. 285). No amended Rule 3.850 motion was filed in accordance with time frames set at the December 19, 1999, hearing.

Following the court's denial the motion for extension of time and Mr. Harper's failure to file an amended Rule 3.850, Mr. Peterka filed a grievance with the Florida Bar regarding Mr. Harper (Supp. PC-R. 176-185). Mr. Harper moved to withdraw from Mr. Peterka's case (Supp. PC-R. 96-98). On June 5, 2000, a hearing was held and Mr. Harper convinced Mr. Peterka to allow Mr. Harper to continue his representation (Supp. PC-R. 187-209).

The day after the hearing, the lower court entered an order granting Mr. Harper an additional thirty days to file an amended Rule 3.850 motion (PC-R. 288).

On July 7, 2000, Mr. Harper filed an amended Rule 3.850 motion (PC-R. 290-336). The motion was a replica of the incomplete motion filed by CCR in 1997. In fact, Mr. Harper removed many of the allegations contained within the 1997 Rule 3.850 motion. Mr. Harper made some grammatical corrections, reorganized the motion, changed underlining to italics to illustrate emphasis, removed the previously denied claims and removed citations and case references (PC-R. 290-335).

As to the ineffective assistance of guilt phase counsel, Mr. Harper added two paragraphs and one sentence (PC-R. 324-5, 309). Mr. Harper added the allegation that Mr. Peterka wanted to testify at the guilt phase (PC-R. 324-5). In addition, Mr. Harper added a sentence citing Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000), regarding trial counsel's concession during opening statement (PC-R. 309).

As to the Mr. Peterka's previous 1997 claim of ineffective assistance of counsel at the penalty phase, Mr. Harper failed to add a single fact to the claim.

On February 22, 2001, the lower court ordered that an evidentiary hearing be held, but limited the claims to allegations of ineffective assistance of trial counsel (PC-R. 465-6).

On June 28-29 and July 16, 2001, an evidentiary hearing was held. At the hearing, Mr. Harper presented the testimony of four of Mr. Peterka's family members: his mother, Linda Peterka; his father, Jon Peterka; his sister, Karyn Hilliard; and his brother, Timothy Peterka. Mr. Harper also presented the testimony of a forensic pathologist, Dr. Joseph Cohen, Mr. Peterka, Mr. Peterka's trial attorney's, Mark Harllee and Earl Loveless, Mr. Peterka's trial investigator, Bill Graham, Lieutenant Alan Atkins from the Okaloosa County Jail and

Martha Shurgot a records custodian from the Okaloosa County Jail.

As to his ineffective assistance of counsel at the penalty phase claim, Mr. Harper presented the testimony of Mr. Peterka's family members to describe Mr. Peterka's background: Mr. Peterka was the first of five children of Jon and Linda Peterka (T. 9). During Mrs. Peterka's testimony, Judge Barron interrupted and instructed counsel to present only relevant information – information that was not presented at trial (T. 10).

Mrs. Peterka described Dan's responsibilities in the family: He was expected to do chores and care for his younger siblings (T. 21).

Judge Barron again interrupted Mrs. Peterka's testimony and told postconviction counsel:

> Well, I'm looking at her previous testimony, and she was asked to describe to the jury why she thinks that her son should stay alive, and it would appear to the Court that this entire line of questioning was – or answer was available to her under that question. She talks about her relationship with her son and her husband. If you're going to take five minutes, that's fine. You know and I know that we could go for three days on this one question.

(T. 22). The lower court was uninterested in Mrs. Peterka's testimony and told counsel: "[I]f you have prepared something that's going to get the Court's attention, it's time for me to

hear it." (T. 24). Postconviction counsel abruptly stopped that line of questioning of Mrs. Peterka (T. 25).

Prior to Judge Barron's interruption, Mrs. Peterka did inform the court that Dan served in the National Guard and received commendations during his service (T. 17; Def. Exhibits 1, 2 & 3). Mr. Peterka's discharge status was a general discharge with honorable conditions (T. 19). One of the commendations read:

> You are to be commended for your outstanding demonstration of leadership. You have displayed an exceptional ability and put forth the extra effort to be the best. The Army requires strong, dedicated leaders to insure our fighting forces maintain the confidence and willingness to follow. You have demonstrated this ability to lead in your desire to be the best.

(T. 20, Def. Ex. 4).

Mr. Peterka's mother attempted to testify about Dan's completion of his GED, but the lower court sustained the State's objection that the State was give no notice of the specific allegation that Mr. Peterka obtained his GED (T. 40).

Mrs. Peterka also explained that Dan was her daughter and his sister, Annie's godfather (T. 25). Mrs. Peterka never knew Dan to be violent (T. 27).

Jon Peterka told the court that his son, Dan, enjoyed fixing cars and was mechanically inclined (T. 78). He

testified that Dan was very helpful to his family and friends (T. 79-80).

Mrs. Peterka explained that she primarily spoke to Investigator Graham in the months preceding Mr. Peterka's trial and had very little contact with trial counsel, Mr. Loveless (T. 11, 12). Mrs. Peterka did not even recall Mr. Harllee's name (T. 29). Mr. Peterka's father, Jon, thought Mr. Harllee's name sounded familiar but recalled having contact with Investigator Graham and Mr. Loveless (T. 75).

Mrs. Peterka and her husband met with Mr. Loveless once, for about fifteen minutes after the jury convicted Mr. Peterka (T. 13). Mrs. Peterka and her husband traveled to Florida after the guilt phase of the trial had already begun and met with Mr. Loveless at his office for a short period of time. Mrs. Peterka told the lower court: "We were not advised as to whether we could do something to help [Dan] or not because more or less everything would be just okay" (T. 13). Mrs. Peterka testified that: "[A]fter Daniel was convicted [] I was invited into the courtroom to participate, and my participation was to be able to ask the jury for leniency or to be able to beg for my son's life which is what I attempted to do . . ." (T. 14). Mrs. Peterka was not told about what information could be mitigating (T. 15-6). Mr. and Mrs.

Peterka were not informed that other witnesses could testify or that exhibits could be introduced (T. 16).

In fact, Mrs. Peterka never considered the possibility of Mr. Peterka's siblings attending the trial or testifying because noone mentioned it to her (T. 36).

Likewise, Jon Peterka recalled that noone ever informed the family of any preparation that was being done or needed to be done for the penalty phase (T. 77, 90-1). Jon Peterka also recalled that when he and his wife arrived in Florida they went to Mr. Loveless' office and introduced themselves (T. 78). The meeting with Mr. Loveless lasted for about ten minutes (T. 78).

Prior to traveling to Florida, Investigator Graham requested that Mrs. Peterka assemble a photo album to show that "Dan was a person, Dan was an intricate part of a family" (T. 38).

Mr. Peterka's parents paid for their own travel to Florida and once they arrived, they were told that they could be reimbursed for their travel costs (T. 33).

At the evidentiary hearing, Karyn Hilliard, Mr. Peterka's sister testified. At the time of the trial, Mrs. Hilliard was eighteen years old (T. 97). Mrs. Hilliard would have testified on her brother's behalf had she been requested to do

so (T. 97). Mrs. Hilliard described Dan as a "very typical American big brother." (T. 98). He always protected his younger siblings (T. 98).

Mr. Peterka's brother, Timothy Peterka, also testified at the evidentiary hearing. At the time of the evidentiary hearing, Tim Peterka was a sergeant in the United States Marines (T. 111). Postconviction counsel attempted to elicit testimony from Tim Peterka about the commendation that Dan Peterka had earned while he was enlisted in the National Guard (T. 111-2). The lower court prohibited Tim Peterka from testifying and told postconviction counsel:

> Counsel, if you wanted someone to testify as to the legal meaning or the military meaning of any such document or any such exhibit, that witness would need to be qualified. I'm assuming what you're requesting is for him to render an opinion. The only people that can testify in a court of law in this state is an expert as to their opinion, and he hasn't been qualified as an expert in the field of military decoration or Minnesota National Guard commendations or whatever it might be.

(T. 112-3).

Tim Peterka did testify about the fact that Dan was a good older brother (T. 113), and always looked out for him (T. 114).

Daniel Peterka also testified in his own behalf. Mr. Peterka recalled that after the jury convicted him, Mr. Harllee spoke with him briefly about the penalty phase (T.

191). The conversation with Mr. Harllee lasted under twenty minutes and Mr. Harllee did not ask Mr. Peterka about his military history or his conduct during his pretrial incarceration (T. 192-3).

Mr. Peterka recalled being told what happened during the penalty phase proceeding, but he was never told or asked about any information that he had that would be helpful (T. 194). In fact, Mr. Peterka never discussed his testimony with his attorneys (T. 194), or asked about his parents traveling to Florida as witnesses (T. 202).

Mr. Peterka testified that while he was incarcerated he was classified in general population which was very rare for an individual charged with capital murder (T. 193). He also told the court that he had no disciplinary reports (T. 193). While Mr. Peterka was incarcerated, his cellmates successfully escaped from the jail (T. 195). Mr. Peterka did not participate in the escape and he remained in his cell all night (T. 195). Mr. Peterka did not want to be a fugitive, again (T. 206).

Mr. Peterka also testified about his service in the Minnesota National Guard. During Mr. Peterka's basic training he was the platoon leader of approximately sixty individuals (T. 197). After basic training, Mr. Peterka became the class

leader in advanced individual training (T. 197). Mr. Peterka achieved these positions based on "the way you conducted yourself, the way you performed, test scores" (T. 198).

Mr. Peterka discussed his service with Investigator Graham when they discussed Mr. Peterka's presentence investigation report (T. 203).

Mr. Peterka also testified that he was aware of the plea offer at the time of trial which would have required him to serve life with a minimum mandatory twenty-five years (T. 210-1). But he did not accept the plea offer because "the shooting did not occur as [the prosecutor] claimed at trial" (T. 211).

Alan Atkins, an officer at the Okaloosa County Jail, testified that he remembered Mr. Peterka from his pretrial incarceration in 1989-90 (T. 491-2). Officer Atkins did not recall Mr. Peterka have any disciplinary problems at the jail (T. 492), and characterized Mr. Peterka as a "little better" than the normal inmate (T. 494).

Mr. Harper also introduced the testimony of a records custodian from the Okaloosa County Jail who testified that Mr. Peterka's jail records had been destroyed (T. 501).

Mark Harllee was Mr. Peterka's second chair attorney at the time of his capital trial (T. 225). In February, 1989, Mr. Harllee was employed as an Assistant Public Defender and he handled misdemeanors (T. 224). Shortly before Mr. Peterka's capital trial, Mr. Harllee began to handle felony cases (T. 224). Several months after Mr. Peterka was indicted Mr. Harllee was assigned to assist Mr. Loveless at Mr. Peterka's capital penalty phase.[2]

Mr. Harllee had no independent recollection about his preparation for Mr. Peterka's penalty phase but testified that he would have spoken to Mr. Peterka about mitigation (T. 228, 231). Mr. Harllee wanted to personalize Mr. Peterka and agreed that anecdotal evidence was important (T. 281-2). He would have presented anecdotal type evidence of Mr. Peterka helping others to the jury (T. 283).

