IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC02-1765
Lower Tribunal No.: 94-9776

MICHAEL BELL,

Appellant

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

AMENDED INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of a trial Court order denying Appellant=s *pro se*, amended motion for post-conviction relief in a death penalty case. This appeal contains references to the record on appeal created for the subject post-conviction motion proceedings. They are designated by the letter AR@ followed by the applicable record volume number, followed by the applicable record page numbers. The appeal also contains references to the prior record of the original jury trial proceedings. They are designated by the letters ATR@ followed by the applicable record volume number, followed by the record page numbers.

The Defendant Michael Bell is referred to herein variously by ADefendant@ and AAppellant@ and ABell.@

The Defendant=s *pro se* post-conviction relief motion which this appeal is based on is formally titled Amended Motion to Vacate Judgment of Conviction and Sentence. (R1, p. 111 **B** R 2, p. 405) However, for ease of reading, it is referred to simply as the Asubject motion@ or the Apro se motion.@ The trial Court permitted the Defendant to represent himself and conduct his own examinations of witnesses during the evidentiary hearing on the subject motion. (R6, p. 963 through R9, p. 1753).

That hearing will be referred to simply as the Aevidentiary hearing@ in this brief. The trial Court order denying the subject motion (R4, p.

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716-753) and being appealed here is formally titled Order on Defendant=s Amended Motion for Post Conviction Relief but is hereafter also referred to as simply the Adenial Order.@

The undersigned attorney is at least the third lawyer appointed by the Court to work with this Defendant on this appeal. The Defendant and his prior lawyers informed the undersigned attorney that the Defendant desires that this brief follow the order and format of Defendant=s own, *pro se* subject motion and appellate brief as closely as possible. The undersigned attorney has complied. As a result, this brief, which is quite atypical of the undersigned attorney=s work, may actually ease review and response.

STATEMENT OF THE CASE AND FACTS

The basic facts of the underlying, first-degree murder case are set forth in this Court=s Opinion in Bell v State, 699 So.2d 674 (Fla. 1997), as follows:

> On December 9, 1993, appellant Michael Bell shot to death Jimmy West and Tamecka Smith as they entered a car outside a liquor lounge in Jacksonville. Three eyewitnesses testified regarding the murders, which the trial court described in the sentencing order as follows. In June 1993, Theodore Wright killed Lamar Bell in a shoot-out which was found to be justifiable homicide committed in self-defense. Michael Bell then swore to get revenge for the murder of his brother, Lamar Bell. During the five

months following Lamar Bell's death, Michael Bell repeatedly told friends and relatives he planned to kill Wright. On December 8, 1993, Michael Bell, through a girlfriend, purchased an AK-47 assault rifle, a thirty-round magazine, and 160 bullets. The next night, Bell saw Theodore Wright's car, a yellow Plymouth. Bell left the area and shortly returned with two friends and his rifle loaded with thirty bullets. After a short search, he saw the yellow car in the parking lot of a liquor lounge. Bell did not know that Wright had sold the car to Wright's half-brother, Jimmy West, and that West had parked it and had gone into the lounge. Bell waited in the parking lot until West left the lounge with Tamecka Smith and another female. Bell picked up the loaded AK-47 and approached the car as West got into the driver's seat and Smith began to enter on the passenger's side. Bell approached the open door on the driver's side and at point-blank range fired twelve bullets into West and four into Smith. The other female ducked and escaped injury. After shooting West and Smith, Bell riddled with bullets the front of the lounge where about a dozen people were waiting to go inside. Bell then drove to his aunt's house and said to her, "Theodore got my brother and now I got his brother."

Appellant was charged with two counts of first-degree murder. At trial in March 1995, appellant pleaded not guilty by reason of self-defense, stating that he believed West had reached for a weapon just before appellant began shooting. The defense presented no evidence or witnesses. A jury found appellant guilty of the first-degree murders of Smith and West and unanimously recommended the death penalty for both murders. During the penalty phase, a lounge security guard testified for the State that he and seven or eight other people were in the line of fire and hit the ground when appellant sprayed bullets in the parking lot of the lounge. He also testified that appellant shot four or
five bullets into a house next door in which three children were residing at the time. The State introduced a copy of

> a record showing that appellant was convicted of armed robbery in 1990. Also during the penalty phase, appellant's mother testified for the defense that she and appellant had received death threats from Wright and West. She testified that appellant was in good mental health and was gainfully employed and
> that she believed he did not commit the murders. In a single sentencing order covering both homicides, the court followed the jury's unanimous recommendation and imposed death sentences, finding three aggravating circumstances [footnote 1 of Opinion omitted here] and one marginal statutory mitigating circumstance.[footnote 2 of Opinion omitted here]

Following this Opinion, the Defendant filed the subject, lengthy, *pro se* post-conviction motion which he formally titled Amended Motion to Vacate Judgment of Conviction and Sentence (Asubject motion@). R1, p. 111 to R2, p. 405. This subject motion raised approximately 38 claims, almost all of which were Aineffective assistance of counsel@ claims. Following a lengthy evidentiary hearing at which the Defendant conducted all his own witness questioning *pro se*, the trial Court entered its order denying the motion (Adenial order,@ R4, p. 716 to R5, p. 837). This appeal followed.

SUMMARY OF ARGUMENT

The Defendant suffered a great many types of ineffective assistance of counsel. In addition, the prosecution improperly failed to disclose information on shooting victim Jimmy West=s prior criminal record as well as information about the Defendant himself being targeted in prior shooting incidents. The combined effect of these

errors and omissions and oversights denied the Defendant effective representation and violated Defendant=s rights to a fair jury trial and due process of law. The trial Court erred in not granting the subject motion for post-conviction relief.

ARGUMENT WITH REGARD TO EACH ISSUE

Issue 1(A): Defense Counsel was ineffective in failing to object to the prosecutor=s comments that co-defendant Dale George pled guilty

Standard of review: For Aineffective assistance of counsel@ claims like this one, the appellate courts apply a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review of both the Adeficient performance@ and Aprejudice@ prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Preservation: This claim/issue was raised in the Defendant=s subject motion. R1, p. 116-119. The trial Court declined to hold an evidentiary hearing on it (R3, p. 496-498) and ultimately denied it. R4, p 718

During its guilt-phase opening argument, the prosecution described Dale George as the Defendant=s getaway driver who pled guilty to being Defendant=s accessory after the fact in the subject murders. TR9, p. 272-273. There was no

objection by defense counsel. The prosecutor had Dale George admit to his guilty plea, again without objection by defense counsel, during Dale George=s guilt-phase testimony. TR10, p. 462-463. Finally, the prosecutor reminded the jurors of Dale George=s guilty plea during the State=s guilt-phase closing argument. (TR10, p. 585-586), again without objection. The prosecutor mentioned Dale George=s guilty plea a total of seven times. TR 8, p. 233; TR9, p. 272, TR 10, p. 462, 463, 464, 585, 586.

In Moore v. State, 186 So.2d 56 (Fla. 3d DCA 1966) the court held that it is improper for the State to disclose to the jury that a co-defendant has already pled guilty. The rationale is that such co-defendant guilty pleas admit guilt and imply that the co-defendant on trial is also guilty. When defense counsel sat silently as Dale George=s guilty plea was revealed to the jury, defense counsel unwittingly forfeited the benefit of a separate trial and separate determination of guilt for this Defendant. Thomas v. State, 202 So.2d 883 (Fla. 3d DCA 1967), Parker v. State, 458 So.2d 750 (Fla. 1984). The prosecutor=s unobjected-to comments about Dale George pleading guilty to being an accessory after the fact to the subject shooting were especially damaging here because they imply that Defendant Bell did indeed commit the actual murders.

Violation of constitutional rights: Trial counsel=s deficient performance in this area denied the Defendant due process of law secured by the Fifth and Fourteenth

Amendments to the United States Constitution and by Article 1, Section 9 of the Florida Constitution. It also denied the Defendant a fair jury trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article 1, Sections 16 and 22 of the Florida Constitution. It also deprived Defendant of the right to effective assistance of counsel which is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article 1, Section 16 of the Florida Constitution and as further clarified by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). The Defendant=s judgment and sentence should be vacated on this basis, and the case remanded to the trial Court for a new trial.

Issue 1 (C): Defense counsel was ineffective in questioning mitigation witness Margo Bell, the Defendant=s mother, about Defendant=s prior prison sentence for robbery

Standard of Review: This is another Aineffective assistance of counsel@ claim. The Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005) and Strickland v. Washington, 466 U.S. 668 (1984) standard of review referred to in the argument for Issue 1(A) above also applies to this issue.

Preservation: This issue/claim was raised in the subject motion. R1, p. 120-121. The trial Court granted an evidentiary hearing on it (R3, p. 496-498) but ultimately denied it. R4, p. 718-719.

Defense counsel called Defendant=s mother, Ms. Margo Bell, to testify as a

mitigation witness during the penalty phase of Defendant=s trial. TR11, p. 663. Defense counsel had her testify about how victim Jimmy West and his half-brother, Theodore Wright, threatened and terrorized Defendant=s family prior to the subject shooting incident. TR11, p. 665-668. However, before questioning her on this subject, defense counsel asked Ms. Bell about Defendant=s prior prison sentence for robbery as follows:

> Q: You were aware that your son had gone to prison for a period of time because of a robbery?
>
> A: Correct.
>
> Q: Were you aware that there was a feud that had developed of some type between your son and Theodore West sometime even before he had gone to the jail on that Robbery Charge?

(TR 11, p. 663-664)

The jurors had already seen a copy of Defendant=s prior conviction for armed robbery before the Defendant=s mother took the stand to testify. (R11, p. 661). Nevertheless, defense counsel began his examination by having her acknowledge her son=s prior robbery conviction to the jury. This cannot be considered a rational trial tactic. The effect of impermissible colloquy regarding a defendant=s prior record can be of such magnitude as to require a new sentencing hearing. Geralds v. State, 601 So.2d 1157 (Fla. 1992).

At the evidentiary hearing for the subject motion, defendant=s trial counsel opined that the credibility of the defense was actually enhanced by forthrightly

revealing Defendant=s prior crime on direct examination, rather than having it exposed by the prosecutor on cross-examination. R8, p. 1497. However, since direct examination of Ms. Bell was limited to threats that Jimmy West and Theodore Wright made to the Defendant=s family, any questions about the Defendant=s criminal past would have impermissibly exceeded the scope of direct examination. Fla. Stat. 90.612 (2). Furthermore, because a copy of the Defendant=s prior robbery conviction had already been published to the jury, questioning witnesses about the Defendant=s past criminal conviction would have been impermissible, Acumulative@ evidence. Fla. Stat. 90.403.

Defendant=s trial counsel was ineffective in having Ms. Bell call the jury=s attention to her son=s prior robbery conviction a second time. This is yet another example of how the trial court erred in not finding ineffective assistance of counsel. This is yet another reason why the trial Court should be reversed, why Defendant=s judgment and sentence should be vacated, and why the case should be remanded for at least a new penalty phase trial. This trial counsel deficiency violated all of the Defendant=s constitutional rights which are identified at the end of the argument for Issue 1(A) above. That Aconstitutional rights@ authority is incorporated by this reference in support of this argument as well.

Issue 1 (D): Defendant received ineffective assistance of counsel when his trial

lawyer advised him against testifying at his own trial

Standard of review: This is another Aineffective assistance of counsel@ claim. The Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005) and Strickland v. Washington, 466 U.S. 668 (1984) standard of review referred to in the argument for Issue 1(A) above also applies to this issue.

Preservation: In his subject motion, the Defendant alleged that his trial counsel was ineffective in advising Defendant not to testify at his own trial. R1, p. 212-124. The trial court granted an evidentiary hearing on this claim (R3, p. 496-488) , but ultimately denied it. R4, p. 720-721.

In its denial order, the trial Court indicated that it declined to find ineffectiveness of trial counsel on this ground because Bamong other reasonsB ADefendant failed to satisfy his burden of proof by presenting any evidence of the instant claim at the hearing.@ R4, p. 720. The Defendant did not testify at his jury trial and, admittedly, he did not testify at the evidentiary hearing for his subject motion and hence did not show the trial Court what he could have said in his own defense if he had opted to testify at his own jury trial. However, Rule 3.850 and Rule 3.851, Fla. R. Crim. P. both indicate that the trial Court is to consider the *entire* trial Court record in adjudicating post-conviction motions. *See, e.g.* Rule 3.850 (d) and Rule 3.851 (f)(5)(D).

The Defendant=s trial counsel testified at the evidentiary hearing. He remembered telling the Defendant that his own testimony wouldn=t have a beneficial effect and that the jury would probably not react favorably to his testimony. R8, p. 1598.

The record of Defendant=s jury trial proceedings indicate that the Defendant=s own criminal record of 3 prior felonies and 5 prior misdemeanors involving dishonesty (TR10, p. 525-527) would not have hurt him much. This because all but one of the eyewitnesses to the shooting had criminal convictions themselves: Eyewitness Lora Hampton had 1 prior felony conviction (R9, p. 282); Eyewitness Henry Edwards was serving a 4-year prison sentence for dealing in stolen property (R9, p. 305); Eyewitness Vanness ANed@ Pryor had a felony conviction as well as pending misdemeanor charges (R9, p. 433-450 and R10, p. 434-437); Eyewitness and co-suspect Dale George had three prior felonies (R 10 p. 462); Mark Richardson (R9, p. 322-345) was the only eyewitness who did not admit of any past convictions of his own.

