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.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR OKALOOSA COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

LINDA McDERMOTT
Florida Bar No. 0102857
141 N.E. 30th Street
Wilton Manors, Florida 33334

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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.

A. The Abandonment of Mr. Peterka's Defense.

Appellee, the State, like the circuit court, excuses counsel's deficient and prejudicial performance by stating that the theories of self defense and accident which the State maintains that trial counsel used during the guilt phase were "coherent". (Answer Brief at 12-3)(hereinafter AB).

What the State fails to acknowledge is that Mr. Peterka never claimed that he shot the victim in self defense; his statement does not support the defense and he never claimed self defense to law enforcement, his trial counsel, his investigator or anyone else.

In fact, there was nothing "coherent" about trial counsel's defense of Mr. Peterka. At the evidentiary hearing, although at one point trial counsel testified that his defense

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[1]Mr. Peterka will not reply to every issue and argument, however he does not expressly abandon the issues and claims not specifically replied to herein. For arguments not addressed herein, Mr. Peterka stands on the arguments presented in his Amended Initial Brief.

was one of self defense, he later contradicted himself and was inconsistent about what his defense really was. (See R. 365, 396-7).

Also, contrary to Appellee's contention, trial counsel did not even consider self defense at the trial until the State argued that self defense was asserted in Mr. Peterka's statement and trial counsel argued against the admission of the reputation evidence. Likewise, on direct appeal, this Court characterized the defense as an accident and not self defense. Peterka v. State, 640 So. 2d 59, 69 (Fla. 1994).

As the State conceded, even trial counsel did not believe that an accident or self defense theory were viable defenses (PC-T. 382, 397-8)(AB at 13-4), yet trial counsel testified that these were his defenses. Trial counsel's testimony and the State's argument is belied by the record.[2] The record clearly demonstrates that trial counsel did not present any evidence or make any argument to the jury about self defense. Indeed, trial counsel argued that it was error for the jury to be instructed on self defense (R. 1818, 1822-6). The argument defense counsel made to the jury, without Mr. Peterka's

[2]At the evidentiary hearing, trial counsel candidly testified that he had "virtually no memory" of Mr. Peterka's case and that he did not have the benefit of his trial file because it had been destroyed in a flood (PC-T. 313).

consent was the functional equivalent of a guilty plea:

> 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).

Arguing that the shooting was the result of an accidental discharge, i.e., that the gun malfunctioned, that "the gun fired or went off or whatever," during the only occasion in the entire course of the trial that trial counsel attempted to articulate the theory of defense to the jury, was ineffective because the jury had received uncontested expert testimony that the gun "was in good working order" and that there was [no] condition that would lead to an accidental discharge" (R. 1554-5).[3] Even the State admits that an accident defense "does not account for the statements" Mr. Peterka made to law enforcement. (AB at 17).

The State, like the lower court, refuses to acknowledge

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[3]Trial counsel did argue during his rebuttal closing argument that "[n]o [the gun] didn't go off accidentally. It wasn't fired by any external [sic] force. Dan pulled the trigger. That's what he meant when he said he fired it." (R. 1808). Mr. Peterka is entitled to relief because this disconnected clarification of his version of events was not enough to present a coherent defense that Mr. Peterka unintentionally and without premeditation shot the victim.

that Mr. Peterka's statement presented a version of events which substantiated a theory that the murder was not premeditated or a conscious killing.[4] Mr. Peterka's repeatedly told law enforcement that Mr. Russell arrived home and confronted him about the three hundred dollar check that was missing, the two argued and a struggle ensued wherein the two were "just wrestling" and it was "[not] really a fight". They both saw the gun and grabbed for it and Mr. Peterka got the gun first. Mr. Peterka **shot Mr. Russell, unintentionally because he was startled because Mr. Russell was lunging at him with his head down and Mr. Peterka pulled the trigger** (R. 2442-4). Mr. Peterka's statement does not substantiate a self defense theory or an accident.

The State is correct in its recognition that "any recognized legal defense must match the confession." (AB at 17). In Mr. Peterka's case, the only viable defense which was supported by the evidence and statements was that Mr. Peterka killed the victim unintentionally and without premeditation, thus, he was not guilty of premeditated first degree murder.[5]

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[4]The medical examiner's testimony at trial supported Mr. Peterka's version of events.

[5]Mr. Peterka was not charged with felony murder, so the only way he would have been convicted of first degree murder was for the State to prove premeditation.