In regards to Mr. Peterka's military history, Mr. Harllee stated: "I believe that I had been apprised of that, but I cannot recall without seeing my notes the analysis that I must have performed in order to determine whether that would benefit Mr. Peterka more than it would be to his detriment."

---

[2]Mr. Peterka was indicted on August 10, 1989, and his trial began in late February, 1990. Mr. Harllee started working on Mr. Peterka's case, several months after he was indicted (T. 225).

(T. 229). However, Mr. Harllee went on to state that the analysis would be "should you bring the mitigation forward" when "there were other actions which were illegal or negative in nature could actually cut against you in presenting that type of mitigation" (T. 230).

Mr. Harllee told the court that he would not present Mr. Peterka's military history "then or now" (T. 230). Mr. Harllee stated:

> This is a very heavy military area. I assume it's still the way it was back in 1990. A lot of retired military settle here. I think those type of jurors with a military background would be impressed hearing about somebody's good record in the military; however, if they were to hear that while he was in the military he committed illegal acts, crimes, and that was the basis for discharge, I think it would have a negative impact.

(T. 258).

As to Mr. Peterka's pretrial incarceration, Mr. Harllee had no recollection about Mr. Peterka's record, but stated that it is something that defense counsel "would have investigated" (T. 233). But, Mr. Harllee could not recall speaking to anyone at the jail about Mr. Peterka's record (T. 276). In fact, Mr. Harllee testified that if there had been any evidence of Mr. Peterka being a "model inmate" he would have used it (T. 277).

Mr. Harllee testified that he fully investigated mitigation and discussed mitigation with Mr. Peterka (T. 234). He also testified that he prepared all of the penalty phase witnesses before they testified (T. 242). He believed that he spent two or three hours with the Peterkas when they arrived in Florida (T. 251). Mr. Harllee could not recall why the defense did not present the live testimony of the numerous witnesses who sent letters, before trial, but were only submitted to the judge before sentencing (T. 250). All Mr. Harllee could muster as an excuse for not calling those witnesses was that they lived in "parts far from [Fort Walton Beach]" (T. 251).

As to aggravating circumstances, Mr. Harllee could not recall doing any research about possible objections (T. 267).

Earl Loveless, Mr. Peterka's lead trial attorney also testified at the evidentiary hearing. Mr. Loveless testified that as to mitigation he: "would have used anything [he] possibly could have" (T. 325).

Like Mr. Harllee he was certain that the defense considered Mr. Peterka's behavior in jail as a mitigating circumstance (T. 321). However, he had no independent recollection as to why Mr. Peterka's jail record was not used in his case (T. 322).

Mr. Loveless also believed that he knew Mr. Peterka served in the National Guard (T. 326). However, he never saw the discharge papers or commendations (T. 328). Mr. Loveless disagreed with Mr. Harllee and told the court that if he had been aware of Mr. Peterka's commendations he would have introduced that evidence to the jury (T. 328).

Bill Graham, Mr. Peterka's trial investigator testified that he was familiar with Mr. Peterka's military service (T. 515). He testified that the commendations were the type of evidence he would pass along to the trial attorney for consideration (T. 520).

Mr. Graham spoke to Mr. Peterka's family on the phone numerous times (T. 519). Mr. Graham also believed he would have spoken to some of the officers at the jail about Mr. Peterka's behavior (T. 521).

As to the guilt phase, Mr. Loveless stated that in his opinion, Mr. Peterka's case was a self-defense case (T. 344, 365). Mr. Loveless based his strategy on Mr. Peterka's confession to law enforcement (T. 344). Mr. Loveless explained:

> Q: And the theory of the defense was what?
>
> A: What Dan had described, that they had had a struggle, that during the struggle the person was – they were separated, the victim went to the couch, came back up off the couch and that Dan had the gun

pointed in that direction and it either fired or went off, so it would have been – it was during the struggle and therefore it was part of self-defense.

Q: Okay. And how does that become self-defense?

A: Well, it becomes an accidental shooting during the course of the struggle for the gun, basically.

Q: Okay. And the theory being accidental – I'm just trying to get this articulated and I don't want to substitute my words for yours, but the theory being is does accidental get you something that self-defense doesn't get you, or does self-defense get you something that accidental doesn't get you?

A: No. If you could actually show a jury that it was truly accidental, that he was, according to the instruction, doing something that he was lawfully entitled to be doing and that the death occurred during that, then you might get a not guilty based on the fact that the jury could find that it was just truly an accident, but I didn't believe that that's what the jury, based upon the totality of the evidence that it was Dan's gun and that he had the gun and that – just the various circumstances – that that was going to be a defense that the jury would believe.

* * *

A: With self-defense you get justifiable use of deadly force.

Q: Okay. And only in a self-defense situation?

A: Yes. There must be some evidence that the use of force was such that it was justifiable, and that entire justifiable use of deadly force instruction only comes in if there's some evidence of self-defense.

(T. 381-2, 383).

Later, Mr. Loveless changed his testimony and stated that the theory of the case was really a lesser included offense rather than excusable or justifiable homicide (T. 396).

Mr. Loveless did not present any evidence in the defense's case. He believed that sufficient evidence was introduced in the State's case regarding the victim's financial situation at the time of the shooting (T. 348).

Mr. Loveless also believed that rather than call an independent pathologist about the dynamics of the shooting he could "sufficiently get [his] point across by . . . impeaching Dr. Kielman, and [he] felt so strongly about [his] position and that the physical evidence supported it that [he] didn't have a problem with presenting it in that fashion" (T. 357).

Mr. Loveless informed Mr. Peterka of his right to testify at the guilt phase (T. 359). Mr. Loveless stated that one of the reasons he advised Mr. Peterka not to testify was to keep out his prior record (T. 360). But, Mr. Harllee testified that he had no independent recollection of informing Mr. Peterka of his right to testify, but he had "never gone to trial once in a criminal case without talking to the defendant about his right to testify." (T. 245).

Dr. Joseph Cohen a forensic pathologist testified that he had been retained by postconviction counsel (T. 124). Dr.

Cohen criticized Dr. Kielman's performance in Mr. Russell's autopsy (T. 125). Dr. Cohen had only spent twenty minutes examining the victim's skull and had reviewed some photographs and reports (T. 124).

Dr. Cohen agreed with Dr. Kielman that the exit wound was not the bridge of the nose, as Dr. Kielman originally believed (R. 129-30). However, Dr. Cohen, after making a cursory review of the badly damaged skull testified that the exit wound was actually another place in the skull, one that was not noted in Dr. Kielman's report (T. 133). Based on the exit wound he identified, Dr. Cohen opined that Mr. Peterka's account of the incident was more likely based on the forensic evidence (T. 128). However, the State completely rebutted Dr. Cohen's testimony with the testimony of Dr. Michael Berkland.

SUMMARY OF ARGUMENT

The circuit court erred in denying Mr. Peterka's ineffective assistance of counsel claims. Trial counsel was ineffective throughout Mr. Peterka's trial, during voir dire the guilt phase, penalty phase and sentencing. Trial counsel's deficient performance prejudiced Mr. Peterka.

Additionally, Mr. Peterka did not receive full and fair postconviction proceedings because the lower court restricted

Mr. Peterka from presenting evidence in support of his claims.

Finally, Mr. Peterka's did not receive full and fair postconviction proceedings. Postconviction counsel was ineffective throughout his postconviction proceedings. Due to postconviction counsel's ineffectiveness, evidence was neither uncovered nor presented to the lower court in support of Mr. Peterka's claims. Had postconviction effectively represented Mr. Peterka, the lower court would not have denied Mr. Peterka's claims. Mr. Peterka has been severely prejudiced and a new evidentiary hearing is required.

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT ERRED IN DENYING MR. PETERKA'S CLAIM THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Trial counsel was ineffective for abandoning Mr. Peterka's defense that Mr. Peterka killed Mr. Russell without consciously deciding to do so. Instead, trial counsel was forced to defend Mr. Peterka with an implausible and unreasonable defense of self defense.

The lower court denied Mr. Peterka's ineffective assistance of counsel claim and found that trial counsel argued a coherent theory of self defense at Mr. Peterka's capital trial (PC-R. 532). The lower court's finding was in error.

At the evidentiary hearing, trial counsel testified somewhat inconsistently: He originally maintained that the theory of defense was self defense (344, 365), but later changed his testimony and stated that his theory was that the crime was "something less than first degree murder" (R. 396), and then retracted that testimony and reasserted that his theory was self defense (R. 397).

If self defense was trial counsel's theory of defense his performance was deficient. Effectively, by allowing the State to force him into claiming self defense trial counsel abandoned Mr. Peterka's version of the shooting and the only viable defense, that the State could not prove premeditated first degree murder. Additionally, self defense was an unreasonable theory because it allowed the State to present prejudicial hearsay testimony about the victim's fear of Mr. Peterka and the gun and the character evidence that the victim was a peaceful individual.

At trial, trial counsel appeared to be confused about his theory of defense. During the State's case-in-chief, the State presented Mr. Peterka's videotaped statement along with his handwritten statement and his oral statements to Ruben Purvis, Frances Thompson, Ronald LeCompte and Connie LeCompte. All of the statements described the events that occurred in the early evening of July 12, 1989, at Mr. Peterka and Mr. Russell's home. In all of his statements, Mr. Peterka confessed to shooting John Russell (R. 1576-7, 1592-3, 1624-6). Mr. Peterka explained that he fired the gun while he and Mr. Russell were wrestling or struggling with each other (R. 2442-5). The struggle concerned a check that Mr. Peterka cashed which belonged to Mr. Russell (R. 2442-5). Mr. Peterka stated:

> I pushed him off behind me, and I had the gun, and I turned around and he was pushing up off the couch, pretty much from a seated position, and he – and he was coming at me kind of head down and **I fired the weapon. I couldn't even believe it, it's almost like I didn't even really know it – just fired the weapon**, and he sat back down on the couch and just fell over backwards, just laid down, down on the couch.

(R. 2444)(emphasis added). Mr. Peterka's statements consistently described a situation where he fired his gun at Mr. Russell, but did not intend to kill Mr. Russell and therefore was not guilty of first degree premeditated murder.

At trial, the State argued that Mr. Peterka's statements established a defense of self defense or accident. Characterizing Mr. Peterka's defense as self defense or accident caused the trial court to allow the State to introduce hearsay statements by the victim that the victim was afraid of Mr. Peterka and not going to confront him about the stolen check (R. 1434, 1457, 1604-5). The State was also allowed to introduce evidence of the victim's character and reputation for peacefulness by characterizing the defense as one of self defense or accident (R. 1165-9, 1180-3, 1298-1300).

During his opening statement, trial counsel told the jury:

> Your job is to determine, ultimately at the end of this case, what Mr. Elmore has proven to you beyond a reasonable doubt. **Quite frankly, if what he proves to you, those facts right at the end where he was talking about what the facts are going to show, what the evidence is going to show, not what Mr. Elmore said, but what the evidence is going to show, if those facts are proven, you are going to come back with a verdict of First Degree Premeditated Murder. There is no question about it.**
>
> The chronology that Mr. Elmore related to you is essentially correct.
>
> * * *
>
> You view the evidence. You'll see what Mr. Elmore has proved to you at the end of the case. That's all I ask. Just hold Mr. Elmore to what he has promised you and nothing else. Thank you.