Defendant=s trial counsel argued a Aself defense@ theory of defense to the jury during closing argument. R10, p. 601. Given the Arogue=s gallery@ of prosecution witnesses who testified against the Defendant , it was nonsensical for defense counsel to dissuade the Defendant from taking the stand and telling the jurors of both the past

threats and the imminent harm that he himself perceived.

A defendant=s allegations that his lawyer improperly advised him against testifying does state a claim for ineffective assistance of counsel. Williams v. State, 601 So.2d 596 (Fla. 1st DCA 1992). Similarly, an attorney who erroneously advises a defendant that the details of his past convictions will become known if defendant testifies provides ineffective assistance of counsel. Jennings v. State, 685 So.2d 879 (Fla. 2d DCA 1996). In the present case, the trial court erred in not finding ineffective assistance of counsel in connection with trial counsel=s advising the Defendant not to testify.

Trial counsel=s deficiency violated all of the Defendant=s constitutional rights which are identified at the end of the argument for Issue 1(A) above. That Aconstitutional rights@ authority is incorporated by this reference in support of this argument as well. The trial Court erred in not granting relief on this basis.

Issue 1 (F): The trial Court erred in not finding ineffective assistance of counsel in connection with the prosecutor=s comment to the jurors that the State does not seek the death penalty in every first degree murder case

Standard of Review: This is another Aineffective assistance of counsel@ claim. The Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005) and Strickland v. Washington, 466 U.S. 668 (1984) standard of review referred to in the argument for Issue 1(A) above also applies to this issue.

Preservation: This issue was raised in Defendant=s subject motion. R1, p. 126-128. The trial Court did not grant an evidentiary hearing on this claim (R3, p. 496-498) and ultimately denied it. R4, p. 532.

In his guilt phase closing argument, the prosecutor explained to the jury, AThe law B well, let me just state this: The State doesn=t seek the death penalty on all first degree murders. It=s not always proper on the law and facts. But where there are facts surrounding a murder that demand that the death penalty be imposed, the State seeks the State seeks the death penalty.@ TR 11, p. 683.

Prosecutor comments which indicate that the State has put a case through its own evaluation process and determined it to be appropriate for pursuit of the death penalty are contrary to the sentence-recommendation function of the jury and are impermissible. Hall v. United States, 419 F.2d 582 (5th Cir. 1969), Pait v. State, 112 So.2d 380 (Fla. 1959). This Florida Supreme Court found a similar comments by this same prosecutor to be among the prejudicial factors requiring a new sentencing-phase trial in Brooks v. State, 762 So.2d 879 (Fla. 2000), a case involving the same prosecutor and the same defense trial lawyer as in the subject case. The prosecutor=s comments in the subject case and trial counsel=s failure to object or otherwise act to counter the effect of them denied the Defendant=s due process and fair jury trial rights secured by the 5th, 6th and 14th Amendments to the United States Constitution and by Article 1, Section 16 of the Florida Constitution. The trial Court erred in not finding

that Defendant suffered from ineffective assistance of counsel on this ground.

Issue 1 (H) The trial Court erred in not finding ineffective assistance of counsel in connection with the failure to adequately investigate and obtain the recorded statement of State witness Erica Williams.

Standard of review: This is another Aineffective assistance of counsel@ claim. The Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005) and Strickland v. Washington, 466 U.S. 668 (1984) standard of review referred to in the argument for Issue 1(A) above also applies to this issue.

Preservation: Defendant raised this claim/issue in his subject motion. R1, p. 129-130. The trial Court granted an evidentiary hearing on it (R4, p. 725-727) but ultimately denied it. R4, p. 725-727.

In essence, the Defendant claimed that his trial counsel was ineffective in failing to investigate Erica Williams. In particular, Defendant alleged that his trial counsel failed to acquire an audiotaped interview indicating that the State coerced Erica Williams into falsely testifying that she gave the AK-47 type gun to the Defendant rather than to his driver, Mr. Dale George. R1, p. 129-130.

It should be noted that Ms. Williams= jury trial testimony was devastating to the defense. She testified that the Defendant told her prior to the subject murders that he intended to Aeven the score@ for the killing of his brother. TR9, 402. She said she purchased an AK-47 type gun for Defendant. TR9, p. 404. She said the Defendant

later admitted to her that he had committed the subject murders and intended to Ahide out@ while the gunshot residue dissipated from his hands. TR9, p. 413.

The State identified Ms. Williams as a State witness in its own, pre-trial discovery response. TR1, p. 15. Therefore, there can be no doubt that Defendant=s trial counsel anticipated her damaging testimony.

At the evidentiary hearing, Defendant=s trial counsel admitted he had received information that an attorney named Rod Gregory possessed an audiotape of Erica Williams being threatened by police detective Bolena prior to Defendant=s jury trial. R8, p. 1512. Defendant=s trial counsel testified Bin essenceB that he had private investigator Don Marks follow up on this lead and attempt to acquire the recorded statement. Defendant=s trial attorney further explained that private investigator Don Marks reported back that there was no tape to be found. R8, p. 1512-1515. Other than this information, Defendant=s trial counsel had no recollection or notes indicating how investigator Don Marks pursued this lead or how he arrived at the conclusion that the recording did not exist. R8, p. 1512-1515. The Index to the record on appeal for the present Appeal No. SC02-1765 indicates the investigation reports of investigator Don Marks were marked and admitted into evidence as Defense exhibits 16 through 26. Defendant has informed his undersigned, Court-appointed counsel that those records, notes and reports confirmed that investigator Don Marks never followed up on this lead.

Erica Williams testified at the evidentiary hearing on the subject motion. She testified that her jury trial testimony was true and correct. She denied ever being coerced or threatened to testify as she did. R7, p. 1344.

At the evidentiary hearing, investigator Don Marks admitted he did not investigate the information that he did not investigate or follow-up on the information that the audiotape existed. R8, p. 1431. *See also* Exhibit 16, page 2 of investigator Don Marks= January 12, 1995 investigative report that was among the pieces of evidentiary hearing evidence transferred from the trial Court to the Florida Supreme Court as part of the record for this appeal. Nevertheless, trial counsel=s own, feeble follow-up to information of an audiotaped Acoerced@ statement reveals just how half-hearted trial counsel=s investigation was.

Ineffective assistance of counsel occurs when there is deficient investigation. Mancera v. State, 600 So.2d 550 (Fla. 2d DCA 1992), Prieto v. State, 573 So.2d 398 (Fla. 2d DCA 1991). Courts have repeatedly held that an attorney is not effective if he fails to investigate sources of evidence which may be helpful to the defense. Davis v. Alabama, 596 F. 2d 1214, 1217 (5th Cir. 1979), Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990). *See also* Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982) and United States v. Gray, 878 F.2d 702 (3rd Cir. 1989) regarding counsel=s independent duty to investigate and prepare. In the present case, Defendant=s trial counsel did not pursue evidence; He avoided it. Defendant received ineffective

assistance of counsel as a result of his trial counsel=s failure to conduct any meaningful investigation.

Such deficient representation violated the same constitutional protections identified in the argument for Issue 1(A) above. That constitutional argument is incorporated by this reference in support of this argument as well. The trial Court erred in failing to find ineffective assistance of counsel in connection with the investigation of State witness Erica Williams.

Issue 1 (I) The trial Court erred in finding that the evidence presented at the evidentiary hearing Awholly@ failed to support Defendant=s allegations that he received ineffective assistance of counsel in connection with trial counsel=s failure to produce Andre Mays as a defense witness

Standard of Review: In reviewing trial Courts= finding of facts in Aineffective assistance of counsel@ claims, the appellate courts defer to trial Court findings of facts which are supported by Acompetent substantial evidence.@ Gore v. State, 846 So.2d 461 (Fla. 2003).

Preservation: This issue was raised in the subject motion. R1, p. 130. The trial Court granted an evidentiary hearing on it (R3, p. 496-498) but ultimately denied it. R4, p. 727-728.

In his subject motion, the Defendant alleged that that his trial counsel was ineffective in failing to present the testimony of a fellow jail inmate named Andre Mays. Defendant alleged that Andre Mays could have testified regarding certain

inducements that the State gave Charles Jones to get him to testify falsely against the Defendant. (R1, p. 130).

At the evidentiary hearing, Andre Mays described how he observed Charles Jones return to jail from police interview with certain perquisites. R6, p. 999-1011. Nevertheless, the trial Court seemed to overlook this evidence, stating in its denial Order that the evidence presented at the evidentiary hearing *wholly* failed to support this claim. R6, p. 999-1011.

In denying post-conviction relief on this ground, the trial Court stated that it found the witnesses who refuted this claim to be more credible than Andre Mays. R4, p. 728. However, in its same denial order the trial Court added, Ain fact, the evidence presented *wholly* failed to support Defendant=s assertions.@ (emphasis Defendant=s). R4, p. 728. Admittedly, it is the province of the trial Court, as trier of fact in such post-conviction motions, to weigh the credibility of witnesses and decide how believable or unbelievable the various witnesses are. Nevertheless, the trial Court=s finding that the evidence *wholly* failed to support Defendant=s claim that the State gave inducements to State Witness Charles Jones ignores the above-described evidentiary hearing testimony of cellmate Andre Mays. It also suggests that the trial Court failed to seriously consider and adjudicate this issue.

Andre Mays testified at the evidentiary hearing that, following Charles Jones= police interviews, Charles Jones returned to his jail cell with braided hair, good food,

cigarettes, marijuana, and tales of having sexual intercourse with his wife, all courtesy of a detective who wanted the Defendant convicted. R6, p. 999-1011. Accordingly, the trial Court=s ruling that the evidence *wholly* fails to support this claim/issue is not supported by competent substantial evidence. The trial Court=s resultant ruling on this issue is not based on the evidence presented at the evidentiary hearing and hence is erroneous.

The trial Court=s failure to consider the evidence on this issue violated that same constitutional protections which are identified at the end of the argument for Issue 1(A) above and which are incorporated by this reference in support of this argument as well. The subject denial order should be reversed. *See* Stephens v. State, 748 So.2d 1028 (Fla. 1999).

Issue 1 (J): The trial Court erred in not finding that the Defendant received ineffective assistance of counsel in connection with trial counsel=s failure to investigate and present a credible defense

Standard of Review: This is another Aineffective assistance of counsel@ claim. The Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005) and Strickland v. Washington, 466 U.S. 668 (1984) standard of review referred to in the argument for Issue 1(A) above also applies to this issue.

Preservation: The Defendant raised this claim/issue in his subject *pro se* motion for post-conviction relief. R1, p. 131. The trial Court granted an evidentiary

hearing on it (R3, p. 496-498) but ultimately denied it. R4, p. 728-730.

(I) The defense of self-defense, as argued at Defendant=s jury trial

As noted by this Florida Supreme Court in its direct appeal Opinion, Defendant=s trial lawyer presented a Aself defense@ theory of defense. Bell v. State, 699 So.2d 674, (Fla. 1997) at 675 and 677. During closing argument, Defense counsel told the jurors they would receive the self-defense jury instruction. TR10, p. 601. Defense counsel also told the jurors that the defense of self-defense is available to someone who reasonably believes he is about to be shot himself, even if he is mistaken about the identity of the person he thinks is about to shoot him. TR10, p. 601. Defense counsel ended his closing argument by attempting to persuade the jurors that this was a case of self-defense, not first-degree murder. R10, p. 606.

(ii) *Partial* evidence supporting a defense of Aself-defense@ *was* presented at trial

Defendant=s trial counsel presented *some* evidence tending to support a defense of self-defense. For example, there was testimony that the Defendant lived in fear of the victim Jimmy West and his family. The Defendant=s girlfriend, Erica Williams, testified that the Defendant had Ms. Williams purchase the AK-47 type gun used in the shooting for their own self-protection. TR9, p. 403. Eyewitness Dale George acknowledged that a longtime, violent feud existed between the Defendant and victim Jimmy West=s family. TR 10, p. 468. The Defendant=s mother, Ms. Margo Bell, also testified to the existence of the feud. TR11, p. 663.

The Defendant=s aunt, Ms. Paula Goins, also mentioned the feud between victim Jimmy West=s family and that the Defendant=s family. TR 10, p. 516-517. Paula Goins also testified that victim Jimmy West and his older brother made known known their intent to kill the Defendant. TR10, p. 516-517. Paula Goins also testified that victim Jimmy West=s street name was AKiller.@ TR10, p. 510.

(iii) Additional evidence existed to support the defense of self-defense

The evidentiary hearing held for the subject motion revealed the existence of still more Aself-defense@ evidence that Defendant=s trial counsel could have found and used at Defendant=s jury trial. For example, live ammunition was found in the victim=s car. R9, p. 1572. *See also* Exhibit AS@ of evidence admitted at evidentiary hearing. There was also new evidence presented at the evidentiary hearing that victim Jimmy West and his brother shot at the Defendant and Defendant=s brother on multiple occasions. R8, p. 1525; R9, p. 1582 and p. 1574-1575; R6, p. 1038-1042 and p. 1124-1138; R7, p. 1240-1275. The Defendant=s mother, Ms. Margo Bell, described the entire family=s mental anguish caused by the subject victim=s shooting and killing of the Defendant=s own brother shortly before the subject homicides. R6, p. 1146-1149.

(iv) Trial counsel=s explanation of why he did not investigate and use other evidence supporting a defense of self-defense

The Areason@ given by defendant=s trial counsel for not fully investigating and

presenting a defense of self-defense appears in the transcripts of evidentiary hearing held for the subject motion. Incredibly, Defendant=s trial counsel claimed that he purposefully did *not* present a defense of self-defense. R8, p. 1522. Defendant=s trial counsel testified that the defense of self-defense was *not* available in this case (R9, p. 1578-1581) because it would admit of the shooting. Defendant=s trial counsel claimed that, although the Defendant admitted in confidence to doing the shooting and Anot in self-defense,@ the Defendant also chose not to present anything which admitted of the shooting. R8, p. 1552; R9, p. 1776-1581. It is hard to make any sense of this.