The State also suggests that a defense strategy which was consistent with Mr. Peterka's statement and negated premeditation is not a recognized defense. (AB at 15). The State is wrong. This Court has repeatedly held that conceding to lesser included offenses is a reasonable defense strategy and may constitute a meaningful adversarial testing. Harris v. State, 768 So. 2d 1179, 1182-3 (Fla. 2000); Brown v. State, 755 So. 2d 616 (Fla. 2000)(holding defense counsel's tactical decision to concede guilt to lesser homicide charge reasonable in light of defendant's confession). Indeed, this Court has found that conceding to a lesser included offense, such as second degree murder or manslaughter, when charged with first degree murder may also gain credibility and acceptance by the jury. Griffin v. State, 28 Fla. Law Weekly S723 (Fla. Sept. 25, 2003). Likewise, Griffin, also contradicts the State's assertion that trial counsel cannot be ineffective for obtaining additional defenses because this Court recognized that using a single, consistent defense gains credibility with the jury and thus, using defenses that made no sense and were not supported by the evidence undermined credibility with the jury. Id.

In Mr. Peterka's case, trial counsel testified that he did not believe that the jury would find self defense or an

accident defense credible (PC-T. 382, 397-8). Therefore, if this Court construes trial counsel's defense at trial as self defense or accident, then counsel was unreasonable for using a defense that he knew the jury would not find credible. Trial counsel would have gained credibility by conceding that Mr. Peterka was responsible for the victim's death, but that he did not premeditate the crime.

The State also suggests that Mr. Peterka believes that negating premeditation is a better defense because self defense and accident were unsuccessful. (AB at 16). However, the reason Mr. Peterka argues that trial counsel was ineffective is that his statement, which was corroborated by the medical examiner's testimony, did not support the defenses that trial counsel testified he used. Rather, the statement supported a defense that negated premeditation.

Because counsel abandoned Mr. Peterka's true and plausible version of how the shooting occurred for a defense that abdicated his not guilty plea and dictated the jury's guilty verdict without Mr. Peterka's knowledge or consent, relief is warranted. Brookhart v. Janis, 384 U.S. 1 (1966)(stating the constitutional principle that although an attorney can make tactical decisions as to how to run a trial, he or she is not permitted to present a defense that amounts

to a guilty plea without the client's consent); Bland v. California Department of Corrections, 20 F.3d 1469, 1479 (9th Cir. 1994)(holding counsel's presentation of a defense that was inconsistent with the defendant's version of how the shooting occurred established prejudice under Strickland); Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991)(holding counsel's failure to investigate a viable defense and presentation of a defense that had been diminished by the evidence was ineffective assistance); Young v. Zant, 677 F.2d 792 (11th Cir. 1982)(holding counsel's failure to adopt the obvious defense, adopting instead an unsupportable defense, was ineffective assistance); see also Nixon v. Singletary, 759 So. 2d 618 (Fla. 2000)(holding presumption of ineffective assistance arising from concession of guilt could only be overcome by showing of defendant's affirmative, explicit acceptance of strategy), on appeal from remand, 857 So. 2d 172 (Fla. 2003)(same).

Additionally, trial counsel's failure to understand, assert and defend Mr. Peterka's version of how the shooting occurred prejudiced Mr. Peterka in another way: It allowed the prosecutor to mischaracterize his defense as a claim that the

shooting occurred either in self defense or accidentally,[6] which led to the admission of otherwise inadmissible evidence concerning 1) the victim's reputation for peacefulness and non-violence (R. 1165-9, 1180-3, 1298-1301),[7] and 2) the victim's fear of Mr. Peterka's gun (R, 1420-8, 1435, 1605), which unfairly implied not only that the deceased would not have confronted Mr. Peterka over the stolen money as he claimed in his statement, but also, and more prejudicially, that he must have shot the victim with a premeditated intent.[8] The State capitalized on this otherwise inadmissible evidence in closing argument (R. 1780-1).

Mr. Peterka has never claimed self defense or that Mr. Russell shot himself by accident. Thus, contrary to the State's assertion, a reasonable attorney would have recognized

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[6]In this context, "accidentally" did not refer to Mr. Peterka's claim that he accidentally/unintentionally shot the victim. It referred to a defense claim that the victim accidentally shot and killed himself. See R. 1420-8 and the case cited, United States v. Brown,, 490 F.2d 758, 767 (D.C. Cir. 1973).

[7]See e.g, Williams v. State, 238 So. 2d 137, 139 (Fla. 1st DCA)(evidence of deceased's reputation for peacefulness and nonviolence is not admissible unless and until the defendant claims and presents some evidence he acted in self defense), cert. denied,241 So. 2d 397 (Fla. 1970).