(R. 1121-5)(emphasis added).[3]

The first mention of self defense arose during the testimony of Kevin Trently (R. 1165). The State asked Mr. Trently about the victim's reputation in the community (R. 1165). The defense objected to the line of questioning and argued that the evidence was "premature until the issue is proper for the jury." (R. 1167). The State argued that "under the Florida Evidence Code the victim's character as it relates to nonviolence has been made relevant by the Defense assertions in the statements that the victim was the aggressor in this case." (R. 1166). The trial court overruled the objection (R. 1167). The State proceeded to elicit character evidence, specifically testimony about the victim's reputation for peacefulness from two other witnesses (R. 1180-1183, 1298-1301). Trial counsel continued to object and argue that the testimony was not relevant (R. 1181, 1300).

---

[3]Mr. Peterka contends that trial counsel was ineffective for conceding premeditated first degree murder by telling the jury that if the State produced the evidence discussed in the State's opening statement that Mr. Peterka was guilty. At the evidentiary hearing, trial counsel explained that such a statement was made only to emphasize that the State could not meet its burden of proof (T. 343). The lower court found that trial counsel's performance was not deficient and that Mr. Peterka was not prejudiced by trial counsel's comment (PC-R. 577).

Throughout the State's case-in-chief, trial counsel never raised the issue of self defense. His questions on cross examination were limited to impeachment of the witnesses, overreaching by the State and whether Mr. Peterka's account of the shooting was consistent with the physical evidence.

Defense counsel did not present any evidence at trial.

During closing argument, trial counsel articulated his theory of the defense:

> But if you recall Dan's statement, they struggled around the room over towards the television, they bumped into and probably fell across the coffee table. you will note in this picture the coffee table is up against the one of the couches. It's not the couch on which the blood stains are, but the opposite-side couch. During the struggle John Russell was basically behind Dan. Dan knocked him off, John fell backwards onto the couch. **Dan turned around with the gun in his hand and the gun fired or went off or whatever**.

(R. 1767-68)(emphasis added). Trial counsel also emphasized: "No, [the gun] didn't go off accidentally. Not as such. It wasn't fired by any external force. Dan pulled the trigger. That's what he meant when he said he fired it. He knew that." (R. 1808). Trial counsel argued that the State had not proved premeditation, but the jury might "find [Mr. Peterka] is guilty of manslaughter" (R. 1815).

The trial court instructed the jury on justifiable homicide, excusable homicide and self defense (R. 1818, 1822-6).

The jury found Mr. Peterka guilty of premeditated first degree murder (R. 1844). Following the verdict, trial counsel filed a Motion for New Trial and one of the grounds cited as error was that trial counsel instructed the jury on self-defense (R. 2024).

Had trial counsel wanted to assert a defense of self defense, the burden was on the defense to produce evidence that the situation on the early evening of July 12th must have been "such as to induce a reasonably prudent person to believe that danger was imminent and there was a real necessity for taking a life." Teague v. State, 390 So. 2d 405, 406 (Fla. 5th DCA 1980). Trial counsel presented no such evidence. Mr. Peterka's statements do not support a defense of self defense.

As early as 1936, this Court addressed a situation similar to Mr. Peterka's, in Hopson v. State, 168 So. 810 (Fla. 1936). In Hopson, this Court set forth the facts:

> The defendant in this case claimed that his wife assaulted him, and that while they were engaged in a fight the wife pulled his pistol out of his holster, where he was carrying it, and at that he attempted to take the pistol away from her; that in the struggle over the pistol the pistol was discharged by accident and unintentionally, with the result that Mrs. Hopson was injured in her arm.

168 So. 2d at 811. The trial court instructed Mr. Hopson's jury that the defendant had invoked the defense of self

defense. Id. Upon reviewing the facts, which are substantially similar to the facts in Mr. Peterka's case, this Court held that "there was no evidence supporting the theory that the defendant shot his wife in necessary self-defense", thus, this Court found that the self defense instruction was error. Id. The Hopson Court found that the theory of defense supported by the defendant's statement was in fact one of accident or misfortune. Id.

Furthermore, courts have repeatedly held that even if a defendant makes a statement that he acted in self defense a court must determine if the facts surrounding the charged crime support a defense of self defense, which allows the prosecution to introduce character evidence concerning the victim and allows the defense an instruction on self defense. See Gaffney v. State, 742 So. 2d 358 (Fla. 2nd DCA 1999)("It is clear that only at Officer Glisson's prompting did Appellant claim he acted in self-defense. His statement does not support a self-defense charge, but instead indicates he acted out of anger and on sudden impulse."); Nunez v. State, 542 So. 2d 1061 (Fla. 3rd DCA 1989).

Mr. Peterka never claimed that he acted in self defense. Rather, every time he described the shooting he stated that he fired the weapon suddenly without thinking.

Likewise, Mr. Peterka never claimed that the shooting occurred as an accident. Certainly he did not mean to shoot and kill Mr. Russell, but the gun did not misfire or malfunction; he fired the weapon. Due to trial counsel's abandonment of Mr. Peterka's defense that he did not intentionally kill Mr. Russell, the State was allowed to present testimony from Donald Champagne, a firearms expert who testified that the gun was in functioning condition with appropriate "trigger pull" (R. 1551). While the trigger pull was decreased by twenty percent due to Mr. Peterka's work on the gun, the gun still required two and a half pounds of trigger pull to fire as a single action weapon and nine pounds of trigger pull for double action (R. 1554). Thus, it was impossible for the gun to be fired by accident.

Agent Champagne's testimony was irrelevant and should have been precluded. Mr. Peterka's never claimed that the gun malfunctioned or misfired.

Trial counsel abandoned Mr. Peterka's viable defense. Mr. Peterka did not misfire the gun. He did not shoot Mr. Russell out of fear in order to defend himself. He was startled by Mr. Russell (R. 2073, 2444). He did not intend to shoot or kill Mr. Russell.

Trial counsel's failure to articulate Mr. Peterka's defense that he did not intend to kill Mr. Russell – the only viable defense – was deficient. Trial counsel's summary that "the gun fired or went off or whatever" illustrates his inability to articulate Mr. Peterka's defense.

Mr. Peterka's statement completely supported his defense that shooting Mr. Russell was not premeditated and at most was a second-degree murder or manslaughter.

Trial counsel also failed to rebut the State's theory that Mr. Peterka executed the victim as he slept on the couch. Evidence was readily available to rebut the State's theory and support Mr. Peterka's statement that he fired the gun and shot Mr. Russell when he was startled by Mr. Russell.

As to physical evidence, trial counsel failed to present any expert testimony about the trajectory of the bullet, the distance of the gun from the victim's head when the shot was fired or the location of the blood evidence. The State's experts testified that the State's theory of an execution was consistent with the physical evidence.

However, days before the trial, Dr. Kielman, after reconsidering his initial opinion, realized that the path of the bullet most likely was straight through the victim's skull and the bullet exited through the base of the skull and lodged

in the victim's body (R. 1232). Dr. Kielman concluded that his original opinion about the exit wound of the bullet and the path of the bullet was unlikely (R. 1232-4). Dr. Kielman's revised opinion supported Mr. Peterka's account of the events because there was no angle to the bullet, which would have been likely had the victim been reclining as the State told the jury (R. 1232-4). Dr. Kielman only revised his opinion because he reexamined the victim's skull (R. 1232).

Had trial counsel retained the appropriate expert assistance, in addition to Dr. Kielman's testimony, he could have presented evidence that was consistent with Mr. Peterka's account of how the victim was shot. (See Argument VI).

Furthermore, after abandoning Mr. Peterka's defense and assuming a defense of self defense or accident, trial counsel failed to rebut the State's evidence. For example, despite the fact that witnesses testified that Mr. Russell had told them that he would not confront Mr. Peterka about the stolen check, evidence was readily available to show the full extent of Mr. Russell's poor financial situation. Such evidence would have been admissible to rebut the State's evidence of Russell's state of mind.

The lower court found that trial counsel made a tactical decision not to introduce additional evidence of Mr. Russell's poor

financial situation because such evidence was presented to the jury during the State's case (PC-R. 578).

During the State's case, the extent of Mr. Russell's financial situation was introduced when Gary Johnson commented that it was unusual for Mr. Russell to leave the house without his cigarettes because he did not have much money and could not afford to leave his cigarettes at home and buy another pack (R. 1281). Also, at the evidentiary, trial counsel commented that he did not think there was any question that Mr. Russell was in a poor financial condition because "[h]e was getting money from home" (T. 346-7).

However, trial counsel never made the argument that Mr. Russell faced serious financial problems. Had the jury known the full extent of Mr. Russell's financial difficulties, the jury would have believed that it was reasonable that Mr. Russell confronted Mr. Peterka after he had evidence that Mr. Peterka had cashed the check.[4]

Additionally, trial counsel failed to rebut the hearsay evidence that Mr. Russell had told others that he would not confront Mr. Peterka about the stolen check.[5] The record

---

[4]On the day before the incident, Mr. Russell received a copy of the check (R. ___).

[5]The lower court found that Mr. Peterka did not identify any particular evidence that could have been presented. See Claim ___.

itself provided conflicting evidence about Mr. Russell's state of mind about how to handle the stolen check matter. Ms. Cox, the bank employee, testified during a proffer that Mr. Russell came into the bank on July 11th with the cashed check (R. 1447). This was the day before Mr. Peterka claimed that Mr. Russell questioned him about the check.

Further, Mr. Russell told Lori Slotkin that he was "going to get Mr. Peterka with the check" (R. 1437). She interpreted this to mean that he was going to let law enforcement handle the matter (R. 1437). However, Deborah Trently testified that Mr. Russell told her that he was not going to confront Mr. Peterka until "the gun was out of the house" (R. 1605).

Trial counsel failed to highlight the inconsistencies in Mr. Russell's motive about how to proceed on the stolen check matter.

The prejudice in abandoning Mr. Peterka's defense and failing to rebut the State's theory was multi-faceted: The State was allowed to introduce hearsay evidence that the victim was afraid of Mr. Peterka and did not intend to confront him about the stolen check; the State was allowed to introduce character evidence about the victim's peaceful reputation; the jury heard impermissible victim impact evidence at the guilt phase; the jury heard irrelevant and

misleading testimony about the weapon; the jury never heard Mr. Peterka's counsel articulate a coherent theory of the defense; and the jury heard inapplicable instructions.

Counsel failed to present a coherent theory of the defense. To be effective, counsel must present "an intelligent and knowledgeable defense" on behalf of his client. Cunningham v. Zant, 928 F. 2d 1006, 1016 (11th Cir. 1991). Counsel failed to investigate and prepare a defense and failed to present an accurate and coherent recitation of the facts, thereby failing to present the jury with a credible alternative to the state's theory.

The State's closing argument exploited the disarray of the defense case when Mr. Elmore argued that the defense had not proven accident or self-defense, for example, It wasn't justifiable use of deadly force. "You can't say that John Russell attempted to murder Daniel Jon Peterka" (R. 1778). Moreover, this was one of several misstatements of the law by the State to which counsel failed to object.