(v) Evidence existed which would have supported a plausible Areasonable doubt@ theory of defense

Evidence existed that Defendant=s trial counsel could have used to present a plausible, Areasonable doubt@ defense. Defense counsel could have made the jurors doubt that the State had disclosed the whole truth to them. For example, the various eyewitnesses admitted that they did not have clear views of what occurred between the victim and Defendant in the seconds before the shooting. Eyewitness Mark Richardson testified that the shooter was wearing a white mask (TR9, p. 345) whereas purported getaway driver Dale George said the ski mask was Abeige and Black@ and Apart light and part dark.@ TR10, p. 477. State witness Vanness ANed@ Pryor admitted he could not see whether the Defendant had a mask or gun. TR10, p. 455-

456.

Furthermore, all the purported eyewitnesses had severe credibility problems. The victims= surviving companion at the bar that night, Ms. Lora Hampton, was serving an 8-year, felony prison sentence. TR9, p. 282. Purported bystander witness Henry Edwards was serving a 4-year felony prison sentence for dealing in stolen property. TR9, p. 305. Bar patron Mark Richardson admitted that he was good friends with victim, Jimmie west. He was never asked whether the recognized Defendant as the shooter at the scene. TR9, p. 322-345. Purported tagalong driver Vanness ANed@ Pryor had a prior felony conviction (TR9, p. 434) and he admitted that his view of the actual shooting was blocked. TR9, p. 444. Defendant=s purported getaway driver, Dale George, was a three-time convicted felon who pled guilty to being Defendant=s accessory after the fact in the subject homicides as part of a negotiated plea agreement limiting his own sentence exposure to five years. TR9, p. 462-463. There was ample reason for the jurors to have reasonable doubts about the claims of these persons.

(vi) Evidence existed to support a plausible defense that the subject killings were justifiable homicides

As an additional or alternative defense, Defendant=s trial counsel could have used the he same Aself defense@ evidence referred to in sections (iv) and (v) above to argue that the subject homicides were justifiable homicides as the expression is defined

by Fla. Stat. 782.02 because the Defendant may have actually come to Atalk softly and carry a big stick@ and negotiate a truce but instead found himself in the position of having to stop Jimmy West from shooting him. Although this may seem preposterous at first, it seems plausible when one considers the family feud Jimmy West and the Defendant were involved in and Ms. Ericka Bracelet=s evidentiary hearing testimony about how the Defendant sought a local church minister=s help in ending the feud. R7, p. 1342-1343.

(vii) Evidence existed supporting a plausible defense that the subject homicides constituted lesser offenses of manslaughter

As an additional or alternative defense, Defendant=s trial counsel could have used the he same Aself defense@ evidence referred to in sections (iv) and (v) and (vi) above to argue that the subject homicides were lesser offense of manslaughter under Fla. Stat. Section 782.07.

(viii) Analysis

Obviously, there was evidence tending to support the State=s argument that this was a simple, premeditated, revenge killing. *See* Bell v. State, 699 So.2d 674 (Fla. 1997) However, as indicated above, there were other pieces of evidence and other theories of defense were available to the defense. By failing to make use of such other evidence and defenses, Defendant=s trial counsel gave up the opportunity to create reasonable doubt and gave up the opportunity to cause some serious juror

debate over what truly occurred on December 9, 1993.

Worse still, Defendant=s trial counsel gave inconsistent arguments that the Defendant shot in self-defense, but the real shooter was getaway driver Dale George. Trial counsel did this by telling the jurors, AYou=ve got witnesses saying the driver was doing the shooting and you=ve got somebody saying he wasn=t shooting but he admits he was the driver.@ TR10, p. 606. Such double-talk undoubtedly harmed the defense.

To render reasonable effective assistance, an attorney must conduct a reasonable investigation to choose and adequately prepare a defense. Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988), Cunningham v. Zant, 928 F.2d 1006 (10th Cir. 1991).

To render reasonable effective assistance, an attorney must present Aan intelligent and knowledgeable defense@ to the jury. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). *See also* State v. Williams, 797 So.2d 1235 (Fla. 2001) regarding how decisions over which defense to present must be reasonable under the norms of professional conduct.

In Hopson v. State, 168 So. 810 (Fla. 1936) the Court held that a new trial was required where the jury is instructed on self-defense when no evidence was presented in support of such theory.

At the very least, where no other theory of defense is available, counsel must

hold the prosecution to its heavy burden of proof beyond reasonable doubt. U.S. v. Chronic, 466 U.S. 648, 654 (1984), Osborne v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988), Nixon v. Singletary, 758 So.2d 618 (Fla. 2000). As noted by the Court in Lusk v. State, 498 So.2d 902 (Fla. 1986), trial counsel=s strategic decision to rely on a certain defense strategy must not fall outside the acceptable range of competent choices.

In a death penalty chase like this one, a plausible defense gives some explanation, some moral justification, however slight, for the offense. Put differently, a plausible defense tends to support some mitigating circumstances and tends to weaken some aggravating circumstances. On the other hand, the lack of a defense tends to support aggravating circumstances and weaken mitigation. Consequently, the lack of a plausible defense is doubly harmful in these types of cases.

The Florida Rules of Professional Conduct prohibit the assertion of defenses known to be without merit. *See* Rule 4-3.1, Fla. R. Prof. Conduct. If Defendant=s trial counsel truly believed Bas he claimedB that the Defendant did *not* shoot the victims in self-defense, then presenting the half-baked defense of self-defense in the present case was not only ineffective representation, it was unethical. There was no justification. However, there is an explanation: ineffective assistance of counsel.

Trial counsel=s failure to present a plausible defense violated the constitutional

provisions which are identified at the end of the argument for Issue 1(A) above and which are now incorporated by this reference in support of this argument as well.

Issue 1 (L): The trial Court erred in not finding that Defendant=s trial counsel provided ineffective assistance of counsel by making improper closing arguments

Standard of Review: This is another Aineffective assistance of counsel@ claim. The Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005) and Strickland v. Washington, 466 U.S. 668 (1984) standard of review referred to in the argument for Issue 1(A) above also applies to this issue.

Preservation: This issue was raised in the subject motion. R1, p. 142-150. The trial Court granted an evidentiary hearing on it (R3, p. 496-498) but ultimately denied it. R4, p. 731-732.

Defendant=s trial counsel made disparaging remarks about the Defendant and the neighborhood he lived in throughout his guilt-phase and penalty-phase closing arguments. For example, Defendant=s trial counsel began his penalty-phase closing argument:

> A . . . there are neighborhoods . . . which are no safer than the jungle. Little safer than the front lines of some war zone. In order to understand at any level the events of December 9th, 1993, it is necessary for us to descent into that world. This is the world in which Michael and his brother were born and lived . . .. It is a world that is so alienate (sic) to most of our experience that although it=s only a mile or two away it might as well be on another planet.@

TR10, p. 595.

Defendant=s trial counsel repeatedly reminded the jurors that the Defendant lived in a Adifferent world@ than they did throughout his guilt-phase closing argument . TR10, p. 596, 597, 598. Defense counsel described the subject homicides as A a scene out of some wild west sort of shoot-out.@ TR 10, p. 600. Defendant=s trial counsel differentiated Defendant=s neighborhood from the jurors= neighborhoods during his guilt-phase closing argument by telling the jurors of how different the Defendant=s Aenvironment@ is from theirs. TR 11, p. 708, 709. Defendant=s trial counsel described the subject shooting as a Atragedy@ or Atragic@ on nine separate occasions. TR 11, p. 705, 706, 709, 710.

Indeed, defense counsel=s comments during closing argument were disparaging to the point of conceding the aggravating circumstance of Fla. Stat. Section 921.141 (f)(I) of the homicide and being committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. For example, during his sentencing-phase closing argument, Defendant=s trial counsel told the jurors, ABut if you look at this, you=ll see that although there is no justification, moral or legal for the acts that were committed at Moncrief Liquors, that neither is this the kind of case that requires a death penalty as asked for by the state.@ TR11, p. 710.

All such comments of defense counsel constituted ineffective assistance of

counsel because they cast the Defendant in such a negative light they virtually guaranteed that the jury would impose the death penalty. Horton v. Zant, 941 F. 2d 1449, 1463 (11th cir. 1991). Stated differently, the comments constituted ineffective assistance of counsel because they gave the jurors no choice but to recommend death. Clark v. State, 690 So. 2d 1280 (Fla. 1997).

Defense counsel=s penalty-phase closing argument was also deficient because it lacked mention of any of Defendant=s good qualities and because it lacked a request for mercy. *See* Mathis v. Zant, 704 F. Supp 1062 (N.D. Ga . 1989) and Horton, supra. At the very least, trial counsel should have reminded jurors of Ms. Paul Goins= testimony of how Defendant actually lived in fear **B**not hatred**B** of the victim and his family. TR 10, p. 510, 516. Defense counsel have recalled the Defendant=s mother=s description of her son=s good manners, service as an alter boy, and football trophies. TR11, p. 676. For all of these reasons, Defendant was denied effective assistance of counsel with respect closing arguments. The trial court erred in failing to find ineffective assistance of counsel with regard to defense counsel=s closing argument to the jury.

Trial counsel=s failure to object to the prosecutor=s improper comments to the jurors violated the constitutional provisions which are identified at the end of the argument for Issue 1(A) above and which are now incorporated by this reference in support of this argument as well.

Issue 1(M): The Trial Court Erred in not finding that Defendant received ineffective assistance of counsel in connection with being shackled during trial

Standard of Review: This is another Aineffective assistance of counsel@ claim. The Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005) and Strickland v. Washington, 466 U.S. 668 (1984) standard of review referred to in the argument for Issue 1(A) above also applies to this issue.

Preservation: This issue was raised in Defendant=s subject motion. R1, p. 150-152. The trial Court granted an evidentiary hearing on it (R3, p. 496-498) but ultimately denied it. R4, p. 732-733.

In its Order denying relief on this ground, the trial Court acknowledged that at the evidentiary hearing on the subject motion, the Defendant=s mother, Margo Bell, testified that she came to every single hearing and trial of the Defendant and he was always shackled (Ain chain@) even though Margo Bell could no longer recall the specific dates and times of such hearings. R4, p. 732-733. That Margo Bell=s memory was good and her testimony truthful is evident in her admission that she brought non-jail clothing for him to wear during his trial. R6, p. 1156-1157. Defendant has also informed his undersigned, Court-appointed attorney that the Avideotape@ shown as Amailed to the Supreme Court of Florida@ at the end of the Index for the record on appeal for this appeal shows him in shackles and possibly jail attire. The trial court also referred to the evidentiary hearing testimony of a number

of other witnesses who testified that they did not recall whether the Defendant was shackled or not in support of its denial. R4, p. 732-733. It is noteworthy, however, that at the evidentiary hearing, Defendant=s trial counsel admitted that he did not know the law on the subject of shackling in Court. R9, p. 1601.

In other words, the only evidentiary hearing witness who recalled one way or the other regarding shackling of the Defendant was his mother, Margo Bell. Despite her testimony that she remembered that the Defendant *was* shackled, the trial Court denied relief on this ground, stating AThe Court finds that Defendant has presented no evidence to support his assertion that he was shackled during the trial. Accordingly, the Court finds that this claim is meritless.@ R4, p. 733. Hence, rather that basing its decision on the weighing of evidence and or an evaluation of the credibility of witnesses, the trial Court abrogated its fact-finding duties and stated that the Defendant Apresented *no* evidence to support his assertion that he was shackled during trial.@(emphasis Defendant=s). R4, p. 733.

The applicable criteria for the imposition of shackling of a Defendant was set out by this Honorable Court in Bello v. State, 547 So.2d 914 (Fla. 1989), requiring a showing be made by the State that the shackles were *necessary*. R 9 Pg. 1601. Though trial counsel appears to have believed Appellant belonged in shackles, it is the State=s burden to make the requisite showing that the shackles were necessary to further an essential interest. The record is silent as to any evidence showing

Appellant belonged in shackles (displaying any disorderly, violent contact by Appellant in any court proceeding or that State proved the shackles were necessary). Finally, the State has argued this claim is procedurally barred as it was not raised on direct appeal. However, again, Trial counsel never objected to the shackling in order to preserve the record for appeal which is the basis for the ineffective assistance of counsel claim.

The right to a fair trial is fundamental Drope v. Missouri, 420 U.S. 162, 172 (1975). At the very core of this right is the presumption of innocence, a basic component of a fair trial in our criminal justice system Estelle v. Williams, 425 U.S. 501 (1976). In Williams, the United States Supreme Court said that to implement the presumption of innocence, trial courts must be alert to factors that may undermine the fairness of the fact-finding process. Id. One such factor that could impair this presumption is the appearance of the Defendant in *shackles, gags or prison clothes* before a jury. Id. The Court further noted that the same would have a significant effect on the jury=s feelings regarding the Defendant, and as such, the Defendant should not be compelled to appear before a jury in such clothing Id. *See also* Illinois v. Allen, 397 U.S. 337 (1970). Finally, the observation of a jail-clothed prisoner diminishes the presumption of innocence, and further leaves the jury with first-hand evidence which could develop concern for Defendant=s future dangerousness and ability to respond to authority, which are factors that could lead a

jury to recommend death as a sentence Elledge v Dugger, 823 F.2d 1439 (11th Cir. 1987); *See also* Bello v. State, 547 So.2d 914 (Fla. 1989).