[8]The State concedes that presenting a self defense or accident defense allowed the State to admit prejudicial evidence. (AB at 15).

that Mr. Peterka's statement supported a second degree or manslaughter conviction and by arguing that theory the defense could prohibit the jury from hearing prejudicial testimony about the victim's reputation for peacefulness and fear of Mr. Peterka's gun. Trial counsel was ineffective. See, e.g., United States v. Kladouris, 739 F.Supp. 1221 (N.D. Ill. 1990) (holding counsel's failure to understand and present the only defense available to the defendant which affected every stage of representation and exacerbated other errors was cumulatively prejudicial under Strickland).

Mr. Peterka is not guilty of first degree premeditated murder and there is a reasonable probability that, but for his trial counsel's unreasonable – and unapproved – abandonment of his version of how the shooting occurred, the jury would have so found.

B. The Reference to the Inadmissible, Excluded Statement.

The State argues that the reference to Mr. Peterka's inadmissible, excluded statement was "innocuous", or so testified Mr. Harlee. (AB at 22). However, the lower court and State's reliance on Mr. Harllee's testimony is in error. At the time of Mr. Peterka's capital trial, Mr. Harllee had only recently begun to work on felony cases; he was an inexperienced, young attorney. Therefore, his determination

that the reference to the statement was innocuous was self-serving and unsupported by any logical rationale.

It was unreasonable for trial counsel to allow and in effect approve of the improper reference to the statement made before the jury. Trial counsel was ineffective for assuming that the jury would "ignore" the reference.

Also, the State argues that there was no prejudice. The prejudice is evident – the jury was allowed to hear that there was another statement made by Mr. Peterka, yet they did not hear it. The reference allowed the jury to speculate about the content of the statement and focus on inadmissible evidence.

Mr. Peterka's trial counsel was ineffective at the guilt phase of his capital trial. Relief is warranted.

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.

In arguing that this Court should deny Mr. Peterka's claim, the State urges this Court to find that Mr. Peterka waived his claim. (AB at 33). However, the lower court did not make such a finding, so the State's argument asserts a new defense. Because the State failed to raise this defense in the court below the argument has been waived.

Additionally, the State also argues that the claim should be denied because Mr. Peterka knew it was his right to testify since he had been previously convicted of a felony. The State has no basis for this argument and no facts were presented at the evidentiary hearing to support this argument. The State's speculation is also incorrect in light of the fact that Mr. Peterka pleaded guilty to his prior felony charges and therefore never had to decide whether or not to testify on his behalf.

Furthermore, the State argues that by testifying Mr. Peterka's prior juvenile convictions would have been introduced. (AB at 36). However, the State cites no authority

or legal basis for the State to have admitted Mr. Peterka's juvenile record when he testified. In fact, Mr. Peterka's juvenile convictions were inadmissible, and therefore the State's argument has no merit. See Fla. Evid. Code § 90.610.

Mr. Peterka had an absolute right to testify in his own behalf. His trial counsel denied him that right and was ineffective in doing so. Relief is proper.

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.

Mr. Peterka's counsel was ineffective at the penalty phase of his capital trial. In its answer, the State ignores the recent explications of how this Court must assess trial counsel's effectiveness under the Sixth Amendment. (AB at 38-51). In Wiggins v. Smith, 123 S. Ct. 2527 (2003), and Williams v. Taylor, 529 U.S. 362 (2000), the United States Supreme Court illuminated the standards to be followed in assessing an ineffective assistance of counsel claim.

Rather than focus on Wiggins, the State argues that much of the evidence presented at the evidentiary hearing was presented during the penalty phase of Mr. Peterka's capital trial. (AB at 38). The State is incorrect. At Mr. Peterka's penalty phase, five witnesses testified in a cursory fashion

that Mr. Peterka was a good person. The testimony from Mr. Peterka's mother, Cindy Rush, Connie LeCompte, Ruben Purvis and Mr. Peterka himself was minimal and related almost no details of Mr. Peterka's life. In fact, in sentencing Mr. Peterka, the trial court found: "While there was evidence tending to show other mitigating circumstances, the Court did not find any to exist". (R. 2078).

The State argues that trial counsel made a strategic decision not to present Mr. Peterka's military history or his good conduct in jail. Likewise, the State faults Mr. Peterka for his counsel's failure to investigate and prepare for the penalty phase.

Under Wiggins, the test for determining whether counsel's performance was deficient is to analyze a trial attorney's putative "knowledge" of available mitigation and strategic decisions flowing therefrom. This analysis requires a close examination of the record, particularly where trial counsel lists "sources" of information from which he allegedly obtained "knowledge" of mitigation; indeed, in Wiggins, much of the Court's opinion is devoted to such an examination. See Wiggins, 123 S. Ct. at 2539 *et. seq.* Any "decision" by counsel not to present evidence about which he was unreasonably unaware cannot survive scrutiny. Wiggins;

Williams. Presenting some mitigation or even a lot of mitigation does not automatically render counsel constitutionally effective if he unreasonably failed to investigate and presented additional mitigation and there is a reasonable probability that the additional mitigation would have tipped the scales in favor of a life sentence.