Trial counsel also failed to prevent the jury from hearing suppressed evidence. During Mr. Peterka's taped statement, a reference was made to a rights' form that was signed before a statement was taken which the Court had suppressed (R. 2441-42). Defense counsel failed to adequately object to this reference

being heard by the jury. In fact, defense counsel approved of presenting the jury with the improper evidence:

> MR. LOVELESS: I just remembered a problem. On the first of the video, if the Court recalls, there is a reference to two separate rights' forms, one of which I can think was 5:30 in the afternoon and the other one that the Court has ruled inadmissible as far as the statement. Rather than have to edit the tape, I would suggest that we ignore, attempt to ignore the fact that it's on there. I would not expect the jury to have any particular questions about that, not make any reference to that or any statements gained from that.
>
> MR. ELMORE: I wasn't worried about it, Judge. I don't think they will be too inquisitive.
>
> JUDGE FLEET: There is no special request from the Defense relative to it?
>
> MR. LOVELESS: No, I just don't want anybody to assume I'm opening the door to that statement.

(R. 1691). It was unreasonable for Mr. Peterka's counsel to assume that the jurors would not notice the reference to the earlier statement.

At the evidentiary hearing, trial counsel claimed that he did not object to the reference because he thought a curative instruction would only draw attention to the earlier, suppressed statement. The lower court credited trial counsel’s testimony and found that trial counsel made a strategic decision which was ineffective (PC-R. 578-9).

“Ignoring” the reference to the suppressed statement was not a reasonable strategy. Trial counsel should have made

arrangements for the tape to be edited. Trial counsel was ineffective for failing to have the reference removed.

Trial counsel was also ineffective during closing argument. Counsel failed to take advantage of the opportunity to prove his case which was provided by the medical examiner's testimony. The medical examiner's opinion was that it was more likely that the shooting occurred as Mr. Peterka stated (R. 1250), than as the State was trying to prove was valuable exculpatory evidence. Yet, counsel argued that:

> What have we got in this case? Everything of any value in this case is circumstantial except one thing and that's Daniel Peterka's statement. All of the physical evidence that you have seen introduced is nothing more than the evidence of a series of events for those circumstance that we have talked about.

(R. 1764). Counsel failed to take advantage of the physical evidence and conceded the state's theory.

Counsel also unreasonably bolstered the evidence presented by the state that John Russell had a reputation in the community as a peaceful person:

> He [Mr. Elmore] has given you John Russell's family and friends to assure that he was a peaceful man, had a reputation in the community and would never have confronted Dan Peterka concerning anything, I assume, or especially that check.

(R. 1765).

There was no evidence that Mr. Russell did not confront Mr. Peterka, yet counsel suggests only weakly that he did confront Mr. Peterka:

> Except for what Deborah Trently said which was that he would not confront him until the gun was out of the house. I assume he meant by that that he would then confront him. Apparently he was a person who would confront another person.

(R. 1764-65).

Counsel unreasonably denigrated the importance and persuasiveness of his own closing argument:

> Throughout the preparation for this trial we are depending on the testimony or statements of a particular witness to determine what the facts are to determine strategy at trial. Dan has said all along, describe what happened. In preparing for it, I am Dan's advocate. I am supposed to believe him. That's my job. Even if I didn't want to, that's my job. I am going to do that.

(R. 1771).

Counsel's failure to investigate and prepare was further demonstrated:

> Even in those situations, occasionally even a defense attorney has a problem particularly in a situation like how do you rectify an angle of a bullet from what you client has told you or his basic statements that he made on video tape with what a doctor tells me? **You get in court and all of a sudden you find out it's true**. You go around him, as Mr. Elmore was doing earlier in the case and ask these questions, it that's [the bridge of the nose] really an exit wound, where is the blood on the floor and carpet?
>
> Where is the bullet? It should have impacted somewhere down on that floor or impacted on something? If he was lying down as Mr. Elmore said, it would have

> impacted somewhere in that room. According to Dr. Kielman, our expert witness, it went all the way through, clearly an exit route. Fortunately, and that's all it was, in preparation I just happened to ask the right question. If I hadn't, you recall where we would be in this situation. There would not be a trigger for Dr. Kielman to re-test his theory. His testimony would have been entirely different.

(R. 1771-72)(emphasis added).

The closing argument presented by defense counsel was inadequate. "An attorney may not stipulate to facts which amount to the 'functional equivalent' of a guilty plea". Wiley v. Sowders, 647 F. 2d 642, 649 (6th Cir. 1981). See also Cox v. Hutto, 589 F. 2d 394 (8th Cir. 1979); Achten v. Dowd, 117 F. 2d 989 (7th Cir. 1941). Counsel’s ineffectiveness "cries out from a reading of this transcript." Douglas v. Wainwright, 714 F. 2d 1532, 1557 (11th Cir. 1983). Confidence in the outcome of Mr. Peterka's trial and sentencing are undermined by counsel's ineffectiveness.

Trial counsel also failed to challenge improper and misleading prosecutorial argument. Defense counsel's failure to object to these blatantly improper comments constituted ineffective assistance of counsel.

The State argued:

> I've done everything I can do. I've showed you all the evidence that I can bring in here to you. It proves Dan Peterka is guilty beyond any reasonable doubt. The evidence cases away any reasonable doubt.

(R. 1798). This comment suggested that there was other evidence which tended to incriminate Mr. Peterka which the State was precluded from presenting. Such comment is a highly improper suggestion that additional evidence existed and that the jury should rely on the State's representation that additional evidence tending to incriminate the defendant exists. Trial counsel failed to object.

Trial counsel was ineffective throughout Mr. Peterka’s entire guilt phase. Rule 3.850 relief is proper.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING MR. PETERKA'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM THAT TRIAL COUNSEL FAILED TO PROPERLY ADVISE MR. PETERKA OF HIS RIGHT TO TESTIFY IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION. MR. PETERKA DID NOT KNOWINGLY, INTELLIGENTLY OR VOLUNTARILY WAIVE HIS RIGHT TO TESTIFY.

Trial counsel's ineffectiveness in failing to articulate the theory of the defense was further exacerbated because he failed to advise Mr. Peterka that he had a right to testify. At the evidentiary hearing, trial counsel testified:

> Q: Did you fully discuss with your client, Daniel Jon Peterka, his right to testify in his own behalf?
>
> A: Certainly. I do in every case. I have never failed to do that in any case.

(T. 359).

The lower court found trial counsel credible: "Mr. Loveless did discuss with Mr. Peterka his right to testify in this case and Mr. Peterka made a decision not [to] testify at his trial (PC-R. 583). The lower court erred.

The record is absent of any colloquy between the court or trial counsel and Mr. Peterka about his right to testify. Trial counsel testified at the evidentiary hearing that he advised Mr. Peterka not to testify because:

> Well, I felt that the statements that were coming in, even though there were some differences

> and discrepancies, they could be taken into consideration, and those statements were – presented the defense the way he wanted it presented. In addition, not putting him on the stand did not subject him to any cross examination. It helped in keeping out prior record, if we were going to be able to do it, and any number of considerations. The basic reason is that the evidence came in as we expected it to and there was nothing he needed to add or indicated that he needed to add.

(T. 359-60). The reasons trial counsel says he considered in advising Mr. Peterka are not supported by the record. First, Mr. Peterka's prior record was known to the jury. The State introduced evidence of Mr. Peterka's only prior felony convictions through its second witness at trial, Deborah May, the court clerk from Scottsbluff, Nebraska, who testified that Mr. Peterka was convicted of two felonies and was sentenced to two consecutive one year sentences (R. 1135-6). Thus, Mr. Peterka's prior felony convictions were already before the jury and it made no sense to advise Mr. Peterka not to testify.

Also, trial counsel testified that Mr. Peterka's statements were consistent (T. 360), thus there was no risk that he could be confronted with discrepancies in his version of events.

The trial court instructed the jury about the defendant's credibility while charging the jury (R. 1829-30).

There was no reasonable explanation for advising (or failing to advise at all) Mr. Peterka not to testify. Had the jury heard Mr. Peterka explain to them the events on July 12, 1989, they certainly would have believed him and returned a verdict of less than first degree premeditated murder.

ARGUMENT III

THE LOWER COURT ERRED IN DENYING MR. PETERKA'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE AT HIS PENALTY PHASE IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Beyond the guilt-innocence stage, defense counsel must also discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

Counsel here did not meet rudimentary constitutional standards. As explained in Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985):

> 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.

Id. at 743 (citations omitted).

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). See also Rose v. State, 675 So. 2d 567 (Fla. 1995); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); Deaton v. Dugger, 635 So. 2d 4 (Fla. 1994). Mr. Peterka's sentence of death is the resulting prejudice. It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trial would have been different if the evidence discussed below had been presented to the sentencer. Strickland, 466 U.S. at 694.

Mr. Peterka’s capital penalty phase was conducted the day after the jury found Mr. Peterka guilty of first degree premeditated murder. Trial counsel presented the testimony of his mother,

Ruben Purvis, Connie LeCompte and Cindy Rush (R. 1870-1903). Mr. Peterka also testified in his own behalf (R. 1905).

Mrs. Peterka told the jury that Dan, was the eldest of five children. Dan was a good athlete and older brother (R. 1890). When asked why the jury should recommend life, Mrs. Peterka made an emotional plea to the jury:

> Because he is a human being, because he is my son, because he is good, because God created him, because I love him, because his whole family loves him, because he's a friend, because he helps people. It's such a difficult question. It's everything I believe in. He is a child of God. He needs your help. You have my son's life in you hands. I'm not trying to justify anything. I"m trying to beg you to help him and not to destroy him. He has life. He has good to give; he has good to share; and I love him with all of my heart. My words come from my heart.

(R. 1896). Finally, Mrs. Peterka offered the jury a photo album that contained photographs of the Peterka family and Dan when he was younger (R. 1892).

On cross examination, the State asked Mrs. Peterka: "When he was a child he got into quite a bit of trouble with the law?" (R. 1897). The defense objected, but the trial court overruled the objection. The State proceeded to question Mrs. Peterka about her son's non-violent juvenile record (R. 1879-9, 1901-2).

Cindy Rush described Mr. Peterka and told the jury that he was a "caring and understanding" person (R. 1882).

Ruben Purvis testified that Mr. Peterka was a responsible, excellent employee (R. 1871).

Connie LeCompte testified that Mr. Peterka was wonderful with her children and helped her and her husband a great deal while he lived with them (R. 1876). In fact, Mr. Peterka took care of her children when she was admitted in the hospital for emergency surgery (R. 1877).

Mr. Peterka told the jury: " I feel I have something, something that I can share with society and I would like to keep my life" (R. 1905). He also stated: "I would like to say to John's family and friends, if I thought I could bring him back, John, I would be glad to give you my life (R. 1905).

The jury recommended that Mr. Peterka be sentenced to death by an eight to four vote (R. 1930).

At his evidentiary hearing, Mr. Peterka presented evidence of mitigation, including, his military record, conduct while incarcerated at the Okaloosa County Jail, his relationship and connection to his family, his prior peaceful behavior and good deeds. The lower court found that the evidence failed to establish either prong of the ineffective assistance of counsel standard (PC-R. 584).