As stated above, it is well established that the practice of shackling a Defendant is an inherently prejudicial practice. Such a practice led to this Court=s requiring that a hearing on necessity precede the decision to shackle a Defendant if he timely objects and requests an inquiry into the same. Bello v. State, 547 So.2d 914 (Fla. 1989). The Court in Bello set out the requisite criteria to meet the necessity test, and in general, the prosecution must make a showing that the shackles were necessary to further an essential interest. Id.

Thus, because trial counsel did not verse himself in the appropriate law regarding shackles, he failed to make the proper objection and requisite inquiry into the necessity of the Appellant being forced to being bound by the shackles during his trial, and he rendered ineffective assistance of counsel. Accordingly, Appellant=s judgment and sentenced should be vacated, and his case remanded for new trial.

Trial counsel=s failure to prevent the Ashackled@ appearance of the Defendant at trial violated the constitutional provisions which are identified at the end of the argument for Issue 1(A) above and which are now incorporated by this reference in support of this argument as well.

Issue 1 (N): The trial Court erred in not finding ineffective assistance of counsel in connection with the mental health experts= failure to address all mental competency considerations of Rule 3.211(a), Fla. R. Crim. P. and in connection with the lack of

expert assistance with mental health mitigation issues

Standard of review: This is another Aineffective assistance of counsel@ claim. The Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005) and Strickland v. Washington, 466 U.S. 668 (1984) standard of review referred to in the argument for Issue 1(A) above also applies to this issue.

Preservation: Defendant raised these issues in his subject motion. R1, p. 152-156. The trial court granted an evidentiary hearing on them (R3, p 496-498) but ultimately denied them. R4, p. 733-736.

Prior to Defendant=s jury trial, the trial Court judge entered Orders appointing psychiatrist Ernest C. Miller and psychologist Beth Shadden to determine whether the Defendant was incompetent to proceed under the criteria of Fla. R. Crim. P. 3.211. R5, p. 823-828. Those appointment Orders specifically direct Doctors Miller and Shadden to consider *and include in their reports* analyses of the following:

1. Defendant=s appreciation of the charges;

2. Defendant=s appreciation of the range and nature of the possible penalties;

3. Defendant=s understanding of the adversary nature of the legal process;

4. Defendant=s capacity to disclose to attorney pertinent facts surround the alleged offense;

5. Defendant=s ability to relate to attorney;

6. Defendant=s ability to assist attorney in planning defense;

7. Defendant=s capacity to realistically challenge prosecution witnesses;

8. Defendant=s ability to manifest appropriate courtroom behavior;

9. Defendant=s capacity to testify relevantly;

10. Defendant=s motivation to help himself in the legal process;

11. Defendant=s capacity to cope with the stress of incarceration prior to trial

R5, p. 823-828.

Rule 3.211(a)(2), Fla. R. Crim. P. specifies that the mental health experts *shall* consider and include in their report items 1, 2, 3, 4, 9 of the above-described Order, as well as an additional item omitted from the above -described Order, namely, whether the defendant can manifest appropriate courtroom behavior. The mental competency report prepared by Drs. Miller and Shadden (R5, p. 829-831) for the subject case is nothing more that a short, shallow description of how the Defendant presented himself psychologically at the time. There is nothing indicating that Drs. Miller and Shadden considered or reported on *any* of the items required by Fla. R. Crim. P. Rule 3.211(a)(2). Nor is there any indication that they considered or reported on the additional concerns required in the trial Court=s above-described appointment order.

The Rules governing competency evaluations and reports are mandatory in nature. Rule 3.210 specifies that the trial Court *shall* order the competency evaluation where there is reasonable ground to believe the Defendant is incompetent; Rule 3.211 states that the mental health experts *shall* consider and report on each of the six enumerated items of Rule 3.211 (a)(2)(A). Jones v. State, 502 So.2d 1375 (Fla. 4th DCA 1987), appeal after remand, 540 So.2d 245 (1989), Livington v. State, 415 So.2d 872 (Fla. 2d DCA 1982), Martinez v. State, 712 So.2d 818 (Fla. 2d DCA 1998). Constitutional and statutory due process protections are violated by trying a person who is mentally incompetent or by failing to adhere to competency-determination procedures. *See, e.g.* Pate v Robinson, 383 U.S. 375 (1966) and Fla. Stat. '916.12(1). At the very least, adherence to the competency evaluation criteria set forth in Rule 3.211, Fla. R. Crim. P. and the additional concerns listed in the appointment order would have led Drs. Miller and Shadden to other, significant mental health mitigation evidence. The trial Court erred in not finding ineffective assistance of counsel connection with trial counsel=s failure to assure that the Court-appointed mental health experts addressed and reported on *all* of the enumerated mental competence considerations of Rule 3.211(a), Fla. R. Crim. P. By failing to take any action at the trial court level, these issues were not preserved for direct appeal, requiring that the matter be addressed now, as an Aineffective assistance of counsel@ post-conviction motion claim.

The trial Court also erred in not finding ineffective assistance of counsel in connection with the failure to develop and present mental-health mitigation evidence. R4, p. 734-736. The meager, inadequate report of Drs. Miller and Shadden (described above) indicates that the Defendant mentioned experiencing auditory hallucinations and occasional blurring vision. R5, p. 830. This is the kind of information that Asends up a red flag@ and alerts effective defense attorneys to the need for additional, mental health investigation and expert assistance. Nevertheless, Defendant=s trial counsel indicated at the evidentiary hearing that his work on mental health matters was limited to Drs. Millers and Shadden=s competency evaluation report. TR10, p. 645-646. Trial counsel=s failure to heed the warning signs, and investigate and present mental health mitigation testimony was, in itself, ineffective assistance of counsel. *See* Wiggins v. Smith, 539 U.S. 510 (2003) and Rompilla v. Beard, ___ U.S. ___, 125 S.Ct 2456, 162 L.Ed.2d360 (2005).

The evidentiary hearing on Defendant=s subject motion revealed the kinds of evidence available to develop and present mental health mitigation. The Defendant=s mother explained how she had obtained a psychological evaluation of the Defendant when he was a child due to behavioral difficulties. R6, p. 1146. The Defendant=s brother testified that Defendant had multiple childhood head injuries, one of them very serious. R6, p. 1125-1136 and 1147. Defendant=s mother testified that the Defendant=s father was a drug addict who physically abused her in front of the

children. She described the difficulties she experienced raising the defendant and his two brothers as a single mother. R6, p. 1148 and 1158. She described the entire family=s anguish over the shooting death of Defendant=s brother, Lamar APewee@ Bell, which occurred very shortly before the subject homicides. R6, p 1146. She testified about the difficulties she encountered raising three sons in drug-infested neighborhoods, and how the family had to move repeatedly. R6, p. 1149.

The only mitigation evidence presented at the penalty phase of Defendant=s jury trial was the testimony of Defendant=s mother. Defendant=s trial counsel did not even bother to contact her in advance regarding what kind of testimony she was able to offer. R6, p. 1139. Trial counsel=s investigator, Don Marks, testified at the evidentiary hearing that Defendant=s trial counsel did not ask him to investigate any mitigation witnesses. R8, p. 1434.

The adequacy of an attorney=s investigation is judged by a Areasonableness@ standard. Mitchell v. Kemp, 62 F.2d 886 (11th Cir. 1985). A decision against presenting mitigation evidence which is made without conducting a reasonable investigation first falls outside the permissible, wide range of reasonable professional judgment and hence satisfies the Adeficient performance of counsel@ prong of 2-part Strickland v. Washington, 467 U.S. 668 (1984) test of ineffective assistance of counsel. Mitchell, supra, and Bush v. Singletary, 988 F.2d 1082 (11th Cir. 1993).

Admittedly, psychiatrist Ernest Miller and the Defendant=s trial counsel gave

indications at the evidentiary hearing that Defendant had an antisocial personality disorder. R7, p. 1285-1286 and R9, 1607. However, given Defendant=s living conditions and history, and given the large number of convicted felons who testified against the Defendant at trial, and given the defendant=s childhood head injuries and psychological problems, it is apparent that the benefits of using and presenting lay and expert testimony to present mental health mitigation evidence clearly outweighed any possible risk. In fact, the existence of an antisocial personality disorder has been deemed a non-statutory mitigating circumstance. Robinson v. State, 761 So.2d 269 (Fla. 1999).

Making matters worse, the trial Court denied defendant=s *pro se,* post-conviction motion to appoint a mental health expert to assist the defense in the subject post-conviction proceedings. Such denial violated Defendant=s right to expert assistance, as established in Ake v. Oklahoma, 470 U.S. 68 (1985) and its progeny. Defendant also refers to and incorporates here in support of this issue all of the facts and legal authority set forth in support of Issue 11(I) below. Such denial denied Defendant the opportunity to prove how a mental health expert could have assisted the defense during the penalty phase of Defendant=s trial. R3, p. 530-539 and 567-568. The trial Court erred in failing to appoint a mental health expert to assist the Defendant in post-conviction proceedings and the trial Court erred in not finding ineffective assistance of counsel in connection with mental health mitigation evidence and mental

health expert assistance.

Trial counsel=s nonfeasance and misfeasance in these matters violated the constitutional provisions which are identified at the end of the argument for Issue 1(A) above and which are now incorporated by this reference in support of this argument as well.

Issue 1(O): The trial Court erred in not finding ineffective assistance of counsel in connection with conceding the existence of guilt and aggravating circumstances

Standard of Review: This is another Aineffective assistance of counsel@ claim. The Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005) and Strickland v. Washington, 466 U.S. 668 (1984) standard of review referred to in the argument for Issue 1(A) above also applies to this issue.

Preservation: This issue was raised in Defendant=s subject motion. R1, p. 157-163. The trial Court granted an evidentiary hearing on it (R3, p. 496-498) but ultimately denied it. R4, p. 736-737.

As noted in his *pro se* subject motion, (R1, p.157-163), during guilt-phase closing argument, the Defendant=s trial lawyer described the subject homicides as a Asenseless, jungle-like, barbaric killing@. TR 10, p. 606. Not only did this statement effectively concede Defendant=s guilt for premeditated, first degree murder, it also

effectively conceded the existence of the aggravating circumstance of the homicide being committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Fla. Stat. '921.141.

Defendant=s trial counsel made additional statements during penalty phase closing argument which conceded the existence of this aggravating circumstance. For example, he told the jury that AThe cold, deliberate, calculated, intentional killing of a human being is an unacceptable act. It should be utterly and completely unacceptable in a civilized society@(TR11, p. 705) and A You=ll see that although there is no justification, moral or legal, for the acts that were committed at Moncrief Liquors . . . It is an outrage to come here in this courtroom and ask you to sink to the levels of moral bankruptcy that were displayed out there at Moncrief Liquors.@ TR11, p. 710.

In Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983) the Court held that counsel=s act of conceding guilt where guilt is in dispute is ineffective assistance of counsel. Concessions of guilt, without the Defendant=s record consent, support a claim of ineffective assistance of counsel. Mills v. State, 714 So.2d 1198 (Fla. 4th DCA 1998). Conceding a client=s guilt in and of itself has been deemed *per se* ineffective assistance of counsel. Mills v. State, 714 So.2d 1198 (Fla. 4th DCA 1998); Nixon v. Singletary, 758 So.2d 618 (Fla. 2000). In the present case, defendant received ineffective assistance of counsel when his trial lawyer made the above-described statements which effectively conceded both guilt and the aggravating

circumstance of the homicide being committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The trial Court erred in failing to find ineffective assistance of counsel on this basis.

Trial counsel=s statements which conceded guilt and aggravating circumstances violated the constitutional provisions which are identified at the end of the argument for Issue 1(A) above and which are now incorporated by this reference in support of this argument as well.

Issue 1(Q): The trial Court erred in not ruling on Defendant=s claim that he received ineffective assistance of counsel in connection with his claim that the entire jury panel was tainted when they saw a bystander wearing a memorial T-shirt bearing the image of victim Tamicka Smith

Standard of Review: Where there have been occurrences of trial court spectators presenting ire-raising graphic displays, the question of whether the trial Court=s handling of the matter adequately protected the accused=s constitutional rights to a fair jury trial is a mixed question of fact and law which the appellate courts review *de novo*. Norris v. Risley, 918 F.2d 828 (9th Cir. 1990). Because the right to a fair jury trial is a fundamental liberty guaranteed by the 6th Amendment to the United States Constitution, the reviewing courts review the record and determine for themselves whether the display was so inherently prejudicial as to post an unacceptable threat to the right of a fair trial. Holbrook v. Flynn, 475 U.S. 560 (1986).

Preservation: The Defendant asserted this claim/issue in his subject motion. R1. P. 167-168. The trial Court declined to allow an evidentiary hearing on it (R3, p. 496-498) and ultimately neglected to rule on this issue in its subject denial order. R4, p. 716-753.

During selection of Defendant=s jury, a female spectator appeared in both in the courtroom and positioned in the courthouse hall so that all of the prospective jurors would have a view of her memorial T-shirt. TR8, p. 97-102. That memorial T-shirt bore a photo of the female victim that filled up almost the entire front of the T-shirt, and bore the inscription, Ain memory of our beloved Tamicka Smith@ as well as her birth and death dates. TR8, p. 99. Defendant=s trial counsel orally moved the Court to strike the entire jury pane. TR8, p. 99. The trial Judge announced that he would defer ruling on the motion until after he brought the prospective jurors back and questioned them about it. TR8, p. 101.

