IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC02-2191
Lower Tribunal No.: 86-6123-CF

GROVER REED,

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

In this brief the Appellant is also referred to as " Defendant" or " Grover Reed." References to the record on appeal are in the form of "R1, p12," with "R" denoting the record volume number and "p" denoting the record page number. All references to the original jury trial transcripts are in the form of "TT 42," with TT" designating the trial transcript page number, as originally paginated by the court reporter.

The appellant has filed two motions for post-conviction relief. The second one is the subject of this appeal. It was filed on May 28, 1996 and is entitled Consolidated Supplemental and/or Amended Motion to Vacate Judgments of Conviction and Sentence. Here, it is called simply the "subject motion." The evidentiary hearing on that motion is called simply the "evidentiary hearing."

During early pre-trial proceedings the Defendant was represented briefly by Assistant Public Defender Alan Chipperfield. Throughout this brief he will be referred to by name and "Defendant's public defender" and "Defendant's first lawyer." During later pre-trial proceedings and continuing through the jury trial, the Defendant was represented by Richard Nichols. Throughout this brief Mr. Nichols will be referred to by name and "trial counsel" and "Defendant's second lawyer." The Florida Department of law enforcement is called the "FDLE," its

popular acronym.

STATEMENT OF THE CASE

This is an appeal of the trial court's denial of a motion for post-conviction relief in a death penalty case. The subject motion for post-conviction relief was filed on May 28, 1996. R1, p40 to R2, p246.

This case has already been before this Florida Supreme Court once in connection with the trial court's denial of an earlier motion for post-conviction relief. In Reed v. State, 640 So.2d 1094 (Fla. 1994) this Florida Supreme Court generally rejected all of the claims in Appellant's earlier motion for post-conviction relief but held that Appellant was entitled to an evidentiary hearing on claims relating to ineffective assistance of counsel. This Court also held that Appellant was entitled to pursue government agency documents through the public document acquisition procedures set forth in F.S. Chapter 119 and Rule 3.850, Fla. R. Crim. P. Id., p. 1098.

Accordingly, the office of the Florida State Capital Collateral Regional Counsel (which represented the Appellant at the time) filed the subject motion for post-conviction relief. It set forth a large number of "ineffective assistance of counsel" claims. R1, p40 to R2, p246. It also advanced a claim, based on newly discovered evidence, that the State violated evidence-disclosure requirements

of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 215 (1963) when it failed to disclose evidence that was beneficial to the defense. R2, p. 239-244.

The trial court conducted a hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993) to determine which issues raised in the subject motion warranted a hearing. R4, p. 674 to R5, p. 873. After receiving argument of counsel, the trial court held that the Appellant was not entitled to a hearing on those "ineffective assistance of counsel" claims concerning (a) the racial exclusion of jurors, (b) the lack of a jury instruction that mere felony murder alone does not justify the death penalty, (c) the lack of further action to protect the Appellant after the aggravating circumstances of "prior felonies of violence" and "cold calculated and premeditated" had been set aside on appeal, and (d) the lack of objection to the "heinous atrocious and cruel" and the "cold, calculated and premeditated" jury instructions. R4, p. 653-660. However, the trial court held that the Appellant was entitled to a hearing on all of the other issues raised in the subject motion. R4, p. 653-660.

The evidentiary hearing lasted from February 19, 2002 to February 20, 2002. R4, p. 674 to R7, p. 1371. On August 28, 2002, the trial court entered its order completely denying the subject motion. R3, p. 512-548. On October 10, 2002, the Appellant timely filed his notice of appeal of that denial order.

STATEMENT OF THE FACTS

On direct appeal from Appellant's judgment and sentence, this reviewing Court summarized that facts adduced at trial which it considered salient to Defendant's conviction:

> In December of 1985 Reed, accompanied by his woman friend and two young children, arrived in Jacksonville homeless and destitute. Through Traveler's Aid they were given shelter in the home of the Reverend Ervin Oermann, a Lutheran minister. They stayed with Reverend Oermann and his wife, Betty, for just over a week but were asked to leave when Reverend Oermann discovered that Reed had drug paraphernalia. However, Reed continued to receive aid from the Oermanns in the form of money and transportation. Eventually the Oermanns began to feel they were being used and withdrew all support. Reed resented the discontinuance of aid and vowed to get even.
>
> On February 27, 1986, Reverend Oermann returned home from a night class and found his wife, Betty, dead on the living room floor. An autopsy showed she had been strangled, raped, and stabbed repeatedly in the throat. Found in the house was a distinctive baseball cap. For some time this cap was the only lead police had, so they produced a television recreation of the crime and showed the cap. One viewer recognized the cap as being much like one Reed wore. Further investigation revealed that Reed was last seen wearing his cap on the day Mrs. Oermann was killed. Ultimately, he was arrested.
>
> The most significant evidence of Reed's guilt may be summarized as follows:
>
> > (a) Witnesses said they had seen Reed wearing his baseball cap on the day of the murder before the probable time of death but not thereafter. They positively identified the cap as Reed's because of the presence of certain stains and mildew.

> (b) Reed's fingerprints were found on checks that had been taken from the Oermann home and had been found in the yard.
>
> (c) An expert witness gave testimony that hairs found on the body and in the baseball cap were consistent with Reed's hair.
>
> (d) Another expert witness gave testimony that the semen found in the body could have been Reed's.
>
> (e) Reed's cellmate, Nigel Hackshaw, gave testimony that Reed had admitted breaking into the Oermann house and killing Mrs. Oermann.
>
> The jury found Reed guilty. Neither side presented additional evidence in the penalty phase. After hearing arguments by counsel, the jury recommended death by an eleven-to-one vote. The judge delayed sentencing in order that a presentence investigation could be completed. After receiving the PSI and after considering additional mitigating evidence presented by Reed, the trial judge sentenced him to death. The judge found six aggravating factors . . . and nothing in mitigation.

Additional facts relevant to the issues of the present appeal are set forth throughout the "argument" portion of this Initial Brief.

SUMMARY OF ARGUMENT

This is a death-penalty case involving the usual trial by a jury of twelve. Defense counsel failed to adequately challenge the State's exercise of peremptory striking of black jurors, depriving the Defendant of a jury selected through a racially neutral process. At the conclusion of the presentation of evidence, Defendant's right to a fair trial by jury was further compromised by Defense counsel's

comments to the jury conceding the Defendant's guilt and conceding the existence of death-penalty aggravating circumstances. Defendant's right to a fair jury trial was also impaired by defense counsel's failure to obtain a jury instruction clarifying that felony murder, by itself, is insufficient for the imposition of the death penalty.

The Defendant's trial attorney was generally unprepared and remiss in failing to object to improper appeals to the jurors' emotions, and in failing to object to incorrect statements about the Defendant's burden of proof, and in failing to object to incorrect jury instructions on death penalty aggravating circumstances.

The Defendant's trial counsel also failed to utilize any kind of mental health expert witness at trial. As a result, the jury never heard any evidence of Defendant's dysfunctional upbringing, horrible childhood, and mental limitations. The jury was not given any evidence of defendant's mental health or upbringing or psychological background to consider as a non-statutory mitigating circumstances.

Fingerprint evidence and blood and hair "trace" evidence that was found at the victim's home was presented and interpreted by the State's expert witnesses at trial. This evidence undoubtedly factored very heavily in Defendant's conviction. The Defendant and his girlfriend, Chris Niznik, lived as invited guests in the victim's home until told to move out, approximately two months before the

murder. TT 372-373, 377, 385-387. As such, one would expect to find some strands of Defendant's hair and some prints from Defendant's fingers about the home and its contents. However, defense counsel failed to hire and use any fingerprint, serology, and hair-type expert witnesses for trial. As a result, the false and misleading testimony of the State's own experts was being presented to the jury substantially unchallenged and uncontradicted. Especially prejudicial was the completely unfounded claim of State fingerprint expert Bruce Scott that one of Defendant's fingerprints which had been found on one of the victim's personal checks was "fresh" and "less than 10 days old." This suggested that it was placed there by the Defendant at the time of the murder.

Defense counsel did not require the State to establish the chain of custody of any of the state's blood, hair or fingerprint evidence. Requiring such proof would have educated the jurors about how mobile and inconclusive hair and body fluid evidence can be, particularly in a case like this one where the Defendant once lived in the victim's house.