Mark Harllee, Mr. Peterka's trial counsel at his capital penalty phase had been practicing criminal law for less than a

year before he was assigned to represent Mr. Peterka (T. 223). In fact, shortly after he was assigned to the felony division he was assigned to represent Mr. Peterka (T. 224). Mr. Peterka's penalty phase was the second penalty phase in which he participated (T. 224).

Mr. Harllee recalled that he became involved in Peterka's case several months after Mr. Peterka had been indicted (T. 224).[6]

At the evidentiary hearing, Mr. Peterka presented evidence of his service in the Minnesota National Guard: In February, 1988, when Mr. Peterka was twenty-one years old, he enlisted in the Minnesota National Guard and was sent to Fort Sill, Oklahoma for training (Def. Ex. 1). He agreed to serve in the military for a minimum of eight years. While at Fort Sill, Mr. Peterka was an outstanding serviceman and was chosen as the platoon leader over sixty individuals (T. 197). He received commendations for his performance, including one for his leadership skills (Def. Ex. 4; T. 197-8).

On February 10, 1989, Mr. Peterka was generally discharged from the National Guard under honorable conditions

[6]Mr. Peterka was indicted on August 10, 1989, and his trial began six months later.

(Def. Ex. 1). His discharge resulted from his convictions in Nebraska (Def. Ex. 1).

At the evidentiary hearing, Mr. Harllee testified that he could not recall whether he knew about Mr. Peterka's military history (T. 229). However, when asked whether there were negative aspects of Mr. Peterka's discharge that would have prevented him from introducing the evidence, he agreed (T. 230). He later explained that the jury heard about Mr. Peterka's military history when Cindy Rush mentioned it in her penalty phase testimony, therefore he felt that the information had been presented (T. 259).

The lower court found:

> Mr. Harllee testified that he was almost positive that the public defender's questionnaire administered to the Defendant had a space for military background or military history. This questionnaire along with the public defender's intake for and conversations with the Defendant and his family provided the information and basis for the presentation of mitigation evidence. Thus, the Defendant was asked about his military record months before his trial and if the defense team was unaware of any details of his military service, Mr. Peterka chose not to provide the information.
>
> Further, Mr. Harllee testified that the decision to not put Peterka's military background into the case was a tactical decision based on the fact that the Defendant had committed illegal acts while in the military which led to his general discharge under honorable conditions. In addition, one penalty phase witness had already testified that the Defendant had been in the National Guard; therefore, Mr. Harllee made the decision not to present any further military record evidence since the State could destroy the

> positive impact of the fact that the Defendant had served in the National Guard by presenting evidence of the acts that brought about his discharge from the military.

(PC-R. 585-6).

The lower court's order is flawed in several respects: While Mr. Harllee was unsure about whether he was aware of Mr. Peterka's service in the National Guard, Mr. Loveless recalled that Mr. Peterka was in the National Guard (T. 229, 326). Therefore, the lower court's determination that Mr. Peterka did not provide the information about his service is in error.[7]

This Court has held that it is trial counsel's duty to investigate and prepare for penalty phase. Mr. Peterka supplied the relevant information about his military service, even going so far as to include the information about his commendation. Thereafter, it was trial counsel's burden to further investigate and present the relevant mitigation.

Mr. Harllee's testimony that he would not have presented the information because the jury would have been upset that

---

[7]Dr. Larson who examined Mr. Peterka at the time of trial noted in his report which was dated, February 14, 1990, approximately a week before Mr. Peterka's capital trial was scheduled to begin, that Mr. Peterka was in the National Guard and he had received commendations. He stated that Mr. Peterka told him that he loved being in the military. See Argument VI.

Mr. Peterka committed a crime while in the military does not make sense and was unreasonable. Mr. Peterka did not commit any crime during his time at the military base, rather his crime of dealing in stolen property occurred while on break at home in Nebraska. Further, the jury had already heard about Mr. Peterka's convictions from Nebraska during the guilt phase of the trial.

Fort Walton Beach was obviously a heavily populated military area. Mr. Peterka's desire to serve his country, his outstanding performance in his first year in the military and his remorse at being discharged would have been important factors for the jury to consider in the penalty phase. Additionally, Mr. Peterka's performance in the military would have also provided trial counsel with the opportunity to argue that Mr. Peterka performed well in a highly structured and supervised environment and that he would similarly perform and adapt well to prison – perhaps even being able to contribute to the inmate population and to assist the correctional officers.

Likewise, Mr. Harllee's testimony that the jury heard about Mr. Peterka's military service is also self-serving and not an accurate representation of the trial record. At trial, when Ms. Rush was asked about her relationship with Mr.

Peterka, she told the jury that they had discussed marriage when he returned from the National Guard (R. 1882). Ms. Rush's testimony was nothing more than a passing comment and did not inform the jury about the positive aspects of Mr. Peterka's military service.[8]

In any event, Mr. Loveless testified that had he known about the commendations Mr. Peterka received he would have presented the information to the jury (T. 327). Mr. Loveless was the senior attorney and he testified that he was equally responsible with Mr. Harllee in investigating and presenting the penalty phase. Thus, considering the roles of Mr. Loveless and Mr. Harllee and their conflicting testimony it is clear that had the trial attorneys been aware of the commendations they would have presented Mr. Peterka's military history.

This Court has held that an individual's military service may be considered in mitigation. Campbell v. State, 571 So. 2d 415, n4 (Fla. 1990); Masterson v. State, 516 So. 2d 256, 258

[8]Ms. Rush's reference to Mr. Peterka's military service would seem to undermine Mr. Harllee's testimony that he did not think the jury would respond to the fact that Mr. Peterka was discharged from the military because, even from Ms. Rush's brief mention of the National Guard and the timeframe in regards to the discussion about marriage and the convictions in Nebraska would indicate that Mr. Peterka was enlisted at the time of his convictions.

(1987); Walker v. State, 707 So. 2d 300 (Fla. 1998). Mr. Peterka's military service would have made a powerful impact on his jury.

The lower court also found that the evidence presented about Mr. Peterka's pretrial incarceration did not establish that his trial attorneys were ineffective (PC-R. 586-7).

At the evidentiary hearing, Mr. Peterka testified that during his pretrial incarceration he never had any disciplinary problems at the jail (T. 193). In fact, Mr. Peterka was housed in population, which was rare for someone who was charged with a violent crime, particularly a first-degree murder where the State was seeking the death penalty (T.193). Mr. Peterka remained in population even after the jury recommended the death penalty (T. 193).

Mr. Peterka also testified that following the jury's recommendation that he be sentenced to death, his cellmates successfully escaped from the prison by creating a hole in the roof by which they could use as a tunnel to get outside of the jail (T. 195).

Lieutenant Alan Atkins testified at the evidentiary hearing about Mr. Peterka's pretrial incarceration. Lt. Atkins remembered Mr. Peterka as a former inmate (T. 491). He didn't recall any specifics about Mr. Peterka, but did not

think that Mr. Peterka caused any problems (T. 492). He commented that Mr. Peterka's conduct "was a little better than normal" and he was more friendly and respectful to the staff (T. 494)

Lt. Atkins had no independent memory about an escape form the jail in 1990.

Postconviction counsel also presented the testimony of a records custodian from the jail, Martha Shurgot. Ms. Shurgot testified that Mr. Peterka's file had been destroyed (T. 499).

Mr. Loveless testified that in every case he would inquire of the jail personnel whether there was anything information that was advantageous (T. 320). He testified that had there been any evidence in Mr. Peterka's case, he would have presented it (T. 322). He also did not recall the escape (T. 325).

Mr. Harllee did not recall any discussion with Mr. Peterka about his pretrial incarceration (T. 231), or the escape (T. 274). Like Mr. Loveless, Mr. Harllee agreed that he would have used evidence of good behavior at the jail (T. 277).

The lower court found that had there been any beneficial evidence to present concerning Mr. Peterka's pretrial

incarceration if it in fact existed (PC-R. 587). Effectively, the trial court discredited Mr. Peterka's testimony.[9]

The only reason to discredit Mr. Peterka's testimony was based on Mr. Loveless' testimony that he investigated all of his clients' histories of incarceration and no evidence was presented at Mr. Peterka's capital penalty phase. However, Mr. Loveless did not specifically recall that he investigated Mr. Peterka's conduct at the jail. Neither did Mr. Harllee. Mr. Loveless admitted that the pretrial questionnaire that was completed when a defendant was arrested would not be very useful in determining if a defendant's conduct was above average or important to present to the jury because the defendant would have been at the jail for a very short amount of time when completing the document.

Mr. Peterka was in fact a "model inmate". Despite his status as an individual charged with premeditated first degree murder with the State seeking the death penalty, Mr. Peterka was housed in general population. He was respectful to the officers and other jail professionals. He had no disciplinary problems. After his cellmates escaped, he remained in his

---

[9]Mr. Peterka's jail records, which were in postconviction counsel's possession corroborate Mr. Peterka's testimony and provide additional favorable information about Mr. Peterka's pretrial and pre-sentence incarceration. See Argument VI.

cell for an for approximately twelve hours, during some portion of which there was still an opportunity to flee.

This Court has repeatedly held that good behavior while incarcerated is an appropriate nonstatutory mitigating circumstance in Florida. See Darden v. State, 329 So. 2d 287 (Fla. 1976); Delap v. State, 440 So. 2d 1242 (Fla. 1983); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982); Francis v. State, 473 So. 2d 672 (Fla. 1985); Jackson v. State, 522 So. 2d 802 (Fla. 1988).

Had trial counsel investigated Mr. Peterka's pre-sentence incarceration, they would have found that Mr. Peterka was a model inmate who responded well to the structured environment and supervision of incarceration. Trial counsel would have been able to convincingly argue that Mr. Peterka should be sentenced to life in prison rather than death.

The lower court also found that had there been any evidence of an escape it would not have made a difference because the jury had already recommended the death penalty (PC-R. 587). Additionally, the court found that Mr. Peterka did not inform his attorneys about the escape (PC-R. 587).

While the escape occurred prior to Mr. Peterka's sentencing, trial counsel certainly could have introduced the evidence before the judge who sentenced Mr. Peterka to death. Trial counsel did introduce evidence at the sentencing hearing (R. 2056-76).

Further, the evidence of the escape would have been persuasive evidence that Mr. Peterka had the capacity and was already rehabilitated, refused to be a fugitive from the law again and took responsibility for his actions. It also provided evidence to support the argument that Mr. Peterka respected the officers at the jail and could adapt to incarceration. Certainly, evidence of the escape and Mr. Peterka's unwillingness to participate of flee would have changed the outcome of his sentencing hearing.

At the evidentiary hearing, postconviction counsel also presented evidence of Mr. Peterka's relationship with his family, good, helpful nature and nonviolent past (T. 8-118). Trial counsel testified at the evidentiary hearing that they wanted to produce anecdotal evidence about Mr. Peterka's past.

The lower court found that the evidence presented at the hearing would not have changed the outcome in the case (PC-R. 588).

Mr. Peterka's jury recommended a death sentence by an eight to four vote. Had only two more jurors voted for life, Mr. Peterka would have been sentenced to life in prison.

Furthermore, the lower court instructed Mr. Peterka's jury on aggravating factors that this Court found were inapplicable. The trial court did not tell the jury about the

limiting instructions about each aggravator. Trial counsel had no strategic reason to fail to object to the aggravating circumstances as to both the applicability and the specific instruction.