When the prospective jurors returned to the courtroom, the trial Court Judge asked if any of them had seen either the memorial T-shirt or another person holding a framed picture of the female victim. Seven prospective jurors confirmed that they *had* indeed seen such. TR8, p. 109. The trial Court Judge then asked if this would adversely affect any juror=s ability to be impartial in this case. No one responded. TR8, p. 109-110. After this, there was no further action or comment or motion or objection of any type whatsoever by Court or counsel, regarding these graphic,

emotion-evoking displays.

Proceeding with trial under circumstances which unacceptably jeopardize the accused=s chances of receiving a fair jury trial in inherently prejudicial. Lozano v. State, 584 So.2d 19 (Fla. 3d DCA 1991). Displays of emotion which draw attention to the victim or victim=s survivors require a new trial where the risk of not receiving a fair jury trial are profound. Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991). In the present case, defense counsel was ineffective in failing to renew his motion to strike the entire jury panel after the trial Court Judge=s follow-up questions. As a result, Defendant was denied his rights to effective assistance of counsel as well as his rights to due process of law and to a fair jury trial as secured by the 6th and 14th Amendments to the U.S. Constitution and by Article 1, Sections 9, 16 and 22 of the Florida Constitution. Moreover, the trial Court failed to enter any kind of ruling whatsoever on this claim/issue, effectively denying it through neglect. Trial courts cannot deny post-conviction motion claims (like this one) that are not conclusively refuted by the record. Mann v. State, 770 So.2d 1158 (Fla. 2000). This reviewing Court is urged to order a new trial based on the graphic display of the victim=s image by the spectators present during jury selection. In the alternative, the case should be remanded to the trial Court with instructions to conduct and evidentiary hearing and enter a ruling on this issue.

Issue 2: The trial Court erred in not finding ineffective assistance of counsel in

connection with trial counsel=s failure to object to the prosecutor=s improper remarks to the jurors.

Standard of Review: This is another Aineffective assistance of counsel@ claim in which the Strickland standard of review described above applies. Furthermore, in determining whether the prosecutor=s improper remarks to the jury are prejudicial, the court engages in a 2-part inquiry. The first question is whether the prosecutor=s comments were calculated to inflame the jury=s emotions and effect their sentencing recommendation. The second question is whether there is a reasonable possibility that the comments affected the verdict. Watts v. State, 593 So.2d 198 (Fla. 1992); Rhodes v. State, 547 So.2d 1201 Fla. 1989)

Preservation: This issue was raised in the subject motion. R1, p. 169-193. The court granted an evidentiary hearing on it (R3, p. 496-498) but ultimately denied it. R4, p. 740-742.

(i) General Inflammatory Comments

The prosecutor made multiple improper and inflammatory comments to the jurors during guilt-phase closing argument. These included telling the jurors that A . . .the blood of Tamecka Smith and the blood of Jimmy West that the defendant spilled in the parking lot, that cold pavement of that Moncrief Liquors parking lot, their blood cries out for justice.@ (TR10, p. 593) and three separate instances of telling the jurors that the Defendant lived by the Alaw of the jungle.@ TR 10, p. 584, 591, 592.

Indeed, the prosecutor engaged in a *tour de force* of improper and inflammatory comments during penalty-phase closing arguments. The jurors were told that victim Jimmy West Awas in the prime of his life@ whereas victim Tamecka Smith Awas an 18-year-old girl just starting her life@ (TR11, p. 681). The jurors were told that A . . .this defendant . . . was 23 years old at the time of these murders . . . . seven years of more living . . . seven years older than he let Tamecka Smith live when he executed her.@ TR 11, p. 699. The jurors were also told that AJimmy West and Tamecka Smith can no longer experience the love of their families, the companionship of their friends, the joys of life@ even though AIt was their God-given right to live, to experience life=s fullness.@ TR11, p. 682. The jurors were told twice again that the Defendant lived by the Alaw of the jungle.@ TR11, p. 682, 690. The State further argued, AIf ever there was a murder that was committed in a cold and calculated manner, its these two, they were executions. They were both executions@ (TR11, p. 693) and AThe evidence in this case shows that these killings, these executions, were the product of a cold, calculated killing machine.@ TR 11, p. 697-698.

Failing to object to emotional appeals to jurors emotions states a valid claim for post-conviction relief. Rachael v. State, 714 So.2d 192 (Fla. 2d DCA 2001). More importantly, as pointed out by the Court in Brooks v. State, 762 So.2d 879 (Fla. 2000), which is a case involving the same prosecutor and the same defense trial

lawyer as in the subject case, a combination of objected-to and unopposed appeals to jurors emotions cumulatively can deprive a capital defendant of a fair penalty phase. Where, as here, the prosecutor=s improper remarks are so inflammatory that they might have influenced the jury to reach a more severe verdict than otherwise, the defendant=s right to a fair jury trial has been compromised enough to require a new trial. Walls v. State, SC03-633 (Fla. 2006).

(ii) Comment that State Pre-Determined Case is Appropriate for Death Penalty

They jurors were also told by the prosecutor that AThe State doesn=t seek the death penalty on all first degree murders, it=s not always proper on the law and facts. But where there are facts surround a murder that demand that the death penalty be imposed, the State seeks the death penalty. In both of these murders, both those facts exist and the State in this case is seeking a death penalty . . .@ TR11, p. 683-684.

A prosecutor=s comment to the jury regarding how infrequently the States seeks the death penalty is improper. Davis v. Singletary, 853 F. Supp. 1492 (M.D. Fla. 1994) aff=d 119 F.3d 1471, Reh. Den. 130 F.3d 446. Similarly, comments by the prosecutor indicating that it is the composite judgment of the prosecuting attorney=s staff that the death penalty is warranted is also impermissible. Pait v. State, 112 So.2d 380 (Fla. 1959). This is because, as noted by the Florida First District Court of Appeal in Pacifico v. State, 42 So.2d 11578 (Fla. 1st DCA 1994), jurors attach

considerable significance to the prosecution=s expressions of its own beliefs about any matter in issue. Indeed, any prosecutor statement which suggests that the State has screened a case and determined it to be appropriate for the prosecution is improper. For example, in McGuire v. State, 411 So.2d 939 (Fla. 4th DCA 1982), the Court condemned a prosecutor=s statement that AIt is not my job to prosecute innocent people.@

(iii) ASame Mercy@ Argument

The prosecutor said that AHe (the Defendant) had no regard for anyone else=s life. He showed them absolutely no mercy, no concern. And now in this sentencing hearing he wants you to care for him. He wants you to look favorably upon him.@ TR11, p. 691. The prosecutor continued, AAll during this trial this defendant=s rights have been honored, he has honored none of the rights of Jimmy West and Tamecka Smith, he murdered their rights he trampled on their rights December 9th of 1993. Did he charge them with a crime? Did he impanel a Grand Jury and present evidence to them to charge Tamecka or Jimmy with a crime? Did he give them a trial? Did he gather a jury to decide a sentence recommendation? No.@ TR11, p. 695-696. The prosecutor=s *grand finale* was, AI ask you to follow the law and I leave you with one thought, if any of you are tempted to show this defendant mercy, I ask you to show him the same mercy that he showed Jimmy West, show him the same mercy that he showed Tamecka Smith and that was none. Thank you.@ TR11,

p. 703.

In Thomas v. State, 748 So.2d 970 (Fla. 1999) the court held that a jury argument asking the jury to show the defendant the same mercy that the defendant showed the victim is a clear example of prosecutorial misconduct which will not be tolerated by the courts. In the more recent case of Reed v. State, 875 So.2d 415 (Fla. 2004) this Florida Supreme Court stated, AThis Court clearly disapproves this type of argument. *See*, *e.g.* Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992); Thomas v. State, 748 So.2d 970, 985 n. 10 (Fla. 1999) >asking a jury to show as much mercy to a defendant as he showed the victim is a clear example of improper prosecutorial misconduct, which constitutes error and will not be tolerated.= @

The jurors were told by the prosecutor that a life recommendation carries with it the chance of parole in 25 years, but that the law might change in the future. TR11, p. 701. Although the State will likely argue that the Defendant did not raise or argue this in the subject post-conviction motion or proceedings, this reviewing Court has deemed arguments instilling fear that a defendant will serve less time or get out on parole to be improper. Card v. State, 803 So.2d 613 (Fla. 2001).

(iv) Constitutional Violations

All of the above-described appeals to juror emotions, as well as trial counsel=s failure to oppose them, denied Defendant=s rights to a fair jury trial and effective representation guaranteed by the 6th and 14th Amendments to the U.S. Constitution

and by Article 1, Sections 16 and 22 of the Florida constitution. They also denied the Defendant due process of law as guaranteed by the 5th and 14th Amendments to the U.S. Constitution and by Article 1, Section 9 of the Florida Constitution. Defendant also refers to and incorporates in support of this Issue all of the argument and authority Defendant set forth in related Issue 1(L) above. The trial Court erred in failing to find ineffective representation and in failing to grant relief.

Issue 4: The trial court erred in not finding ineffective assistance of counsel for failing to object and request a curative jury instruction for the State=s incorrect statement of the advisory sentence procedure

Standard of Review: This is another Aineffective assistance of counsel@ claim. The Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005) and Strickland v. Washington, 466 U.S. 668 (1984) standard of review referred to in the argument for Issue 1(A) above also applies to this issue.

Preservation: This issue was raised in the subject motion. R1, p. 195-210. The trial Court did not grant an evidentiary hearing on it (R3, p. 496-498) and ultimately denied it. R4, p. 742-743.

At first glance, the handwritten title and text for this issue/claim in the *pro se* subject motion seems to allege that the *trial court* erred in giving a sentencing-phase jury instruction which denied the option of recommending life notwithstanding a finding that the aggravating circumstances outweigh mitigating circumstances. R1, p.

195-196. This is confusing. Actually, the jury trial record indicates that the trial Court correctly instructed the jurors *not* to recommend death and *not* to engage in the mitigation-versus-aggravation Aweighing@ process if they first concluded that the aggravating circumstances in and of themselves did *not* justify death. TR1, p. 86; TR11, p. 714-715.

Upon a further reading of the subject motion, it becomes apparent that the Defendant is actually complaining Bin a very awkward languageB that his trial counsel failed object or take other corrective action in response the following incorrect description of the weighing process given by the State in its closing argument:

> During the penalty phase process, the prosecutor (Mr. Bathe) informed the jury: AYou are first to determine if there are aggravating factors that have been proven that justify a death recommendation, a death sentence. Then you are to determine if there are mitigating circumstances which outweigh, outweigh the aggravating circumstances. If sufficient aggravating circumstances had been proved beyond a reasonable doubt you must recommend a death penalty unless the mitigating circumstances outweigh those aggravating circumstances.@ [Reference to TR 11, p. 685]
>
> (R1, p. 198)

In other words, Defendant complains that this State, penalty phase closing argument directs the jurors to jump directly from finding aggravating circumstances to weighing mitigation-versus-aggravation, thereby skipping the interim step of determining whether the aggravating circumstances alone are of sufficient magnitude

to justify death. The Defendant further endeavors to allege, as best as he can, that the trial Court=s subsequent reading of the standard penalty phase jury instruction did nothing to correct this misinformation. R1, p. 198.

The State indicated that it understood the Defendant to be alleging ineffective assistance of counsel in this claim. *See,* State=s post-evidentiary hearing written closing argument, R3, p. 588 and 596. The trial Court also indicated that it viewed this issue/claim as alleging A . . . that counsel rendered ineffective assistance by failing to object to this instruction.@ R4, p. 742. Insomuch as the State and the trial Court viewed this claim as alleging ineffective assistance of trial counsel for failing to object, the trial Court=s finding that AThis claim is procedurally barred in that it could and should have been raised on direct appeal@ (R4, p. 742) is clearly erroneous.

Actually, because trial counsel failed to object to the incorrect statement of law to the jurors, an appellate Court would likely hold that the issue was not preserved for appeal.

In other words, this issue *was* properly raised in the subject post-conviction motion. The trial Court erred in holding that this issue is procedurally barred. The trial Court erred in failing to adjudicate this issue on the merits.

Trial counsel=s failure to object to incorrect or improper statements by the prosecutor can warrant post-conviction relief ineffective assistance of counsel where such improper statements are prejudicial to the Defendant. Cummings v. State, 412

So.2d 436 (Fla. 4th DCA 1982), Mann v. State, 482 So.2d 1360 (Fla. 1986). Here, the prosecutor=s misstatement of the advisory sentence procedure denied jurors the right to exercise discretion in favor of recommending a life sentence, even where aggravating circumstances have been shown to exist. Zant v. Stephens, 462 U.S. 862 (1983), Peek v. Kemp, 784 F.2d 1479 (11th Cir. 1986). A jury instruction which create a presumption that death is the correct sentence once aggravating circumstances are found violates the individualized sentencing required in death penalty cases. Jackson v. Dugger, 837 F. 2d 1467 (11th Cir. 1988), Summer v. Shuman, 483 U.S. 66 (1987). Where, as here, the unremedied jury instruction taints the jury=s sentence recommendation, the Court must vacate the death sentence and remand for a new sentencing hearing before a properly instructed jury. Thompson v. Dugger, 515 So.2d 173 (Fla. 1987), Downs v. Dugger, 514 So.2d 1069 (Fla. 1987). The trial court erred in failing to find ineffectiveness on this ground in the subject case.

Trial counsel=s failure to object and request a curative jury instruction violated the constitutional provisions which are identified at the end of the argument for Issue 1(A) above and which are now incorporated by this reference in support of this argument as well.

Issue 6: The trial Court erred in not finding ineffective assistance of counsel when trial counsel failed to object to comments diminishing the jury=s sentencing responsibility and discretion, in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) and its progeny

Standard of Review: This is another Aineffective assistance of counsel@ claim. The Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005) and Strickland v. Washington, 466 U.S. 668 (1984) standard of review referred to in the argument for Issue 1(A) above also applies to this issue.