Defendant's trial counsel was deficient in failing to present and support an alibi defense. Defendant's trial counsel decided for himself that Defendant was guilty and was lying about his alibi, notwithstanding the Defendant's insistence that he was innocent.

Each of these instances of deficient performance by defense counsel, considered individually and cumulatively, indicate that defense counsel did not provide the Defendant with effective representation.

Defendant's judgment and sentence should also be vacated because of a violation of the evidence-disclosure requirements of Brady v. Maryland, 373 U.S. 83 (1963) and its progeny. The Defendant recently discovered evidence which would have been beneficial to the defense and which had been withheld by the State. Following trial, Defendant acquired the report and testimony of Jacksonville Sheriff's Office police officer D.N. Summersill. Officer Summersill found the defendant asleep in a car, a considerable distance from the victim's home, without the incriminating ball cap, very shortly before the time when Reverend Oermann last saw his wife alive.

The Defendant acquired a second type of evidence beneficial to the defense and which was wrongfully withheld by the State. Through the use of post-trial public records demands, the Defendant acquired disciplinary reports and statements of Florida Department of Law Enforcement (FDLE) employees and supervisors which indicated that the FDLE fingerprint expert who testified against the Defendant at trial was caught snorting the cocaine at the FDLE crime lab and had been relieved of his duties prior to testifying against the Defendant. Such

impeachment evidence helps explain the expert's outlandish trial testimony and hence was crucial to the defense. The State's failure to disclose it justifies vacating Defendant's judgment and sentence.

The trial court erred in its determination that the Defendant was not prejudiced as a result of ineffective assistance of counsel and the State's nondisclosure of key impeachment and defense evidence. The trial court erred in denying Defendant's motion for post-conviction relief.

ARGUMENT WITH REGARD TO EACH ISSUE

1. THE TRIAL COURT ERRED IN REFUSING TO GRANT AN EVIDENTIARY HEARING ON THE ISSUE OF WHETHER DEFENDANT'S TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO ADEQUATELY CHALLENGE THE STATE'S USE OF PEREMPTORY CHALLENGES TO STRIKE BLACK JURORS

The Defendant has alleged that his trial counsel was ineffective in failing to challenge the State's use of eight of its ten peremptory challenges to strike black potential jurors. R1, p. 44-45. The Florida Supreme Court already addressed the legality of the State's removal of black jurors in Reed v. State, 560 So.2d 203 (Fla. 1990) at pages 204-205. That was the original direct appeal of the original judgment and sentence. Citing Kibler v. State, 546 So.2d 710 (Fla. 1989), and State v. Neil, 457 So.2d 481 (Fla. 1984), and State v. Slappey, 522 so. 2d 18 (Fla. 1988) this court upheld the jury selection process and explained, "Here, Reed

does not question the prosecutor's motivation for five of his eight challenges, and the reasons for the other three had at least some facial legitimacy." Reed, supra, pp. 205-206 (emphasis Appellant's).

The present appeal, by contrast, seeks review of the trial court's denial of the subject motion. The Defendant alleged that the State exercised eight out of ten of its peremptory challenges to excuse black prospective jurors. R1, p. 45. The Defendant also alleged that the trial court required the State to explain its reasons for its peremptory strikes of black jurors. R1, p. 45 to 49. Finally, the Defendant alleged that his own trial counsel was ineffective in failing to follow up and challenge the sufficiency of the State's explanations for its striking of black jurors. R1, p. 49, 50, 53-57.[1]

In State v. Neil, 457 So.2d 481 (Fla. 1984) this court held that a defense attorney questioning the seemingly racial exercise of peremptory challenges must satisfy a two-prong test: "A party concerned about the other side's use of peremptory challenges must demonstrate on the record that the challenged persons are members of a distinct racial group *and* that there is a strong likelihood that they

[1]Citations to the jury trial transcript pages at which the strikes of black jurors appear are included in the subject motion. R1, p. 45. Defendant alleged, in his subject motion, that trial counsel was ineffective with regard to racial jury selection. R1, p. 45-65.

have been challenged solely because of their race." (emphasis appellant's). The Defendant claims that his trial counsel failed to satisfy the second prong of the test by not going beyond merely pointing out the existence of peremptory strikes of members of a distinct racial group. R1, p. 54-57. Trial counsel did not attempt to meet the burden of persuading the trial court that the peremptory strikes were exercised in a racially discriminatory way notwithstanding the State's purported justification. Melbourne v. State, 679 So.2d 759 (Fla. 1996).