Shortly before Mr. Peterka's capital trial, Mr. Harllee, trial counsel who was responsible for the penalty phase, started representing defendants on felony charges (PC-R. 224). Additionally, Mr. Harllee only became involved in Mr. Peterka's case shortly before trial (PC-R. 225). Trial counsel failed to investigate any sources of mitigation, other than having Mr. Peterka answer some questions shortly after his arrest and requesting that his parents prepare a photo album of the family. Thus, any strategic decisions that trial counsel allegedly made cannot be considered reasonable under Wiggins.

Mitigation must be investigated well. Wiggins, 122 S.Ct. at 2536-37. Using the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty, the Court in Wiggins held that counsel's minimal investigation into the defendant's background (only reviewing the defendant's PSI report and a DSS file),and abandonment of that investigation in order to

focus on lingering doubt, fell short of reasonable professional standards:

> Counsel's conduct...fell short of the standards for capital defense work articulated by the American Bar Association...standards to which we have long referred as guides to determining what is reasonable. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." Id. (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty 11.4.1(C), p. 93 (1989)).

Id. at 2537. It is not reasonable for counsel to find some mitigation and stop when the investigation is incomplete. This is what occurred in Mr. Peterka's case.

The State argues that trial counsel did not present Mr. Peterka's military experience because of Mr. Peterka's discharge and that such a decision was reasonable. (AB at 48). The jury was well aware of Mr. Peterka's age and the fact that he was convicted of a felony, thus they certainly knew that he had been discharged from the military. Trial counsel was unreasonable for failing to present the full testimony of Mr. Peterka's service.

Also, the State suggests that Mr. Peterka's service in the military was insignificant because he did not serve in combat. (AB at 49). The importance of Mr. Peterka's military history cannot be understated and is no less significant

because Mr. Peterka did not see any combat. Mr. Peterka was willing to defend his country and was very patriotic. He also excelled in the structured environment of the military. Thus, counsel could have argued that Mr. Peterka was a candidate for a life sentence, rather than death since he would likewise excel in a prison environment. Additionally, due to the composition of the jury and the heavily populated military area, the jury would have only been impressed by a young man who was so enthusiastic about serving his country and assuming the risk of potential combat.

The State's reliance on a form that was never even proved existed does not support a finding that trial counsel was effective in investigating Mr. Peterka's military history.

Furthermore, the escape that occurred at the prison in which Mr. Peterka did not participate along with the evidence that Mr. Peterka was a model inmate was crucial to present to the jury. It was trial counsel's obligation to investigate such evidence and not Mr. Peterka's burden to prepare his trial counsel. Mr. Peterka was never asked by trial counsel about his conduct in jail.

Indeed, as to the prejudice prong, the United States Supreme Court's recent pronouncements direct a court to "reweigh the evidence in aggravation against the totality of

available mitigating evidence." Wiggins v. Smith, 123 S.Ct 2357, 2542 (2003)(emphasis added); see also Williams, supra, 120 S.Ct at 1495 (court is required to conduct an "assessment of the totality of the omitted evidence" and then to "evaluate the totality of the available mitigation evidence–both that adduced at trial, and the evidence adduced in the habeas proceeding")(emphasis added). If "the available mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [the defendant's] moral culpability," Wiggins, 123 S.Ct. at 2544 (quoting Williams, 102 S.Ct. at 1495, then prejudice has been shown. Also, Petitioner need only show that the available mitigation creates "a reasonable probability that one **juror** would have struck a different balance." Id. (emphasis added). And, every defendant has "a right–indeed a constitutionally protected right–to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer," Williams, 120 S.Ct. at 1513, regardless of the strength of the state's case, the heinous nature of the offense, or the severity of the aggravators. Williams, 120 S.Ct. at 1515. For a fact to be mitigating it does not have to be relevant to the crime – any of "the diverse frailties of humankind," Woodson v. North Carolina, 428 U.S. 280, 304 (1976), which might counsel in

favor of a sentence less than death, Lockett v. Ohio, 438 U.S. 586 (1978), are mitigating. Williams, 120 S.Ct at 1495. The totality of all of the mitigation in Mr. Peterka's case has never been properly considered and has not been considered in light of the improper aggravating circumstance presented to the jury.[9] Relief is proper.

[9]The State relies on improper aggravating factors to argue that no prejudice occurred. (AB at 51).