Preservation: This issue was raised in the subject motion. R2, p. 210-219. The trial Court denied an evidentiary hearing on it (R3, p. 496-498) and ultimately declined to grant relief or find ineffective assistance of counsel in connection with it. R4, p. 743.

During Defendant=s jury trial, the trial Court judge made several statements to the jurors which diminished their sense of their sentencing responsibility, all without objection by trial counsel and all in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). Such unopposed, improper comments included:

> Now, the sentence is the function of the Judge of this court and not the function of the jury, however, because a guilty verdict could lead to a sentence of death, your qualifications to serve as jurors in this case depends upon your attitude toward rendering a verdict that possibly could result in the death sentence.
>
> (prior to voir dire questioning, TR8, p. 70)
>
> You have previously found the defendant guilty of two counts of murder in the first degree. The punishment for these crimes is either death or life imprisonment without the possibility of parole for 25 years. The final decision as to what punishment shall be imposed rests solely with the Judge of this court, however, the law requires that you, the

> jury, render to the curt advisory sentences as to what punishment you think should be imposed upon the defendant.
>
> (prior to presentation of sentencing phase evidence, TR 10, p. 647)
>
> . . . the final decision as to what punishment shall be imposed rests solely with the Judge of this court, however, the law requires that you, the jury, render to the court advisory sentences as to what punishment you think should be imposed upon the defendant.
>
> * * *
>
> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of this court.
>
> (prior to sentencing deliberation, TR11, p. 712-713)

During Defendant=s jury trial, the prosecutor made several statements to the jurors which diminished the jurors= sentencing responsibility all without objection by trial counsel and all in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). Such unopposed, improper comments included:

> We=re here today, you are here today to consider what punishment to recommend to Judge Olliff, that the defendant should get for executing Jimmy West and Tamecka Smith. The final decision is not made by you but by Judge Olliff.
>
> (prior to sentencing deliberation, TR11, p. 683)

> If you weigh out all of the aggravating circumstances, and compare them to the absence of these mitigating circumstances, the only recommendation you can come to if you follow the law is a recommendation of death.
>
> * * *
>
> . . . . because if you weigh out all of the aggravating and mitigating circumstances, weigh out all the evidence, if you apply the law that the Judge will explain to you, you will see that the aggravating circumstances clearly outweigh the mitigating circumstances the mitigating circumstances hasn=t even been established. And under the law and under the evidence death is the only proper recommendation for you all to make to Judge Olliff for him to decide what the final sentence will be.
>
> (prior to sentencing deliberation,
> TR11, p. 702-703)

The case of Caldwell vs. Mississippi, 472 U.S. 320 (1985), invokes the most essential and basic eighth amendment requirements of a death sentence - that such a sentence be individualized (i.e. based on the character of the offender and circumstances of the offense), and that such a sentence be reliable. As noted by the United States Supreme Court in Caldwell :

> It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been lead to believe that the responsibility for determining the appropriateness of the Defendant=s death rests elsewhere. This Court has repeatedly said that under the Eight Amendment Athe qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.@ California v. Ramos, 463 U.S. 992, at 998-999, 103 S.Ct. 3446 at 3451. Accordingly, many of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing

process should facilitate the responsible and reliable exercise of sentencing discretion.

This Caldwell prohibition against statements diminishing the jury=s sense of its sentencing responsibility which was enunciated in Caldwell applies with equal strength to Florida=s capital sentencing procedure. Dugger v. Adams, 109 S.Ct. 1211 (l989); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988 (en banc), cert. denied, 109 S.Ct. 1353 (1989); Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988); Garcia v. State, 492 So.2d 360 (Fla. l986).

The above-identified comments of Court and counsel in the present case were even more egregious and reached a higher level of impropriety because they indicated to the jurors that they had no choice but to recommend death if they felt the aggravating circumstances outweighed the mitigating circumstances. This Florida Supreme Court has repeatedly stressed the impropriety of such comments to jurors. Franqui v. State, 804 So.2d 1185 (Fla. 2001), Henyard v. State, 689 So. 2d 239 (Fla. 1996), *see also* Brooks v. State, 762 So.2d 879, 902 (Fla. 2000), a case involving the same prosecutor and the same defense trial attorney as the subject case. The trial Court erred in failing to find ineffective assistance of counsel for not opposing such comments and in not granting relief on this basis.

Trial counsel=s failure to take action with respect to Court and counsel comments diminishing the jurors= sense of their sentencing responsibility violated the

constitutional provisions which are identified at the end of the argument for Issue 1(A) above and which are now incorporated by this reference in support of this argument as well.

Issue 7: The trial Court erred in not finding ineffective representation in connection with trial counsel=s failure to object to the prosecutor=s admitted peremptory strike of a prospective juror who had conscientious scruples against the death penalty

Standard of review: This is another Aineffective assistance of counsel@ claim. The Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005) and Strickland v. Washington, 466 U.S. 668 (1984) standard of review referred to in the argument for Issue 1(A) above also applies to this issue.

Preservation: This issue was raised in the subject motion. R2, p. 219-222. The trial Court did not grant an evidentiary hearing on it (R3, p. 496-498) and ultimately denied it. R4, p. 743-744.

During Defendant=s jury selection, prospective juror Charles Gardenshire testified that his own father had been murdered in 1976 and that the murderer received a life sentence and that his father=s murder got him to thinking and he became not as strongly in favor of the death penalty as before, although Ain a sense@ the death penalty still has a place in the criminal justice system. TR8, p. 140-141.

After lengthy voir dire, and following completion of all Afor cause@ challenges of prospective jurors (TR8, p. 228-229) the prosecutor peremptorily struck Charles Gardenshire (TR8, p. 229-230), purportedly because of his father=s murder and because he subsequently Ahad a change in the death penalty views.@ TR8, p. 230-231. Prospective juror Charles Gardenshire was so removed without objection, even though he said he would be fair and impartial and would follow the jury instructions. TR8, p. 181, 214, 217.

Defense counsel was ineffective in failing to object to the State=s admittedly peremptorily striking prospective juror Charles Gardenshire solely because of his qualms about the death penalty. In including this issue in this appeal, the Defendant acknowledges this Florida Supreme Court=s decision in Morrison v. State, 818 So.2d 412 (Fla. 2002) and its holding that the prohibition against striking jurors with conscientious scruples about the death penalty applies only to motions to strike jurors *for cause*. However, As noted by the United States Supreme Court in Witherspoon v. Illinois, 391 U.S. 510, 519 (1968):

> The only justification the State has offered for the jury-selection technique it employed here is that individuals who express serious reservations about capital punishment cannot be relied upon to vote for it even when the laws of the State and the instructions of the trial judge would make death the proper penalty. But in Illinois, as in other States,[fn13] the jury is given broad discretion to decide whether or not death is "the proper penalty" in a given case, and a juror's general views about

> capital punishment play an inevitable role in any such decision.
>
> A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. Guided by neither rule nor standard, "free to select or reject as it [sees] fit,"[fn14] a jury that must choose between life imprisonment and capital punishment can do little more **C** and must do nothing less **C** than express the conscience of the community on the ultimate question of life or death.[fn15] Yet, in a nation less than half of whose people believe in the death penalty,[fn16] a jury composed exclusively of such people cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment**C** of all who would be reluctant to pronounce the extreme penalty **C** such a jury can speak only for a distinct and dwindling minority.[fn17]

In view of the Witherspoon rationale of assuring that death-case juries are representative of the entire community, and include death-scrupled jurors, the present defendant urges this Florida Supreme Court to reconsider its ruling in Walls v. State, 641 So.2d 381, 386 (Fla. 1994) establish that it is no longer acceptable to strike **B**for cause *or* peremptorily **B** even one single juror solely because of his or her reservations about the death penalty.

The trial Court also denied relief on this issue because **A** . . . it could and should have been raised on direct appeal.@ (R4, p. 743-744). However, claims that trial counsel was ineffective in failing to object and preserve valid issues for appeal

are *not* procedurally barred in Aineffective assistance of counsel@ post-conviction proceedings. Hardman v. State, 584 So.2d 649 (Fla. 1st DCA 1991), Wells v. State, 598 So.2d 259 (Fla. 1st DCA 1992). The trial court erred in failing to find ineffective assistance of counsel and in failing to afford relief on this ground.

Trial counsel=s failure to object to the State=s admitted, peremptory strike of a prospective juror solely because he had qualms about the death penalty violated the constitutional provisions which are identified at the end of the argument for Issue 1(A) above and which are now incorporated by this reference in support of this argument as well.

Issue 8: The trial Court erred in not finding that the State violated the disclosure rule of *Brady v. Maryland*, 373 U.S. 83 (1983) and its progeny by not disclosing prison and law enforcement records of the victim=s violent, criminal past

Standard of Review: This Florida Supreme Court, in Lightbourne v. State, 841 So. 2d 431 (Fla. 2003), citing Stephens v. State, 748 So. 2d 1028 (Fla. 1999), recently enunciated the standard of appellate review of lower-court adjudications of claimed *Brady* violations as follows:

> To establish a Brady violation, the defendant must show the following: (1) that the evidence at issue is favorable to him, either because it is exculpatory or because it is impeaching; (2) that the evidence was suppressed by the State, either willfully or inadvertently; and (3) that the suppression resulted in prejudice. Rogers v. State, 782 So. 2d 373, 378 (Fla. 2001) (citing Strickler v. Greene, 527 U.S. 263, 280-82 (1999)). Brady claims are mixed

> questions of law and fact. Rogers, 782 So. 2d at 376-77.
>
> When reviewing Brady claims, this Court applies a mixed standard of review, "defer[ring] to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but review[ing] de novo the application of those facts to the law."

.

Preservation: The present Defendant alleged in his subject, handwritten, *pro se* motion, that A . . .undisclosed evidence would have establishes the victim (Jimmy West) violent charter, his participant in the defendant act . . . . . and to contradict, Mr. Bateh referring to the victim as Ainnocent@, all threw the trial and penalty phase.@ (R2, p. 225)

In other words, the Defendant alleged that undisclosed evidence of the victim Jimmy West=s violent character would have been especially beneficial for the defense during the penalty phase of Defendant=s jury trial .

The Defendant identified the kinds of victim information that the State withheld in his subject motion. Specifically, he alleged that the State failed to disclose multiple pre-murder police complaints and reports about the subject victim=s attempts to shoot the Defendant (R2, p 224) and conviction and prison sentence for a machine gun. R2, p. 225. The trial Court did not grant an evidentiary hearing on this issue (R3, p. 496-

498) and apparently denied it based solely on a review of prior record. R4, p. 744.

The transcript of Defendant=s jury selection indicates that one of Defendant=s prospective jurors mentioned during voir dire that he had learned from the popular media that the victim in the subject case had been under investigation for counterfeiting at the time of the subject murders and had been incarcerated. TR8, p. 181-182. A review of the Index to the record on appeal for the subject appeal number SC02-1765 reveals various evidentiary hearing exhibits which seem refer to the subject victim=s criminal past and which appear to have been transmitted to this reviewing Court along with the record for this appeal. These include newspaper articles (Defense Exhibits C, 1, 2), an Arrest and booking report of victim Jimmy West (Defense Exhibit 30, a copy of a police supplement report on victim Jimmy West (State exhibit 6).

During the sentencing phase of a capital defendant=s trial, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant. This includes matters relating to any of the aggravating or mitigating circumstances. Fla. Stat. Section 921.142 Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence.

Therefore, even if it is assumed that evidence of the victim=s bad character was of no consequence to Defendant=s penalty phase, such evidence would have been

admissible Band very usefulB in the sentencing phase. Because Adeath is different,@ any evidence which might convince the jury to recommend a lighter sentence must come in and strict rules of evidence must yield. Green v. Georgia, 442 U.S. 95 (1979). Alternatively, the evidence of the victim=s criminal past was useful as a kind of Areverse Willliams= Rule@ evidence, admissible under Florida case law, to rebut or negate any inference that the Defendant=s life is worth less than the victim=s life. *See, e.g.* State v. Emery Storer, 2D05-1044 (Fla. 2d DCA 2006).

The evidence of the victim=s violent, criminal past would have corroborated mitigation witness Paula Goins= testimony that the Defendant lived in a state of fear because the victim and the victim=s brother threatened to kill the Defendant and Defendant=s family. (TR 11, p. 665). The evidence of the Victim Jimmy West=s violent character would have also been useful to support the defense of self-defense. Hoffman v. State, 708 So.2d 962, 966 (Fla. 5th DCA 1998), State v. Smith, 573 So.2d 306 (Fla. 1990). Finally, the evidence of the victim=s violent, criminal past would have softened the impact of the prosecutor telling the jury that the the victim was Aa young man in the prime of his life@ (TR11, p. 681), Aa young man who had nothing to do with his brother=s death@ (TR11, p. 682), an Ainnocent victim@ (TR11, p. 695). Put differently, the evidence of the victim=s violent character would have been useful to counter the State=s intimation that the Defendant was less worthy of life than the victim. (TR11, p. 686-688).

If the State had disclosed and provided the evidence it possessed of the victim=s past encounters with the law, Defense counsel could have reviewed and used it. The jurors would have seen that the subject shooting was not just a simple revenge killing. The jurors would have better understood the whole milieu of the shooting occurred and would have been better-informed sentencers. The trial court erred in not finding a *Brady* violation.

The prosecution=s *Brady* violation contravened the constitutional protections which are identified at the end of the argument for Issue 1(A) above and which are now incorporated by this reference in support of this argument as well.