Likewise, trial counsel failed to prevent the jury from hearing about Mr. Peterka's prior nonviolent juvenile record. During the cross examination of Mr. Peterka's mother, the State questioned her about Mr. Peterka's juvenile record (R. 1897-9, 1901-3). The State argued that the defense had put Mr. Peterka's character at issue. This Court recognized the error on direct appeal. Peterka v. State, 640 So. 2d 59, 70 (Fla. 1994). The lower court held that trial counsel could not be ineffective because this Court had found that the error was harmless (PC-R. 590). The lower court's analysis was in error.

During its deliberations, the jury requested the documents regarding Mr. Peterka's prior juvenile record. The trial court did not allow the jury to examine the documents because they were not in evidence. Clearly, Mr. Peterka's prior nonviolent juvenile record affected the deliberations and caused some jurors to recommend death.

Also, trial counsel failed to challenge the aggravators or minimize them in any way. For example, the aggravator that

Mr. Peterka was under a sentence of imprisonment at the time of the crime should have been given limited weight by the jury and judge. Mr. Peterka failed to report for his sentence. He did not escape from jail. Trial counsel did not advise Mr. Peterka's sentencers of this. Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989).

Had trial counsel investigated and prepared for Mr. Peterka's penalty phase, they could have produced compelling evidence of why the jury should recommend a life sentence. Further, had trial counsel effectively challenged the State's aggravators and requested the limiting instructions, Mr. Peterka's jury would have recommended a life sentence.

Furthermore, a cumulative analysis of the evidence is required. The lower court did not conduct a cumulative analysis. State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

Mr. Peterka is entitled to relief.

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING MR. PETERKA'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE DURING THE VOIR DIRE OF HIS CAPITAL TRIAL IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In Mr. Peterka's case, trial counsel failed to properly voir dire prospective jurors or make reasonable challenges for cause and made improper comments to the prospective jurors. Defense counsel's failure to reasonably perform resulted in the great likelihood that

Mr. Peterka did not receive the unbiased jury to which he was entitled. Mr. Peterka's jury verdict becomes suspect in light of counsel's ineffectiveness during voir dire.

The lower court denied Mr. Peterka's claim finding that the specific complaints about challenges were refuted by the record (PC-R. 570-6). The lower court also found that Mr. Peterka's complaints about failing to ask questions prospective about specific concepts was a reasonable tactical decision by trial counsel (PC-R. 570-6). The lower court erred.

The State indicted Mr. Peterka for premeditated First Degree Murder of John Russell (R. 1947-48). The defense should have been preparing to present a defense that the shooting was unintentional and that the State would fail to prove first degree murder. The circumstances surrounding the shooting death of Mr. Russell were crucial to that defense argument given that defense counsel would need to vigorously rebut the State's theory of premeditation.

However, during voir dire, counsel failed to question the prospective jurors about their understanding of intent, premeditation, and their attitudes toward the factual circumstances of the case. Another key aspect of the State's case was the medical examiner and firearms expert testimony about the firearm and the distance between the firearm and John Russell when the shooting occurred. Defense counsel failed to question prospective jurors on

their knowledge of firearms or their feelings about an individual owning a weapon, gun control or related issues. Prospective jurors' experiences, knowledge and feelings about firearms was an important issue to investigate in voir dire and counsel's failure to do so was deficient performance.

When one prospective juror indicated that she had owned a firearm, counsel did not inquire into the extent of her knowledge (R. 421). Out of forty (40) potential jurors, counsel raised the firearms issue with only one (1) potential juror:

> MR. LOVELESS: Oh, do you have guns in your home?
>
> MS. KING: Yes.
>
> MR. LOVELESS: Handguns?
>
> MS. KING: Yeah.
>
> MR. LOVELESS: Are you trained in the use of handguns?
>
> MS. KING: No.

(R. 421). Without further inquiry into what this or any other prospective juror knew about firearms, the defense could not have known if the prospective juror's knowledge about firearms was accurate. Moreover, defense counsel did not obtain enough information from the prospective jurors to make reasonable challenges.

Mr. Peterka's counsel also failed to inquire into the prospective jurors' opinions and feelings about owning firearms.

Defense counsel knew that Mr. Peterka's ownership and experience with firearms would be brought to light during the State's case. The ability of people to purchase and own firearms is an issue about which many people have strong feelings. Therefore, it was unreasonable for counsel not to inquire into this subject. Defense counsel's failure to properly question the prospective jurors was deficient performance.

Defense counsel also erred when, during voir dire examination, he failed to inquire into the prospective jurors' opinions about Mr. Peterka's motive for fleeing Nebraska. Counsel was aware that the State would present testimony regarding Mr. Peterka's fear of homosexual activity he believed occurs in prison. It was imperative that the defense know whether or not the prospective jurors believed that Mr. Peterka's fear was reasonable and what their opinions and feelings were on the issue. Defense counsel failed to explore this area with the prospective jurors.

Mr. Peterka's counsel failed to voir dire on even basic concepts of criminal law. He did not adequately inquire into prospective jurors' understanding of burden of proof or reasonable doubt. These concepts are basic legal principles that should be discussed with venire members in order to empanel a fair and impartial jury. Defense counsel's failure to properly voir dire the prospective jurors was deficient performance.

Defense counsel's failure to make reasonable challenges for cause was also deficient performance. Several times during voir dire, prospective jurors made remarks in response to questions which provided grounds for cause challenges. Defense counsel failed to challenge these prospective jurors for cause; either letting them remain on the jury or using a peremptory challenge to remove them.

In response to a question about media exposure, juror King stated: "They were room-mates or something, lived in a house and he murdered him and buried him somewhere, is that the one? That's all I know" (R. 407). Juror King's statement illustrates her preconception that Mr. Peterka committed the crime with which he had been charged. If that was not enough, this juror also socialized with the Sheriff (R. 405); had previously worked for attorneys who practiced criminal defense and may have been affected by that experience (R.404); and responded with several equivocal answers of "I think so" to important questions about placing biases aside (R. 405, 407-8, 410-11, 412, 417-19, 421). Mr. Peterka's counsel failed to challenge this juror for cause despite her biases and inability to put those biases aside.

Likewise, several other prospective jurors heard or made comments which provided grounds for cause challenges. Yet, defense counsel failed to challenge them for cause. The Assistant State Attorney explained premeditation to juror Monroe:

> MR. ELMORE: For example, I'm going to kill that person. Let me think about that for a minute. Yeah, I'm going to kill that person and pull the trigger. I'm not saying that you've got to agree with me that --
>
> MS. MONROE: You're using that as an example of premeditation?
>
> MR. ELMORE: Yes, ma'am.

(R. 561). Mr. Peterka's counsel objected to this explanation and the Judge sustained and attempted to explain that the example was "not necessarily the law that supports that particular – it's a question of fact to be decided by each juror" (R. 561). After hearing this improper comment on premeditation, it was unreasonable for counsel to fail to challenge juror Monroe for cause.

Mr. Peterka's counsel asked juror Revolinsky if Mr. Peterka's prior criminal record would affect his verdict. Juror Revolinsky responded:

> Well, that could fall under the aggravating things but I think just because somebody's done something before, doesn't mean he's guilty of everything. I mean that's going to come up down the road. I say that would be more in giving punishment maybe than guilt or innocence.

(R. 617). Mr. Peterka's counsel failed to address this remark and clarify that only a prior violent crime could be used as an aggravating circumstance. Defense counsel should have challenged juror Revolinsky for cause based on his inability to narrowly apply aggravating circumstances. At the very least, defense counsel should have questioned this potential juror more specifically on this issue.

Likewise, Mr. Peterka's counsel failed to challenge juror Tomson. The exchange with juror Tomson illustrated his bias against Mr. Peterka's case:

> MR. LOVELESS: Okay. the fact that a -- the evidence might show that Dan Peterka may have been in trouble with the law before, say in the State of Nebraska. Would proof of that fact make you believe he would be more likely to commit another crime?
>
> MR. TOMSON: There is a possibility.
>
> MR. LOVELESS: Would you be willing to just judge the facts of the case here and not assume just because a person commits one crime, he's more predisposed to commit another?
>
> MR. TOMSON: As long as they're not associated.

(R. 713-14). Since juror Tomson admitted he would be unable to put feelings about Mr. Peterka's prior conviction aside, defense counsel was unreasonable in failing to challenge him for cause. The defense knew that the State's theory of the case was that Mr. Peterka committed first degree murder to assume his roommate's identity because he wanted to avoid serving his prison sentence from Nebraska and that therefore, the State would likely argue that the Florida and Nebraska crimes were "associated" yet defense counsel failed to challenge for cause.

Mr. Peterka's counsel failed to challenge prospective jurors for cause who were clearly biased. Instead, he used Mr. Peterka's peremptories to challenge biased prospective jurors leaving Mr. Peterka with no more peremptories to challenge people he did not want

on the jury, but did not have cause to strike. Prospective juror Parker was one such juror. Prospective juror Parker stated:

> MR. LOVELESS: ... Okay. Do you feel like every premeditated murder should carry the death penalty? If you find a person guilty beyond a reasonable doubt of premeditated murder, do you think that that should carry the death penalty?
>
> MR. PARKER: In my mind?
>
> MR. LOVELESS: Yes, in your mind?
>
> MR. PARKER: Personally, under the circumstances and reason, what you called it again.
>
> MR. LOVELESS: Premeditated?
>
> MR. PARKER: Premeditated, if he thought about it and decided, yeah, that's what he's going to do no matter what, yeah.
>
> MR. LOVELESS: Okay. I'm not asking you what the law is. I'm asking your personal belief. Now, given that as your personal belief, would [you] be able to put aside and follow the law if the law, is, in fact, different from that? (sic)
>
> MR. PARKER: I believe I could.

(R. 495-96). Prospective juror Parker was predisposed to impose the death penalty on anyone convicted of premeditated murder. He was not sure that he could put those feelings aside. Mr. Peterka's counsel used a peremptory challenge without first moving to remove prospective juror Parker for cause. Had he challenged prospective juror Parker for cause, the judge would have likely granted the challenge and Mr. Peterka's counsel would have been able to exercise

a peremptory on a potential juror whom Mr. Peterka did not want to sit on the jury.

Similarly, during Mr. Peterka's counsel's voir dire of prospective juror White, the prospective juror made several statements that illustrated her bias against Mr. Peterka. In response to defense counsel's question on the possibility of the victim's death occurring because Mr. Peterka acted in self defense, prospective juror White stated: "It may be but I think maybe we use that as a cop-out sometimes" (R. 651). Despite prospective juror White's obvious bias against Mr. Peterka's case, defense counsel did not attempt to challenge her for cause. Instead, he used a peremptory challenge to remove her from the jury.

During voir dire, defense counsel also failed to properly object to the Court's vague definition of aggravating circumstances. While the State conducted voir dire of prospective juror King, the Court interjected: "Well, counselor, the Court is of the opinion that you can define an aggravating circumstance without giving specific itemization for the statues themselves; very simply, circumstances above and beyond normal" (R. 398). Mr. Peterka's counsel failed to adequately object to this vague and improper definition.

Later, while the State conducted voir dire of prospective juror Martin, the Court again improperly defined aggravating and mitigating circumstances (R. 964). Both of these prospective jurors sat on Mr.