ARGUMENT IV

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.

The State attempts to recharacterize Mr. Peterka's claim as an ineffective assistance of postconviction counsel claim and argues that such a claim must be denied because no constitutional right to effective assistance of postconviction counsel exists. (AB at 10, 70, 71-2). The State misses the point. While Mr. Peterka certainly believes that his former postconviction counsel was ineffective, he also believes that he has been denied due process in postconviction, partly due to the errors of his postconviction counsel.

Additionally, despite the State's contention that there is no constitutional right to effective assistance of postconviction counsel, the State cannot deny that this Court has repeatedly held that due process applies to postconviction proceedings and that this Court has held that capital postconviction defendants have a right to effective assistance of counsel. See Spalding v. Dugger, 526 So. 2d 71, 72 (Fla. 1988); Graham v. State, 372 So. 2d 1363 (Fla. 1979).

In Spaziano v. State, this Court found that an attorney who lacks the necessary resources and/or capital trial experience will be

deemed not competent to continue representation of death sentenced client. 660 So. 2d 1363, 1369-1370 (Fla. 1995) (discussing capabilities of attorney who was not employed by the Capital Collateral Representative (CCR)).

Furthermore, the State's suggestion that only issues of guilt or innocence require this Court to ensure that competent collateral counsel be appointed and litigate capital postconviction cases is not supported by this Court or the United States Supreme Court.

The State also argues that prior counsel's reliance on the work of the Capital Collateral Counsel for the Northern Region was not ineffective because "[t]wo legal minds are better than one." (AB at 73). However, what the State fails to recognize is that prior counsel relied on admittedly incomplete work. Essentially, prior postconviction counsel did nothing to investigate or prepare Mr. Peterka's amended Rule 3.850 motion. Mr. Peterka was forced to proceed to an evidentiary hearing on a shell of a postconviction motion containing little more than legal claims.

Likewise, the State argues that the evidence Mr. Peterka wishes to present is "not compelling". (AB at 73). The evidence Mr. Peterka wishes to present is compelling. Much of the evidence concerning the victim's alleged statements about

not confronting Mr. Peterka and the State's theory of premeditation is completely refuted by evidence that was available to trial counsel but he failed to obtain it. In addition to the evidence Mr. Peterka detailed in his initial brief he also would present the following evidence in support of his claims for relief:

At the guilt phase of Mr. Peterka's capital trial, trial counsel failed to investigate or present evidence to show the unreliability of Mr. Russell's statements which were admitted as hearsay. A central feature of the State's case was the deceased's state of mind, specifically, the deceased's stated intent not to confront Mr. Peterka about the three hundred dollar money order Mr. Peterka had stolen from him. This was crucial evidence that needed to be rebutted because Mr. Peterka claims the shooting occurred unintentionally during a struggle that ensued when the deceased confronted him about the stolen money order. Simply put, if there was no confrontation there was no unintentional shooting and Mr. Peterka was guilty of first degree murder. Significant evidence was available to not only undermine the State's evidence of the victim's state of mind but also to support Mr. Peterka's version of how the shooting occurred. Mr. Peterka claimed that his trial counsel's failure to present this

evidence was ineffective. For example, the State presented the testimony of Gary Johnson. Mr. Johnson was the victim's friend and filed the missing person's report. During cross examination of Mr. Johnson, trial counsel failed to elicit that when Mr. Johnson spoke to the police about the victim being missing he explained that he was concerned because the victim had been "talking to him about a check that he was waiting for [from] a relative, a $300.00 check that came up as being cashed at his bank **and [the victim] was going to question [Mr. Peterka] about it**. (R. 2359)(emphasis added).

Likewise, the State also presented the testimony of the deputy who took the missing person's report on the victim, Daniel Harkins. During Deputy Harkins cross examination, trial counsel failed to elicit that the reason he investigated the missing person's report was because the victim's friends feared for his safety because the victim had indicated that he was going to question Mr. Peterka about the stolen money order (R. 2359).

The evidence that the victim did intend to confront Mr. Peterka about the money order was valuable exculpatory evidence which directly contradicted the State's hearsay evidence and argument that there never was such a confrontation. However, counsel did not ask even one question

in this regard.

Additionally, the State elicited testimony from the bank manager of the bank where order was cashed concerning the victim's comments that he was not going to "say anything to anybody else" about the check. However, the victim discussed the matter of the stolen check with several individuals. Thus, the victim made inconsistent statements about his intentions, but the jury never learned of the inconsistencies.