In its initial opinion in the appeal of the original judgment and sentence in the present case, this Florida Supreme Court expressed doubts about the racial neutrality of Defendant's jury selection process by stating, "Here, however, because the record reflects that three jurors may have been challenged because of their race, we find it necessary to grant a new trial." 14 Fla. L. Weekly at 299 . This opinion was subsequently withdrawn following the publication of Kibler v. State, 546 So.2d 710 (Fla. 1989) and was replaced by Reed v. State, 560 So.2d 203 (Fla. 1990) which upheld the jury selection process. However, it is fair to say that the jury selection process in this case has warranted the past concern and comments of this reviewing court.

Although the Defendant's alleged that his trial counsel was ineffective in failing to conduct the inquiry needed to satisfy the second prong of the State v.

Neil test (R1, p. 49-50, 53-57), the trial court refused to consider the issue. R4, p. 611-616, 653. This was error. Because there was no evidentiary hearing on this issue, there is no record of what explanation, if any, defense counsel might have given for not taking the further action to effectively challenge the State's strikes of black jurors. Where no evidentiary hearing is held below, the reviewing court accepts the Defendant's factual allegations as true to the extent that they are not refuted by the record. Finney v. State, SC 00-1351 (Fla. 2002). The case should be remanded to the trial court with instructions to grant the Defendant an evidentiary hearing on the issue of whether or not defense counsel was ineffective with regard to the State's exercise of peremptory strikes of black jurors.

2. THE TRIAL COURT ERRED IN NOT HOLDING THAT DEFENSE COUNSEL'S FAILURE TO USE A HAIR-TYPE EXPERT DENIED DEFENDANT THE EFFECTIVE ASSISTANCE OF COUNSEL

One of the first witnesses called to testify at the Defendant's jury trial was Irvin Oermann. He was the victim's husband as well the pastor of Grace Lutheran Church and he was the first person to discover his wife's murdered body inside of their home. TT 368 -371. Mr. Oermann testified about events occurring between the time of his first encounter with the Defendant up to the discovery of his wife's dead body. On December 11, 1985, he took the homeless defendant and Defendant's family into his own home, as an act of charity extended at the

request of the Traveler's Aid society. TT 372. The Defendant lived in the Oermann home from December 11 - 22, 1985. TT 373.

Approximately two months later, on February 27, 1986, Irvin Oermann returned home from teaching a church youth class and discovered his wife's murdered, naked body inside their home TT 377-390. He also found a baseball-type cap lying underneath a table. TT 386-387. It was a red and white ball cap. TT 399. Irvin Oermann picked the cap up and placed it on top of the table. TT 401-402. That cap, and the hair found on it were to become key pieces of evidence in Defendant's trial.

During Defendant's jury trial, testimony regarding the collection of hair evidence was presented by Ms. Carol Herring, Senior Crime Lab Technician for the Florida Department of Law Enforcement. TT 641. She collected three hairs from the cap and also took three hairs from the Defendant's head for comparison. TT 645-647. She also performed "sweepings" to acquire bits of trace evidence from the clothing that was found under and around the body of the victim. TT 641-643. Defendant's trial lawyer expressly waived proof of the chain of custody of the hair evidence. TT 649.

Dr. Peter Lipkovic, the Chief Medical Examiner for the Fourth Judicial Circuit of Florida examined the victim's body and conducted the autopsy. TT

441. Dr. Lipkovic collected some loose hairs from the area just outside of the victim's vagina (TT 458). He also collected additional loose hair from "combings" of the victim's pubic hair. TT 463-464. He explained how he placed the hairs in an envelope and then turned that envelope over to Detective Hugh Eason of the Jacksonville Sheriff's Office. TT 463-646. No objection regarding the chain of custody of hair evidence was raised by defense counsel. TT 464, 467.