Peterka's jury. The fact that the Court provided these prospective jurors with improper definitions of aggravating circumstances rendered Mr. Peterka's conviction and sentence unreliable. Defense counsel's failure to properly object to these definitions was wholly unreasonable and deficient.

Prospective juror Watson illustrated his bias against Mr. Peterka:

> MR. LOVELESS: ... Do you assume that because we're asking for the opinion, that we figure we're going to get to that second penalty phase?
>
> Mr. Watson: Oh, I eventually think so, yes.

(R. 917). Prospective juror Watson was prejudiced and believed that because he had been questioned about the penalty phase, Mr. Peterka would be convicted of first degree premeditated murder. Had defense counsel properly challenged this prospective juror, among others, for cause when there was a clear bias, Mr. Peterka would have been able to use his peremptory challenges on prospective jurors with whom he felt uncomfortable. Defense counsel's failure to make reasonable challenges for cause and use peremptory challenges on jurors with obvious biases was deficient performance.

ARGUMENT V

THE CIRCUIT COURT'S NUMEROUS ERRONEOUS RULINGS DENIED MR. PETERKA DUE PROCESS AND THE RIGHT TO A FULL AND FAIR HEARING.

During Mr. Peterka's evidentiary hearing, Judge Barron prohibited Mrs. Peterka from testifying to information about Mr. Peterka's family (T. 10, 22). Judge Barron repeatedly interrupted Mrs. Peterka's testimony and told postconviction counsel that he wanted to hear only knew information from Mrs. Peterka. While questioning Mrs. Peterka about her son's character, Judge Barron told postconviction counsel: "[i]f you have prepared something that's going to get the Court's attention, it's time for me to hear it." (T. 24). Postconviction counsel abruptly discontinued Mrs. Peterka's testimony about Mr. Peterka's relationship with his family.

Later, Judge Barron limited Mr. Peterka's brother, Tim, from testifying about the significance of receiving a commendation while in the military. Judge Barron told postconviction counsel: "[I]f you wanted someone to testify as to the legal meaning or the military meaning of any such document or any such exhibit, that witness would need to be qualified." (T. 112). Despite his distinguished service in the military, Tim Peterka was not allowed to testify about his understanding of the significance of the commendations Dan Peterka received during his service.

Furthermore, at the evidentiary hearing, Judge Barron prohibited postconviction counsel from introducing evidence that was not specifically pleaded in Mr. Peterka's Rule 3.850 motion. During

Mrs. Peterka's testimony, postconviction counsel questioned Mrs. Peterka about the GED that Mr. Peterka earned (T. 42). The State objected, asserting that the State was given no notice of the GED in the Rule 3.850 motion. Judge Barron sustained the State's objection and struck Mr. Peterka's GED.

Judge Barron did not provide Mr. Peterka with a full and fair hearing. The record reflects that the court was uninterested in Mr. Peterka's mitigation which was primarily focused on his relationships with his family. While Mrs. Peterka did testify at trial, she did not provide any detailed information about Mr. Peterka's character. The lower court prevented her from fully testifying.

Likewise the lower court was in error to restrict Tim Peterka's testimony about the commendations and prevent postconviction counsel from introducing Mr. Peterka's GED.

The fact that Mr. Peterka earned a GED was significant in arguing that while he dropped out of high school, Mr. Peterka wanted to enter the National Guard and had to achieve his GED in order to do so. Also, while he was in the National Guard, Mr. Peterka's performance was exemplary and he earned commendations over the first year of his service.

Also, while Mrs. Peterka testified at the evidentiary hearing, the lower court asked her who made the arrangements for the Peterkas to travel to Florida:

COURT: Ma’am, you know, we’ve been over this two or three times, but honestly, all of us in this courtroom know this, and I need your answer on it. There’s not any reason for you to be down here if there was not a possibility of a penalty phase. So you’re telling us one thing. You’re saying that they told you it’s really not a capital case, but you need to come down here for the trial.

A: No one told me I needed to come, no one told me I needed to come. I came because I wanted to --

COURT: So it’s your testimony that they told you that really, there wasn’t any premeditation in this case, that it was not a real capital case, and that you could come down here if you wanted to support your son, but what did they tell you, maybe we might or might not pay your expenses? I mean what did they say?

A: I don’t think the expenses were ever mentioned until after we had been here.

COURT: Well, you talked about expenses in your original testimony because they asked you weren’t you going to come, and you said no, you couldn’t afford it.

A: Okay.

COURT: You talked about that in your last testimony at trial, so obviously expenses were mentioned, and the cost of transportation was mentioned.

A: Okay.

COURT: And it’s in black and white in this last transcript, so are you now telling me you never talked about expenses with anyone? Is that now your testimony?

A: I do know that we were reimbursed for coming down.

COURT: And they talked to you about it – did they talk to you about it before you came down here?

A: I thought it was after – but maybe – I don't know, I thought it was after.

WHITTINGTON: Your Honor, where are you referencing in the record? I see some conversation about money, but I don't see about expenses.

COURT: Page 1890, 24, because we don't have the money to be able to come to Florida. We didn't have the money, we don't have the money. Money was discussed, transportation expenses were discussed at the last trial when she was on the stand. That's what the Court was referring to.

WHITTINGTON: I see the part about money. We don't have the money now. We came because even though we don't have the money, I wanted to come here to support my son. I don't see where she says anything about expenses.

COURT: Counsel, whether or not travel expenses were discussed is in the record, it's in the record, let's move on. I'm not arguing the point. I'm just pointing out the fact that expenses were discussed, and her travel expense and the expense of transportation was discussed at the last trial.

WHITTINGTON: I just don't see it. That's why I was asking, that maybe I was looking at the wrong part, that's all. I see the part about the money discussion. I don't see –

COURT: Well, good, then, you see different than I do, don't you? Let's move on.

(T. 69-72). In fact, Mrs. Peterka's testimony regarding the travel costs was completely consistent. She and her husband payed for their own travel to Florida.

The issue was important because it illustrated that trial counsel did not consider presenting the Peterkas' testimony at the penalty phase otherwise they would have arranged for their travel instead of only reimbursing them after they traveled to Florida and testified.

Mr. Peterka 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); including being allowed to present evidence at his hearing and receive a ruling from a neutral, detached judge.

Furthermore, Mr. Peterka was not required to specifically plead every item of proof that supported his claims. At the time Mr. Peterka filed his Rule 3.850 motion, the Rule required only that he plead "a brief statement of the facts (and other conditions) relied on in support of the motion." Fla. R. Crim P. 3.850(c)(6). The rule did not require Mr. Peterka to plead all of the proof he would offer in support of the facts pleaded in his Rule 3.850 motion.

Mr. Peterka was denied a full and fair evidentiary hearing.

ARGUMENT VI

MR. PETERKA WAS DENIED DUE PROCESS IN HIS POSTCONVICTION PROCEEDINGS BECAUSE EVIDENCE WAS NOT

PRESENTED AT THE HEARING THAT WOULD HAVE SUPPORTED HIS CLAIMS FOR RELIEF. MR. PETERKA'S POSTCONVICTION COUNSEL WAS INEFFECTIVE.

In the latter half of 1999 this Court issued several opinions essential to the proper evaluation of the instant argument. On June 17, 1999, this Court decided Arbelaez v. Butterworth, 738 So. 2d 326 (Fla. 1999). Therein, this Court acknowledged it has "a constitutional responsibility to ensure the death penalty is administered in a fair, consistent, and reliable manner...". Id. In a special concurrence, two Justices discussed the right to counsel in capital postconviction in terms of State Due Process. Counsel was characterized as an "essential requirement" in capital postconviction proceedings. Id. at 329.

As noted in Arbelaez, all capital litigation is particularly unique, complex and difficult. The basic requirement of due process in an adversarial system is that an accused be zealously represented at "every level"; in a death penalty case such representation is the "very foundation of justice". Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). The special degree of reliability in capital cases, which can only be provided by competent and effective representation in postconviction proceedings, is necessary to ensure that capital punishment is not imposed in an arbitrary

and capricious manner and that no one who is innocent or who has been unconstitutionally convicted or sentenced to death is executed. Arbelaez v. Butterworth, 738 So. 2d 331 at n. 12.

On August 19, 1999, this Court issued its opinion in Peede v. State, 748 So. 2d 253 (Fla. 1999). Therein, this Court made clear that ineffective representation at any level of the capital punishment process will not be tolerated. The Court felt "constrained to comment on the representation afforded Peede in these proceedings [appeal from summary denial of motion for postconviction relief]", which included criticism of the length, lack of thoroughness, and conclusory nature of the initial brief, and reminded counsel of "the ethical obligation to provide coherent and competent representation, **especially in death penalty cases**, and we urge the trial court, upon remand, to **be certain that Peede receives effective representation"**. Id. at 256, n. 5 (emphasis added). Less than a week later, this Court entered an unpublished Order in Fotopoulos v. State, 741 So. 2d 1135 (Fla. 1999), which remanded the case for further proceedings in the lower court **despite having considered briefs on appeal and having heard oral argument**, because appellate counsel inappropriately attempted to raise issues and assert arguments and positions which should have been, but were not, presented

to the lower court in the Rule 3.850 motion. The Court did not penalize Fotopoulos for his attorney's incompetence; rather, it remanded for corrective action to be taken prior to ruling on the appeal.

In September, 2000, this Court entered an order in Happ v. State, Case No. SC93121 (Sept. 13, 2000). This Court ordered:

> Upon consideration of the briefs and oral argument presented to this Court, we conclude that counsel for appellant has set forth positions and arguments that had not previously been properly pleaded or presented with particularity to the trial court in the pleadings filed in the trial court. As we did in Peede v. State, 748 So. 2d 253 (Fla. 1999), we criticize and condemn this practice. However, in an attempt to properly administer justice, and recognizing the legislature's call for judicial oversight of collateral counsel, we hereby dismiss the above case without prejudice for allowing the appellant to further amend the underlying motion . . . and proceed in the trial court on certain limited claims.

Like Happ and Fotopolous, Mr. Peterka's case must be remanded for further evidentiary development in order to adequately assess Mr. Peterka's claims for relief.

In 1997, the Office of the Capital Collateral Representative(CCR), represented Mr. Peterka. In March, 1997, CCR filed a preliminary Rule 3.850 motion which contained record claims only. No investigation had been conducted in

Mr. Peterka's case, very few public records were collected and no experts were retained.

When CCR was abolished, Mr. Peterka was represented by the Capital Collateral Counsel for the Northern Region (CCC-NR). CCC-NR represented Mr. Peterka for much of 1998. Throughout 1998, postconviction counsel investigated Mr. Peterka's case. An investigator traveled to Nebraska and Minnesota and met with numerous family members and friends of Mr. Peterka. An investigator interviewed all of Mr. Peterka's immediate family members, Mr. Peterka's aunts and uncles, Mr. Peterka's friends and former girlfriends. A plethora of valuable mitigation, which was not presented to the jury that recommended the death penalty, was uncovered.

Additionally, designated counsel collected public records regarding Mr. Peterka's case, including Mr. Peterka's jail file. CCC-NR investigated the escape from the Okaloosa County Jail which occurred after the jury recommended that Mr. Peterka be sentenced to death, but before the trial court imposed his sentence and which Mr. Peterka did not participate.