Trial counsel also failed to develop the victim's serious financial problems with witnesses. At trial, Jean Purvis, Mr. Peterka and the victim's landlord, testified, but trial counsel failed to elicit the information she possessed about the victim's financial situation: Mr. Russell took Mr. Peterka's rent money and spent it on his own personal bills and was seven hundred and eleven dollars behind in rent and about to be evicted (R. 2221-2). She also knew that there were problems between the roommates because Mr. Russell failed to pay the bills. Given Mr. Peterka's claim that the shooting occurred during an argument about money and in light of the State's hearsay evidence and argument that such a confrontation never occurred, this too was valuable

exculpatory evidence.[10]

In addition to failing to challenge the inconsistent hearsay statements made by the victim, trial counsel failed to adequately investigate and prepare to challenge virtually all other aspects of the State's case.

Counsel failed to adequately investigate the medical examiner's conclusions. Dr. Edmund Kielman, who testified that he conducted the autopsy on the victim, told trial counsel during his deposition that based on the discoloration of the gunshot wound and the extensive fracturing of the skull, the wound was a contact wound. This was damaging testimony to Mr. Peterka's defense because it was inconsistent with Mr. Peterka's statement that he fired the shot from two or three feet and consistent with the State's theory that Mr. Peterka intentionally killed Mr. Russell by placing the gun against Mr. Russell's head and pulling the trigger. Counsel asked no questions about the medical examiner's qualifications in terminal ballistics. Dr. Kielman was only qualified to testify about forensic medicine and pathology (R. 1193). Had he inquired he would have learned that Dr. Kielman had no

[10]Mr. Peterka attempted to develop these allegation of ineffective assistance of counsel when he submitted a pro se Rule 3.850 motion, but the circuit court refused to accept the motion and prior postconviction counsel did not develop the claims or present evidence in support of the claims.

qualifications in terminal ballistics and that he did not conduct any tests to confirm his opinion (R. 1252).

Had trial counsel investigated the medical opinion, he would have learned that the discoloration that led to this opinion also could have been related to the decomposition process (R. 1244-5), or that the kinetic energy and commotion of the bullet alone could have exerted its force through the brain and shattered the skull even if it had been fired from a distance greater than an inch (R. 1222-3, 1228, 1253).

Given, Dr. Kielman's sketchy deposition testimony, and especially given the doctor changed other aspects of his opinion pretrial when he realized they were untrue (R. 1208, 1770-1), counsel's decision not to independently investigate the condition of the victim's wounds was unreasonable and ineffective. In fact, had he investigated, trial counsel would have learned that the medical examiner's opinion was false and the gunshot wound is consistent with Mr. Peterka's statements of how the shooting occurred.

Furthermore, trial counsel failed to take advantage of the opportunity to demonstrate that Mr. Peterka's statement of how the shooting occurred was credible. At trial, the firearms expert testified that the gun was in "good working order" and that there was "[no] condition that would lead to

[an] accidental discharge" (R. 1554-5). However, the expert did testify that the amount of pressure required to pull the trigger of the gun was up to twenty percent **below** normal (R. 1564). While this factor may not have contributed to an accidental discharge, it could have contributed to an unintentional shooting, i.e., one where Mr. Peterka jerked the trigger when he was startled by Mr. Russell lunging toward him (R. 2073, 2444). Trial counsel failed to develop and argue this exculpatory evidence.

Trial counsel failed to consult with a criminalist. Postconviction counsel has consulted with a criminalist who has found that the blood evidence from the crime scene completely refutes the State's theory of how the crime occurred and supports Mr. Peterka's version of events. If the crime had occurred the way the State believed, that the victim was lying with his head on the arm of the couch and Mr. Peterka shot him in the top of the head, there would have been blood staining on the arm of the couch.

In fact the blood staining that was found on the couch and beneath the couch support Mr. Peterka's version of how the shooting occurred. There was blow back and spattering on the back cushion of the couch. As the victim fell onto the couch he slumped over to his side and because the wound produced a

substantial amount of blood, blood pooled in the corner of the couch. The blood also seeped through that area onto the carpet.

Likewise, expert testimony would support the medical examiner's conclusion that the bullet lodged in the spinal cord and because of the directionality of the bullet, again, Mr. Peterka's version of events was consistent with the physical evidence. On the other hand, the State's theory was inconsistent with the path of the bullet. Models of the event have been made that prove that Mr. Peterka's statements about the way the shooting occurred are perfectly consistent with the physical evidence. Expert testimony regarding the crime scene substantiates that the shooting was not an execution.

Following the trial, a juror wrote to Assistant State Attorney Elmore and asked:

> If there was so much blood as claimed [by Mr. Peterka], why wasn't there any on the walls, or other sections of the couch, or on the way to the kitchen? The most damning of all was the position of the bullet wound to the head. We jurors tried every way we could to figure out how that kind of a wound could have occurred in a scuffle. If it had, then it would be more likely that the bullet would have exited at an angle instead of going straight down into the chest as was suspected.