Issue 11 (C): The trial Court erred in not finding ineffective assistance of counsel in connection with trial Counsel=s failure to investigate and prepare for the trial testimony of State Witness Mark Richardson

Standard of Review: This is another Aineffective assistance of counsel@ claim. The Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005) and Strickland v. Washington, 466 U.S. 668 (1984) standard of review referred to in the argument for Issue 1(A) above also applies to this issue.

Preservation: This issue was raised in the subject motion. R2, p. 445. The trial Court granted an evidentiary hearing on it (R3, p. 496-498) but ultimately denied it. R4, p. 747.

Prosecution trial witness Mark Richardson testified at Defendant=s jury trial. Initially, he admitted that he and the Defendant had known each other and had been good friends for ten years. TR9, p. 322. Consequently, the jurors were likely to view Mark Richardson to be biased in favor of the victim and against the Defendant. Mark Richardson testified that bar customer=s were required to pass through a metal detector and were checked for weapons before entering the subject Moncrief Liquors bar. TR9, p. 325. This is consistent with the testimony of another trial witness, Lora Hampton, who similarly testified that all bar patrons were so searched for weapons before being allowed to enter the bar. TR9, p. 285. The Defendant=s aunt, Ms. Paula Goins recalled how the Defendant told her that patrons of the Moncrief Liquors bar could not bring their weapons into the bar (TR 10, p. 506) and how the Defendant observed victim Jimmy West reaching down into his car, as if grabbing a weapon kept under the seat. TR10, p. 507-508. Mark Richardson testified again at the evidentiary hearing on the subject motion. He admitted touching the victim=s body immediately after the subject shooting. R8, p. 1452. The crime scene investigation reports indicate that there was live ammunition in the victim=s car, but no gun. R9, p. 1572. All of this testimony raised the possibility of Mark Richardson taking and disposing of the victim=s firearm. If this information had been presented to the jury, it would have greatly increased the Defendant=s chances of persuading the jury that whoever did this shooting did it in self-defense. There is no justification for

Defendant=s trial counsel=s failure to investigate and utilize all of this evidence to bring this possibility to the jurors= attention.

The duty to provide effective representation includes the duty to investigate and prepare. Goodwin v. Balkcom, 694 F.2d 794, 805 (11th Cir. 1982). *See also* Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990). In the present case, there existed evidence that the victim had been armed and that someone took the victim=s gun sometime between the shooting and the arrival of police officers. Defendant=s trial counsel failed to investigate and familiarize himself with the evidence needed to present a credible defense of self-defense. The trial Court erred in failing to find ineffectiveness here.

Trial counsel=s misfeasance and nonfeasance in this matter violated the constitutional provisions which are identified at the end of the argument for Issue 1(A) above and which are now incorporated by this reference in support of this argument as well.

Issue 11 (D): The trial Court erred in not finding ineffective assistance of counsel in connection with trial Counsel=s failure to investigate and prepare for the trial testimony of State Witness Charles Jones

Standard of Review: This is another Aineffective assistance of counsel@ claim. The Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005) and Strickland v. Washington, 466 U.S. 668 (1984) standard of review referred to in the argument for

Issue 1(A) above also applies to this issue.

Preservation: This issue was raised in the subject motion. R2, p. 445-446. The trial Court granted an evidentiary hearing on it (R3, p. 496-498) but eventually denied it. R4, p. 748.

At trial, Charles Jones testified that the Defendant tried to sell him an AK-47 type of gun sometime after the subject murders. TR10, p. 488. The actual make and model of the AK-47 type of gun that Defendant=s girlfriend purchased for him prior to the subject murders was a Norinco Mak-90. TR9, p. 430.

The Defendant alleged in his subject motion that his trial counsel was ineffective in failing to investigate, discover and impeach State witness Charles Jones= with an Charles Jones= earlier sworn statement of October 31, 1995 in which Charles Jones indicated that the gun Defendant tried to sell him after the subject shooting was *chrome* in color. R3, p. 445.

Defendant further alleges **B** in his own, *pro se* fashion**B** that the gun his girlfriend bought for him was actually *black* in color, as evidenced by the retail sale documentation. *See,* R3, p. 446 and State=s jury trial Exhibits 24 and 25 and TR9, p. 404-405.

The formerly *pro se* Defendant indicates that these State=s jury trial Exhibits 24 and 25 as well as the above-referenced sworn statement of October 31, 1995, all support this argument. The formerly *pro se* Defendant also believes that they have

all been included in the record on appeal and remain in the possession of this reviewing Court. Therefore, although the undersigned, Court-appointed attorney has not had an opportunity to review and analyze Exhibits 24 and 25, he can still argue in good faith to this reviewing Court that if Exhibits 24 and 25 do indeed evidence the sale of a Ablack@ gun, and if the October 31, 1995 sworn statement of Charles Jones does indeed reference a Asilver@ gun, then Defendant=s trial counsel should have noticed the discrepancy and should have brought it out during his cross-examination of Charles Jones and during his argument to the jury.

The duty to provide effective representation includes the duty to investigate and prepare. Goodwin v. Balkcom, 694 F.2d 794, 805 (11th Cir. 1982). *See also* Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990). In the present case, trial counsel failed to familiarize himself with these conflicting descriptions of the gun=s color. Trial counsel failed to prove and call the jurors= attention to the gun-color discrepancy. The trial Court erred in not finding ineffective assistance of counsel on this basis.

Trial counsel=s failure to discover and utilize evidence beneficial to the defense violated the same constitutional provisions which are identified at the end of the argument for Issue 1(A) above and which are now incorporated by this reference in support of this argument as well.

Issue 11 (E): The trial Court erred in not finding ineffective assistance of counsel in connection with trial counsel=s failure to call witness Andre Mays to counter the testimony of witness Charles Jones

Standard of Review: This is another Aineffective assistance of counsel@ claim. The Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005) and Strickland v. Washington, 466 U.S. 668 (1984) standard of review referred to in the argument for Issue 1(A) above also applies to this issue.

Preservation: This issue was raised in the subject motion. R2, p. 446. The trial Court granted an evidentiary hearing on it (R3, p. 496-498), but ultimately denied it. R4, p. 748.

The Defendant alleged in his subject motion that Andre Mays was a cellmate of State witness Charles Jones. R3, p. 446. The Defendant further alleged that Andre Mays could have testified about how Charles Jones= revealed bias against the Defendant, when Charles Jones told Andre Mays about Charles Jones= A . . .disagreements in the past with (Defendant) Bell, even shooting Mr. Bell.@ R3, p. 446.

Andre Mays testified at the evidentiary hearing on the subject motion under his alias of AAbdul Wilson.@ R6, p. 996. Andre Mays recalled how Charles Jones spoke in jail of how he and the Defendant had a prior Aconfrontation@ out on the streets and had been Abeefing@ with each other in the past. R6, p. 1003-1004.

The Defendant now candidly discloses to this Florida Supreme Court, that Charles Jones *did* admit during Defendant=s jury trial that he and the Defendant A . . . had quarrels and problems in the past. . .@ TR10, p. 451. However, Defendant=s trial counsel should have called Andre Mays to testify about them anyway so the jurors could see that the Charles Jones B Michael Bell conflicts so angered Charles Jones that he talked about them with others.

The duty to provide effective representation includes the duty to investigate and prepare. Goodwin v. Balkcom, 694 F.2d 794, 805 (11th Cir. 1982). *See also* Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990). In the present case, Defendant=s trial was ineffective in failing to discover and use Andre Mays= testimony about the strength of the enmity between State witness Charles Jones and Defendant Michael Bell. The

trial Court erred in not finding ineffective assistance of counsel in this regard.

Trial counsel=s substandard performance in this area violated the constitutional provisions which are identified at the end of the argument for Issue 1(A) above and which are now incorporated by this reference in support of this argument as well.

Issue 11 (G): The trial Court erred in not finding ineffective assistance of counsel in connection with trial counsel=s failure to prepare for the testimony of State witnesses Dale George and Erica Williams

Standard of Review: This is another Aineffective assistance of counsel@ claim. The Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005) and Strickland v. Washington, 466 U.S. 668 (1984) standard of review referred to in the argument for Issue 1(A) above also applies to this issue.

Preservation: The Defendant raised this issue in his subject motion. R2, p. 446-447. The trial Court granted an evidentiary hearing on it (R3, p. 496-498) but ultimately denied it. R4, p. 749.

The Defendant indicated in his subject motion that, prior to the subject shooting, he angered State witness Dale George by having videotaped sex with his girlfriend. R7, p. 1273. Dale George=s brother, Julian George, testified at the evidentiary hearing that Dale George saw the videotape and was indeed angered by it. R6, p. 981. Dale George himself testified at the evidentiary hearing. He admitted that we was upset about the videotape at first, but eventually Alet it go@ and did not testify falsely against the Defendant. R7, p. 1323.

The Defendant also indicated in his subject motion that his own girlfriend, State witness Erica Williams, learned of the videotape and was upset over it. R2, p. 447. At the evidentiary hearing, Erica Williams confirmed that she was indeed upset by the videotape. R7, p. 1345. Julian George also testified to seeing Erica Williams visibly upset over the videotape. R6, p. 981.

At the evidentiary hearing, Defendant=s trial counsel could not give give any satisfactory explanation as to why he failed to reveal such witness anger and upset on cross examination.

The Defendant also alleged, in *nearly* incomprehensible terms, that State Witness Dale George observed victim Jimmy AKiller@ West shoot at the Defendant on prior occasions. R3, p. 447 (top line of page). At the evidentiary hearing, Dale George testified that he did indeed observe the victim or the victim=s older brother shooting at the Defendant once in the past. R7, p. 1317. Defendant=s trial counsel admitted at the evidentiary hearing that he had been aware of this. R9, p. 1582. He gave no satisfactory reason as to why he did not cross-examine Dale George about this at trial.

Failing to investigate and prepare for witness testimony is ineffective assistance of counsel. Knight v. State, 431 So.2d 272 (Fla. 5th DCA 1983). Engaging in cross-examination without first ascertaining the probable response is ineffective representation. Cole v. State, 700 So.2d 33 (Fla. 5th DCA 1997). The foregoing demonstrates how, in the present case, the Defendant=s trial counsel failed to prepare and cross-examine State Witnesses Dale George and Erica Williams. Defendant=s trial counsel gave up the opportunity to reveal their hurt feelings and animosity toward the Defendant. Defendant=s trial counsel=s lack of preparedness in this area also

forfeited the opportunity for the jurors to hear how victim Jimmy West or his brother had previously shot at the Defendant. Such information would have been beneficial to the defense for both self-defense and nonstatutory mitigation purposes.

Trial counsel=s inadequate preparation and poor performance in these matters violated Defendant=s constitutional rights identified at the end of the argument for Issue 1(A) above and which constitutional rights are now incorporated by this reference in support of this argument as well.

Issue 11(I): The trial Court erred in not finding ineffective assistance of counsel in connection with trial Counsel=s failure to investigate and present any penalty phase evidence other than the testimony of the Defendant=s mother

Standard of Review: This is another Aineffective assistance of counsel@ claim. The Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005) and Strickland v. Washington, 466 U.S. 668 (1984) standard of review referred to in the argument for Issue 1(A) above also applies to this issue.

Preservation: The Defendant raised this issue in his subject motion. R3, p. 448-450. The trial Court granted an evidentiary hearing on it (R3, p. 496-498) but ultimately denied it. R4, p. 750-751.

The bare-bones mitigation case presented by Defendant=s trial counsel was correctly described by this Florida Supreme Court in its Opinion in the earlier direct appeal for this case , Bell v. State, 649 So.2d 674, 679 (Fla. 1997), as follows:

> Appellant presented no evidence during the guilt phase of the trial and only the testimony of his mother during the penalty phase. The trial court properly examined the record for mitigation, including a competency evaluation, and then weighed the minimal mitigation it found.

At the evidentiary hearing for the subject motion, the Defendant called various witnesses that he contends his trial counsel should have called to give mitigation testimony during the penalty phase of Defendant=s jury trial. These additional penalty-phase witnesses included Dale George, who testified at the evidentiary hearing that he did indeed observe the victim or the victim=s older brother shooting at the Defendant at one time in the past. R7, p. 1317. At the

evidentiary hearing Defendant also presented the testimony of another current prison inmate and former friend of the Defendant=s named Maurice Jones. Maurice Jones testified that he once observed the subject victim, Jimmy AKiller@ West shooting at the Defendant and accidentally killing a female bystander named Trisha Clyde. R6, p. 1036.

Anthony Ammons testified at the evidentiary hearing. Anthony Ammons is a Florida church deacon with a prison ministry. He is a second cousin of the Defendant (R6, p. 1109) who has known the Defendant since his childhood in Joliet, Illinois. R6, p. 104-1105. Mr Ammons described the Defendant as Bamong other thingsB a happy-go-lucky, humble and carrying (sic) person. R6, p. 1104. He described the

Defendant=s father as a drug addict and wife-beater who forced Defendant=s mother to return to Jacksonville, Florida, to raise the Defendant and his brothers as a single parent. R6, p. 1105.

The Defendant=s brother, Gregory Bell, also testified at the evidentiary hearing. Gregory Bell admitted that he himself is a three-time convicted felon. R6, p. 1134. He explained how the Defendant sustained a serious, childhood head injury playing football, followed by two weeks of memory impairment and dizzy spells. R6, p. 1125. Willie Squaire described the Defendant as a loving, caring person. R6 p. 1126.

Willie Squaire testified that the Defendant=s trial

lawyer never bothered to contact him. R6, p. 1127.