CCC-NR also consulted with a variety of experts, including forensic pathologists, criminalists, forensic

anthropologists and mental health experts. Background materials were prepared for the experts.

However, in December 1998, Robert Harper entered a notice of appearance in Mr. Peterka's case. He was retained by Mr. Peterka's family. After missing the first deadline to file an amended Rule 3.850 motion, Mr. Peterka filed a grievance with the Florida Bar, complaining about the lack of communication between Mr. Harper and himself. Mr. Peterka complained that Mr. Harper had only spoke to him once at the prison and had not responded to a single letter that Mr. Peterka wrote (Supp. PC-R. 200-1). In fact, Mr. Peterka had no idea that a deadline was imposed for his amended Rule 3.850 motion until he saw a motion for extension of time which indicated that the motion was due within twelve days (Supp. PC-R. 201).[10]

Mr. Harper requested that he be allowed to withdraw, citing a conflict with Mr. Peterka (Supp. PC-R. 176-184). At a subsequent hearing, Mr. Harper told the court: "I don't want to represent Mr. Peterka" (Supp. PC-R. 191-2). Mr. Harper believed that there was an actual conflict of interest (Supp. PC-R. 192). He also believed that he could not ethically continue to represent Mr. Peterka (Supp. PC-R. 199).

---

[10]The lower court denied the motion for extension of time and Mr. Harper missed the deadline.

Mr. Peterka ultimately agreed to allow Mr. Harper to continue to represent him (Supp. PC-R. 205). The court inquired whether he should enter an order requiring Mr. Harper to communicate with Mr. Peterka, but Mr. Harper did not think such an order would be necessary (Supp. PC-R. 206).

Just over two months later, Mr. Peterka again complained that Mr. Harper was not adequately representing him (Supp. PC-R. 210-5). Mr. Peterka filed several pro se motions which the lower court denied because Mr. Peterka was represented by counsel (Supp. PC-R. 211-2).

An amended Rule 3.850 motion was eventually filed, but that motion did not include a single fact that was not contained in the preliminary, incomplete Rule 3.850 motion that was filed by CCR. Rather, Mr. Harper reorganized the motion, corrected some grammatical errors, removed the majority of the case references and removed the claims that the lower court had already denied. Mr. Harper added two paragraphs and one sentence to Mr. Peterka's claim that his trial counsel was ineffective at the guilt phase: Mr. Harper added the allegation that Mr. Peterka wanted to testify at the guilt phase (PC-R. 324-5). In addition, Mr. Harper added a sentence citing Nixon v. Singletary, 758 So. 2d 618 (Fla.

2000), regarding trial counsel's concession during opening statement (PC-R. 309).

Mr. Harper did not add a single fact to the ineffective assistance of counsel at the penalty phase claim which was little more than a shell of a claim, with case citations, when CCR filed Mr. Peterka's initial Rule 3.850 motion.

It was obvious that Mr. Harper had not consulted with any experts, interviewed any witnesses or reviewed any public records when the motion was filed.

The failure to factually develop and prepare Mr. Peterka's claims became glaringly obvious at the evidentiary hearing. Mr. Harper presented a records custodian from the Okaloosa County Jail to testify that Mr. Peterka's records had been destroyed. Mr. Peterka's records may have been destroyed, but CCR obtained the records in 1996. Mr. Peterka's jail file was copied and no less than four copies along with the original were in the files that CCC-NR provided to Mr. Harper.

Mr. Peterka's jail files corroborated Mr. Peterka's testimony at the evidentiary hearing. Mr. Peterka's records demonstrate that he was classified by jail personnel as a medium security status inmate despite the charges he was facing and the potential death sentence. Even after the jury

recommended the death sentence, Mr. Peterka remained in population in medium security rather than being moved to maximum security.

Mr. Peterka's review forms indicate that the jail personnel considered him a "model inmate" and documented that he caused no problems at the jail and assisted jail personnel.[11]

The lower court found that the trial attorneys were credible when they testified that they inquired into Mr. Peterka's custody and had there been anything to present they would have presented it (PC-R. 586-7). Clearly, trial counsel did not investigate Mr. Peterka's behavior at the jail. Had they reviewed his file they would have been able to prove that he was a model inmate who assisted the jail staff and adapted well to incarceration. Both trial attorneys agreed that they would have presented evidence of good behavior in Mr. Peterka's case.

Had postconviction counsel presented the evidence at Mr. Peterka's evidentiary hearing, it would have made a

---

[11]Undersigned is currently attempting to locate and interview the individuals who supervised Mr. Peterka. Additionally, Mr. Peterka's fellow inmates wrote a letter requesting that he be allowed to remain in population despite the jury's recommendation of death. Undersigned is also locating and interviewing these individuals.

difference. The lower court's order is in error in light of the existence of the jail records. Postconviction counsel possessed the jail records, yet represented to the court that they had been destroyed.

At the evidentiary hearing, Mr. Peterka also testified about a successful escape from the jail in which he chose not to participate (T. 195). Lieutenant Atkins had no recollection of the escape. Mr. Peterka's trial attorneys could not remember the escape.

Had trial counsel investigated and prepared for the evidentiary hearing he could have corroborated Mr. Peterka's testimony and refreshed the recollection of the other witnesses. In fact, on April 9, 1990, two individuals escaped from the Okaloosa County Jail. The escape was reported in the local paper. The inmates climbed through the security mesh in the ceiling at approximately 1:00 a.m. Jail personnel were unaware that the inmates escaped until the following morning. One of the inmates was not apprehended for several months.

Undersigned has developed facts that Mr. Peterka was aware of the escape and chose not to participate despite having the ability and opportunity to do so. The inmates who escaped encouraged Mr. Peterka to join them. Individuals in the jail were aware that Mr. Peterka did not escape.

Mr. Peterka's choice to remain in the jail and accept his responsibilities illustrate that he had learned from his flight from Nebraska. He no longer wanted to be a fugitive and already demonstrated that he could be rehabilitated, even within the ten months he had been incarcerated. Had trial counsel presented the evidence to the sentencing court it is likely that he would have imposed a life sentence.

Again, the lower court's order is flawed because postconviction counsel failed to investigate the evidence of the escape.

Former postconviction counsel failed to pursue or present any of the valuable mitigation that CCC-NR had uncovered. Todd Sachs was a close friend of Mr. Peterka, even his roommate a few years before Mr. Peterka arrived in Florida. Mr. Sachs described Mr. Peterka as a loyal and trusted friend. He explained that in highschool he introduced Mr. Peterka to alcohol and Mr. Peterka soon abused alcohol on a daily basis. He stated that Mr. Peterka was "getting drunk every day of the week" in his senior year of highschool. He also described how Mr. Peterka was not a violent person and actually diffused situations when there was a potential for violence. Mr. Sachs' provided insight into Mr. Peterka's character that was

unknown to the jury and judge who sentenced Mr. Peterka to death.

At the time of Mr. Peterka's trial, Mr. Sachs lived in Jacksonville, Florida. He spoke to Mr. Peterka's trial attorney and offered to help in any way he could. Trial counsel told him that he was not needed. There is no reasonable explanation for failing to present Mr. Sachs' testimony to Mr. Peterka's jury.

In 1997, Mr. Sachs was interviewed by an investigator from CCC-NR. The CCC-NR attorney representing Mr. Peterka believed that Mr. Sachs was an important penalty phase witness who should have been called to testify at trial.

Mr. Sachs contacted Mr. Peterka's former postconviction attorneys in 2001 when he became aware that an evidentiary hearing was about to be held. Steve Whittington, one of Mr. Harper's associates, contacted Mr. Sachs the night before the evidentiary hearing and told him that he did not need to travel to the hearing. Again, there is no explanation for failing to present Mr. Sachs' testimony.

Likewise, Carol Sachs, Todd Sachs mom, also knew Mr. Peterka well, before this crime occurred. Mrs. Sachs was a friend of Mr. Peterka's mother. Mrs. Sachs possessed a unique perspective on Mr. Peterka's character: she observed him

playing with the children in her daycare, spending time with her son Todd and their friends. She observed him when he had disappointed his parents and witnessed the start of his serious alcohol dependency.

Before the evidentiary hearing, Mrs. Sachs attempted to contact Mr. Peterka's attorneys. She received a phone call from Mr. Whittington as he traveled to the evidentiary hearing. She provided Mr. Whittington with the information she knew about Mr. Peterka. Mr. Whittington stated: "I guess we should have been talking to Todd."

Mr. Peterka supplied Mr. Harper with numerous names and addresses of individuals who could provide mitigating information. None of those individuals' testimony was presented to the lower court at Mr. Peterka's evidentiary hearing.

No mental health expert was retained. At the time of trial, Dr. James Larson evaluated Mr. Peterka. He did not have any background materials. Dr. Larson still found that at the time of the crime Mr. Peterka was experiencing considerable depression and opined that Mr. Peterka may have been experiencing considerable emotional duress. He also believed that Mr.Peterka may have been approaching intoxication at the time of the crime. He recommended that

trial counsel determine if there were any records about Mr. Peterka's alcohol abuse.

Finally, Dr. Larson recommended neuropsychological testing due to the significant discrepancies in Mr. Peterka's test scores. No neuropsychological testing was conducted at trial.

In fact, had trial counsel performed effectively or had former postconviction counsel investigated the areas that Dr. Larson suggested, they would have found that Mr. Peterka has a history of substance abuse. At the time of the crime he was consuming at least six beers every night of the week and much more on the weekends.

CCC-NR previously investigated and most recently reaffirmed that evidence existed to support many of Dr. Larson's opinions.

The evidentiary record is completely undeveloped in regards to the mental health area, yet mental health issues were relevant to Mr. Peterka's trial.

Mr. Peterka, through counsel, urges this Court to allow further evidentiary development in order to "properly administer justice". Happ, Case No. SC93121 9Sept. 13, 2000).[12]

---

[12]All of the experts that CCC-NR had identified as necessary to litigate the issues in Mr. Peterka's case were ignored by Mr. Harper. Currently, postconviction counsel is

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, appellant, DANIEL JON PETERKA, urges this Court to reverse the lower court's order and grant Mr. Peterka Rule 3.850 relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amended Initial Brief has been furnished by United States Mail, first class postage prepaid, to Gary Milligan, Assistant Attorney General, Department of Legal Affairs, The Capitol, PL-01, Tallahassee, Florida 32399, on March 26, 2003.

CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the Amended Initial Brief of Appellant has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

MICHAEL P. REITER
Capital Collateral Counsel
Northern Region
Florida Bar No. 0320234

---

preparing a proper, fully plead Rule 3.850 motion to file on Mr. Peterka's behalf. Postconviction counsel is consulting with experts, interviewing witnesses and reviewing public records in order to develop all of the facts which should have been presented at Mr. Peterka's evidentiary hearing. Postconviction counsel respectfully requests the opportunity to present the evidence to the lower court before this Court considers Mr. Peterka's issues.

_____
LINDA McDERMOTT
Assistant CCC-NR
Florida Bar No. 0102857
1533-B S. Monroe Street
Tallahassee, Florida 32301
(850) 488-7200
Attorney for Appellant