Clearly, the jury was concerned with the physical evidence and crime scene. Had trial counsel consulted with a criminalist he would have learned that the crime scene and location of the

bullet were entirely consistent with Mr. Peterka's statement of how the shooting occurred and he could have demonstrated the way the crime occurred to the jury. The jury needed the assistance of an expert to understand the physical evidence in the case.

As to the guilt phase, perhaps most egregiously, trial counsel failed to interview Cindy Rush about her continuing contact with Mr. Peterka while he was in Florida. Trial counsel never interviewed Ms. Rush even though she was Mr. Peterka's long time girlfriend when he fled Nebraska and came to Florida.[11] Mr. Peterka remained in contact with Ms. Rush while he was in Florida. In fact, shortly before the shooting, Mr. Peterka told Ms. Rush that he was going to return to Nebraska and turn himself into the authorities to begin serving his two year sentence. Had trial counsel spoken to Ms. Rush she would have provided the most powerful

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[11]At a minimum trial counsel should have interviewed Ms. Rush as to penalty phase information. Ms. Rush was a penalty phase witness on behalf of Mr. Peterka, but only because the State brought her to the trial and she stayed to be with Mr. Peterka's family after she had testified. Shortly, before presenting her limited testimony, trial counsel approached her and asked her if she would testify on Mr. Peterka's behalf. There is no excuse for failing to contact Ms. Rush pretrial about penalty phase issues since counsel was well aware of her relationship to Mr. Peterka. Had trial counsel spoken to her, and explained the State's theory, she would have told him that Mr. Peterka intended to return to Nebraska and turn himself into law enforcement.

exculpatory evidence in the case.[12] Had Mr. Peterka planned to turn himself in he would not have shot Mr. Russell in order to assume his identity and avoid detection as the State argued to the jury.

Mr. Peterka also discussed his relationship with Mr. Russell when he spoke to Ms. Rush. Ms. Rush knew that Mr. Russell had taken Mr. Peterka's rent money and used it for his own personal expenses. Mr. Peterka also explained that Mr. Russell was desperate for money. Ms. Rush was a crucial defense witness, but she was never interviewed to determine if she had any helpful information.

Also, trial counsel failed to adequately investigate and present the information he received through the deposition of the victim's cousin, Deborah Trently. During her deposition, Mrs. Trently told trial counsel that she and her husband had been giving the victim his rent money because he had told them that Mr. Peterka had been using the rent money to pay his share instead of the victim's. The value of the information was that it would have undermined the hearsay testimony introduced at trial that the victim would not have confronted

[12]This evidence also appeared in Dr. Larson's report of the mental health evaluation he conducted with Mr. Peterka. Mr. Peterka offered this evidence to his counsel, but they failed to follow up on the information or speak to Ms. Rush.

Mr. Peterka about the money and it would have corroborated Mr. Peterka's statement that the victim was desperate for money and allowed Mr. Peterka to use his identification because he paid him. Most importantly, it would have corroborated Mr. Peterka's claim that Mr. Russell's poor financial situation caused the confrontation that led to the shooting. Trial counsel failed to develop and present this available evidence.

Furthermore, trial counsel failed to develop evidence that Mr. Peterka was aware that he would be arrested after he provided law enforcement with his name and date of birth. Frances Thompson informed law enforcement that Mr. Peterka "should have left" after the deputy questioned him about Mr. Russell's being missing (R. 2363-5, 2368). Had counsel interviewed Ms. Thompson he would have learned that Mr. Peterka not only sent her away from the apartment because he knew he would be arrested, but also she urged him to flee. Despite this, Mr. Peterka remained at the apartment expecting to be arrested. The import of Ms. Thompson's information undermined the State's theory that he committed first degree premeditated murder to avoid arrest when he remained in the apartment expecting to be arrested.

Trial counsel failed to adequately investigate the full extent of the victim's poor financial situation. Evidence,

such as the victim's loss of his car and life insurance due to his inability to make payments, his false information that he told his family members in order to gain money from them and the imminent repossession of his car and eviction because he could not meet his obligations would have been valuable evidence to corroborate Mr. Peterka's claim that he shooting occurred during an argument about money, the victim was desperate for money and also to contest the State's hearsay evidence about the victim's state of mind.

The State's failure to consult with Mr. Peterka led to the jury's hearing misleading and false testimony. For example, after the shooting, Mr. Peterka tried to stop the victim from bleeding and removed Mr. Russell's glasses. Later, Mr. Peterka washed the glasses and placed them on the window sill above the kitchen sink. Mr. Peterka's information would have explained why Mr. Russell's glasses were on the window sill and also contradicted the State's theory that the victim placed his glasses on the window sill and then fell asleep on the couch. (R. 1791-2).