Defendant=s mother, Margo Bell, was the only witness actually called by the defense to testify during the penalty phase of Defendant=s trial. However, she provided additional information at the evidentiary hearing. She testified that Defendant=s trial counsel never bothered to speak to her or otherwise prepare her to testify. (R6, p. 1139). She testified about additional testimony she could have given during the penalty phase, as described in the argument for the Issue 1(N) above.

Ms. Thosha Mingo testified at the evidentiary hearing. She explained that the Defendant had always been generous and respectful toward her. The Defendant encouraged her children to stay in school. R7, p. 1180.

Ms. Amy Blount testified at the evidentiary hearing. She described the Defendant as loyal, dependent (sic) and honest. R7, p. 1186. She said that the Defendant helped her sister in hard times. R7, p. 1186-1187.

Ms Charae Davis testified at the evidentiary hearing. She was one of the Defendant=s former girlfriends. She described the Defendant was a nice, loving, church-going person who helped with his grandfather=s fruit truck business. R7, p. 1193. The Defendant=s trial attorney never even bothered to talk to her. R7, p. 1196.

Ms. Beverly Brisbane testified at the evidentiary hearing. She described the Defendant as a Anice, outgoing, free@ person who once gave helpful advice to a mutual friend named Carolyn. R7, p. 1198.

Mr Walter White testified at the evidentiary hearing. He admitted that the Defendant=s girlfriend was very upset about Defendant=s videotaped sexual encounter with another woman. R7, p. 1216. However, he also testified that the Defendant had some good qualities, such as helping out with automobile repairs and playing with the neighborhood children. R7, p. 1217.

Psychiatrist Ernest Miller, M.D. was one of the two mental health experts who authored the Defendant=s pre-trial competency report which is described elsewhere in this brief. He testified at the evidentiary hearing. He admitted that Defendant=s trial

lawyer never gave him any background information on the Defendant. R7, p. 1272. He also admitted that Defendant=s trial counsel did not ask him what he himself might have to offer as mental health mitigation until *after* the competency evaluation report was completed. R7, p. 1273. Dr. Miller told Defendant=s trial lawyer that , *based on his competency examination*, he could not offer any mental health testimony beneficial to the defense. R7, p. 1273. Dr. Miller did note that the death of the Defendant=s brother (which occurred very shortly before the subject shooting) was a significant stressor in Defendant=s life.

R7, p. 1274-1275

Dr. Miller also testified that the Defendant denied doing the subject shooting. R7, p. 1277. Dr. Miller indicated that the Defendant displayed signs of an antisocial personality disorder. R7, p. 1285.

The private investigator used by Defendant=s trial Counsel was Don Marks. He too testified at the evidentiary hearing. He said that Defendant=s trial lawyer never instructed him to engage in any kind of Amitigating circumstance@ investigation whatsoever. R8, p. 1434. Defendant=s trial lawyer admitted at the evidentiary hearing that he would not bother supplying psychiatrist Ernest Miller with Defendant=s school records, juvenile delinquency records, Department of Corrections records, jail records, or hospital records unless psychiatrist Ernest Miller felt there was a need for

them and asked for them. R9, p. 1609.

Defendant=s trial lawyer testified at the evidentiary hearing that using Dr. Ernest Miller to testify regarding mental health matters during the penalty phase would do more harm than good because it would eventually reveal that the Defendant had an antisocial personality disorder with narcissistic tendencies. R9, p. 1664-1666. Defendant=s trial lawyer also testified that a tactical decision was made, with the Defendant=s consent, not to present any penalty phase defense witnesses other than the Defendant=s own mother. R9, p. 1666.

Evidence that a defendant is a caring family person is mitigation. Dolinsky v. State, 576 So.2d 271 (Fla. l991), Harmon v. State, 527 So.2d 182 (Fla. l988), Rogers v. State, 511 So.2d 526 (Fla. l987), Kokal v. State, 456 So.2d 444 (Fla. l984), Washington v. State, 432 So.2d 44 (Fla. l983), Jacobs v. State, 396 So.2d 713 (Fla. l981).

Evidence of a disadvantaged childhood is mitigation. Hegwood v. State, 75 So.2d 170 (Fla. l991), Carter v. State, 560 So.2d 1166 (Fla. l990), Brown v. State, 526 So.2d 903 (Fla. l988), DuBoise v. State, 520 So.2d 260 (Fla. l988).

The United States Supreme Court has emphasized that the duty to provide effective assistance of counsel includes a duty to thoroughly investigate the facts and records of the capital-case defendant in order to learn what evidence is available.

This is a case of ineffective assistance of counsel because trial counsel=s investigation was "woefully inadequate." Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla. 1995). Here, the record demonstrates that trial counsel failed to perform a reasonably diligent investigation. See Rompilla v. Beard, 125 S. Ct. 2456, 2463 (2005), Wiggins v. Smith, 539 U.S 510, 525 (2003); Strickland v. Washington, 466 U.S. at 699 (1989). Defendant also refers to and incorporates here in support of this issue all of the facts and legal authority set forth in support of Issue 1(N) above. The trial Court erred in not finding ineffective assistance of counsel in connection with the failure to investigate and present mitigation evidence.

Trial counsel=s failure to present mitigation evidence violated the constitutional provisions which are identified at the end of the argument for Issue 1(A) above and which are now incorporated by this reference in support of this argument as well.

(brief continues on next page)

Issue 12: The trial Court erred in not finding ineffective assistance of counsel in connection with trial counsel=s failure to assure that the jurors were sworn

Standard of review: This is another Aineffective assistance of counsel@ claim. The Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005) and Strickland v. Washington, 466 U.S. 668 (1984) standard of review referred to in the argument for Issue 1(A) above also applies to this issue.

Preservation: Defendant raised this issue in his subject motion. R2, p. 451-455. The trial Court granted an evidentiary hearing on it (R3, p. 496-498) but ultimately denied it. R4, p. 751-752.

Defendant contends that his trial counsel rendered ineffective assistance of counsel by failing to object to the Court=s failure to administer the oath to the individual prospective jurors assigned to Defendant=s individual case *prior* to Voir

Dire. The record is devoid of any showing that Defendant=s prospective jurors were ever sworn to truly and fairly try the issues and render a true verdict in this case. Defendant=s trial counsel failed to object to this oversight. As a result, this issue was not preserved for direct appeal.

Two witnesses gave testimony on this issue at the evidentiary hearing. The first was Mike Riley, Assistant Clerk of the Court in Duval County, Florida. He testified that, as a matter of course, potential jurors were gathered every Monday morning for jury selection. R8, p. 1447-1449. He testified that in 1995, when jurors were polled and brought in for qualifying purposes, they were given an oath to swear or affirm to answer questions truthfully. R8, p. 1447. He did not affirmatively state that he gave the oath on the specific day that Defendant=s prospective jurors were impaneled. However, he said that *if* the jury selection in this case had occurred on March 5, 1995, then the oath would have been administered by the deputy clerk on duty in that courtroom at the time: himself. R8, p. 1448-1449.

Mr. Riley acknowledged that the administration of the oath was not recorded by the court reporter. However, Mr. Riley stated that jury oaths remain in effect throughout the prospective jurors= jury service. R8, p. 1450-1451. Such statements do not fulfill the requirement that the jury be duly sworn to try the issues and render

a true verdict in this Defendant=s individual case.

The second witness to testify on the matter was Michael Bell=s trial counsel, Mr. Richard Nichols. Mr. Nichols testified that he thought that the jurors were sworn by the Court prior to the individual jury selection questions. R9, p. 1640.

Mr. Nichols could *not* affirmatively state that the jurors were sworn in his presence. The most Defendant=s trial counsel could say was that he had tried many cases in front of the trial Judge, and one of his certain formalities was swearing in the jury. R9, p. 1640. Mr. Nichols testified that Ain my recollection, it was done. I have never had a case where it was done ... I don=t know what to tell you other than I believe that the oath was given .... I don=t remember who it was that administered the oath ...@. R9 p. 1641-1642.

Such a vague, generalized recollection does not satisfy the requirements that the oath be administered to the jury and the requirement that it should be recorded. Before being examined, prospective jurors in a criminal case are specifically required to be sworn, either individually or collectively, with the form of oath prescribed by rule. Florida Rules of Criminal Procedure, Rule 3.300(a). By every indication, this did not occur in the present case.

A trial begins when the jury is sworn in for voir dire examination in an individual case and Anot when the initial oath is administered to a large prospective

panel.@ See Moore vs. State, 368 So.2d 1291 (1979). Thus, the trial court erred in relying on the swearing of the large group of prospective jurors by a clerk in another courtroom rather than requiring swearing of the prospective jurors assembled for a specific trial. See also, Martin v. State, 816 So.2d 187 (Fla. 5th

DCA 2002).

Defendant Michael Bell had a constitutional right to be present when the jurors were sworn, yet he was unable to exercise this right. His trial counsel did not object to the lack of the oath. Under Muhammad v. State, 782 So.2d 343, 353 (Fla. 2001), the failure to bring the lack of the oath to the Court=s attention Ba critical constitutional errorB is not excusable as a reasonable professional judgment. Counsel=s conduct fell below acceptable standards and denied Defendant effective assistance of counsel guaranteed by the Sixth Amendment, United States Constitution, as set forth in Strickland vs. Washington, 466 U.S. 688 (1984). The trial Court erred in not finding ineffective assistance of counsel in this area.

Trial counsel=s failure to assure that the Defendant has a *sworn* jury violated the constitutional provisions which are identified at the end of the argument for Issue 1(A) above and which are now incorporated by this reference in support of this argument as well.

Issue 14: The trial Court erred in not finding ineffective assistance of counsel in connection with the cumulative errors of trial counsel

Standard of Review: On appeals of a lower Court=s rulings on Aineffective assistance of counsel@ claims, the appellate Court reviews the record *de novo* and

applies the double-pronged Asubstandard performance plus prejudice@ test of Strickland v. Washington, 466 U.S. 668 (1984).

Preservation: The Defendant raised Bas best he could in his own, *pro se* fashionB the issue of the ineffectiveness of his trial counsel=s performance when all of trial counsel=s errors are considered as a whole. The Defendant did this in the introductory paragraphs of his subject motion. R1, p. 111-113. The subject denial order addresses each Aineffectiveness@ claim individually but fails to analyze or address the cumulative, prejudicial effect of all of trial counsel=s errors together. R5, p. 71752.

The Court is required to also consider the cumulative effect of all of the combined errors of trial counsel. Strickland v. Washington, 466 U.S. 668 (1984), State v. Gunsby, 670 So.2d 920 (Fla. 1996). Individual errors which may in themselves be insufficient to prejudice a defendant may, when combined with all of counsel=s other errors, have the cumulative effect of rendering a defendant=s trial unreliable. If so, the Aprejudice@ prong of the Strickland test is met and ineffective representation is established. Robinson v. State, 707 So.2d 688 (Fla. 1998). In

the present case, the trial Court erred in failing to consider and address the cumulative effect of all of trial counsel=s errors. Here, the many errors of Defendant=s trial counsel had the cumulative effect of depriving the

Defendant of effective assistance of counsel and violating all of the Defendant=s constitutional rights which are identified at the end of the argument for Issue 1(A) above and which constitutional provisions are now incorporated by this reference in support of this argument as well.

Issue 15: The trial Court erred in finding that many of the issues raised in the subject motion are barred because they could have been raised on appeal

Standard of Review: The question of whether the Defendant is procedurally barred from raising certain claims in his subject post-conviction motion because they could have been raised on direct appeal appears to be a question of law, which the Court reviews *de novo*. Jones v. State, 790 So.2d 1194 (Fla. 1st DCA 2001).

Preservation: The issue of procedural bar has arisen for the first time in the subject denial order which is the subject of this appeal. Insofar as this is the first opportunity to challenge such rulings, the issue is properly before this reviewing Court.

Throughout its subject denial Order, the trial Court held that many issues were procedurally barred from post-conviction proceedings because they could have been raised on direct appeal. *See* R4, p. 731 re issue 1(K);

R4, p. 734, re issue 1(N); R4, p. 742 re issues 3 and 4; R4, p. 743, re issues 5, 6, and 7; R4, p. 744 re Issue 8; R4, p. 745 re Issue 9. However, allegations of ineffective assistance of counsel are *not* procedurally barred because trial counsel failed to raise them below and preserve them for appeal. Hardman v. State, 584 So.2d 649 (Fla. 1st DCA 1991; Wells v. State, 598 So.2d 259 (Fla. 1st DCA 1992). Accordingly, the trial Court erred and should be reversed for holding that Defendant=s Aineffective assistance of counsel@ claims were procedurally barred from collateral review. By effectively denying collateral review, the trial Court denied Defendant=s rights to due process of law and effective assistance of counsel under Fifth and Fourteenth Amendments to the United States Constitution and Under Article 1, Sections 9 and 16 of the Florida Constitution.

CONCLUSION

The trial Court erred in not finding ineffective assistance of counsel and in not reversing Defendant=s judgment and sentence on this basis. The trial Court also erred

in never addressing or otherwise making any kind of ruling on issue 1(Q) regarding graphic displays of the victim=s image by trial spectators. The Florida Supreme Court is requested to enter its Opinion, Order and Mandate

reversing the subject denial order and directing the lower Court to vacate Defendant=s Judgment and Sentence of Death and set the matter for a new trial.

CERTIFICATE OF SERVICE

The undersigned, Court-appointed attorney hereby certifies that copies of this brief have been served by U.S. Mail addressed as follows:

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief is submitted in Times New Roman 14-point font and complies with the font requirements of Rule 9.210, Fla. R. App. P.

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