Trial counsel also failed to present the jury with the reason that Mr. Peterka had possession of the victim's identification. While in the victim's car, Mr. Peterka found the wallet and removed its contents. Thus, Mr. Peterka's

possession of the identification did not prove "premeditation in this case" as the State argued to the jury (R 1786-7).

Likewise, trial counsel failed to discover that the victim's driver's license had been suspended at the time of the shooting. Such evidence was valuable to rebut the State's theory that Mr. Peterka planned to use the license to assume the victim's identity.[13]

Trial counsel also failed to investigate the towels that Mr. Peterka had used to try to assist the victim after he had been shot. Mr. Peterka had left the bloody towels outside after trying to rinse the blood from them. Had trial counsel investigated he would have learned that the towels were outside, but law enforcement failed to collect them. Even the crime scene photographs show the towels. Obviously, the value of the towels was that they corroborated Mr. Peterka's statement and refuted the State's argument that the towels "would not ever seem to have been found, despite [Mr. Peterka's] claim they were outside [the apartment] with the [couch cushions]. (Answer Brief on direct appeal p. 48-90).

Trial counsel also failed to adequately consult with

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[13]During the examination of the driver's license examiner, Mr. Peterka mentioned the fact that Mr. Russell's license was suspended to his counsel. Counsel indicated that it was "too late" for the information to be of any use.

mental health professionals. Just a week or so before trial, defense counsel retained the services of Dr. James Larson, a psychologist, to evaluate Mr. Peterka. Dr. Larson made several diagnoses that would have been helpful to Mr. Peterka at the guilt and penalty phases.[14] He informed trial counsel that Mr. Peterka was suffering from depression and "considerable emotional duress" at the time of the shooting. Dr. Larson also recommended that neuropsychological testing be conducted, but none was. In fact, Mr. Peterka's verbal and performance IQs indicate a discrepancy which is a red flag for mental impairments.

Current postconviction counsel has had Mr. Peterka evaluated by a qualified neuropsychologist who did indeed find that Mr. Peterka suffered from alcohol abuse, depression and some impairments. Because Mr. Peterka had been drinking at the time of the shooting, his history of alcohol abuse and the effects that it has over time was relevant not only to the penalty phase mental health mitigators, but also to the issue of ability to form premeditation. Dr. Larson told defense counsel: "It may be important to note that the Defendant drank several beers just prior to the incident for which he is

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[14]Dr. Larson told defense counsel that Mr. Peterka would "make a good witness." See Argument II.

charged. Although he denied that he was intoxicated at the time, his alcohol use may have been at such a level that it did impair his judgment to some degree."

Also, at the penalty phase, trial counsel could have presented compelling evidence that Mr. Peterka was a model inmate who assisted the correctional officers and other inmates. Trial counsel testified that he investigated this aspect of mitigation. He did not. Mr. Peterka's jail record in and of itself provide evidence of his contribution to other inmates and his respect for the jail personnel. Additionally, current postconviction counsel has interviewed staff of the jail and other inmates and found that Mr. Peterka thrived in the structured jail environment. Mr. Peterka assisted other inmates in reading and writing. He also taught inmates to play chess and counseled inmates when they had problems with others. All of Mr. Peterka's fellow inmates described him as being respectful to jail personnel and as "keeping his cool" and trying to be a peace keeper when altercations arose. Had trial counsel spoken to any of his fellow inmates or jail personnel, they would have realized that Mr. Peterka's behavior in jail provided powerful evidence in mitigation when the jury was deciding between death and life in prison.

Mr. Peterka is not requesting that this Court find that a

constitutional right to effective assistance of postconviction counsel exists. Rather, Mr. Peterka requests the opportunity to receive due process in his postconviction proceedings and be allowed to file an amended Rule 3.850 motion and present compelling evidence which entitles him to relief to the circuit court.

CONCLUSION

The circuit court erred in denying Mr. Peterka's Rule 3.850 motion. Mr. Peterka did not receive a full and fair evidentiary proceedings and did not receive effective assistance of counsel.

Mr. Peterka is entitled to relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by first class mail, postage prepaid, to Charmaine Millsaps, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, FL 32399-1050, on February 26, 2004.

CERTIFICATION OF TYPE SIZE AND STYLE

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_____
LINDA McDERMOTT
Florida Bar No. 0102857
141 N.E. 30th Street
Wilton Manors, Florida 33334
(850) 322-2172
Attorney for Appellant