The State's hair-type expert was James Luten. He was an employee of the Florida Department of Law Enforcement. TT 652. His expertise was in the field of micro-analysis: the examination and comparison of trace evidence such as hairs and fibers. TT 652. Mr. Luten explained to the jury that the hairs found on the cap were microscopically the same as the hair samples taken from the Defendant's own head. TT 666. Mr. Luten also testified that one of the hairs obtained in the "sweeping" of crime scene clothing was microscopically the same as a head hair sample taken from the Defendant. TT 667-668. James Luten also testified that one of the loose hairs found among the victim's pubic hair was microscopically the same as a pubic hair sample taken from the defendant. TT 669-670.

Defendant's trial counsel failed to use a hair expert of his own and never objected or required proof regarding the chain of custody of the hair evidence. At

the evidentiary hearing, Defendant's first lawyer testified that when he had been handling the defense, he prepared a motion to incur the costs of mental health, blood, and hair-type experts.

The Defendant alleged that his trial lawyer was ineffective in failing to utilize a hair-type expert for the defense. R1, p. 68-73, 82-85, 86-92. At the evidentiary hearing on the subject motion for post-conviction relief, the Defendant presented the testimony of Dr. Dale Nute, Ph. D. Dr. Nute is a criminology professor at Florida State University who also has a background as a microanalysis supervisor. R4, p. 783- 784. Dr. Dale Nute was tendered to the trial court, without objection, as an expert in blood and hair analysis. R4, p. 785. Dr. Nute explained what a defense hair expert could have contributed to the defense, if one had been utilized. R4, p. 789.

During the original jury trial, the State's hair expert, James Luten, explained that the odds of hair comparisons identifying the wrong person are "extremely remote." TT 672-673. Dr. Dale Nute, explained that this was an exaggeration and that a defense hair-type expert like himself could have suggested some cross-examination questions that would have revealed the comparatively low reliability of hair-type evidence. R4, p. 798-799. With regard to the Defendant's pubic hair that was allegedly found in the victim's pubic area, Dr. Nute noted that the

Defendant had previously resided in the victim's house. R4, p. 800. Dr. Nute said that he would have provided defense counsel with some plausible –albeit improbable– alternatives means by which Defendant's pubic hair could have ended up in the victim's pubic hair. R4, p. 800. These alternative means of hair transference include the possibility of the victim picking up a stray hair while sitting on a piece of furniture in the nude. R4, p. 800 to R5, p. 801. With regard to the hair evidence found on the baseball cap, and with regard to hair evidence in general, Dr. Nute said that he would have educated defense counsel about how easily hair –particularly head hair– can be shed and transferred and picked up by other items of clothing. R5, p. 801-802. With regard to the means by which hair can be transferred from one place to another, Dr. Nute said, " . . . you can always come up with a possible scenario." R5, p. 801-802. Dr. Nute would have alerted defense counsel to the possibility of hair being transferred by such things as washing machines, static electricity, and bed clothes. R5, p. 826-827. Chris Niznik, the Defendant's live-in girlfriend testified at the evidentiary hearing. She and the defendant had lived with the victim in the victim's house up until approximately two weeks prior to moving into a trailer. EH 2/21/01 p134, L 4-22. When Christine Niznik and the defendant lived in the victim's home, Christine Niznik used the victim's laundry facilities and pitched in with household

chores, including vacuuming, dusting and cleaning. EH 2/21/02 p. 142, L 13 to p. 143, L 9.

Trial counsel's explanation for not utilizing defense experts and for not presenting an alibi defense and Defendant's response to that explanation are set forth in the argument for Issue 5 below and are incorporated herein for brevity.

In its order denying Defendant's subject motion for post-conviction relief, the trial court commented, "At best, Dr. Nute's suggestions were that he could have provided a "plausible but not very probable explanation of the ways that the defendant's pubic hair could have been associated with the victim's body and the location at which it was found." The trial court also stated, "Furthermore, Dr. Nute's hearing testimony really failed to offer anything about hair, shedding hairs, or the transference of shedding hairs that would not already be known by an experienced criminal defense lawyer." R3, p. 518-519.

The trial court made a similar statement during the evidentiary hearing for the subject post-conviction motion when it engaged in the following exchange with Dr. Nute:

> THE COURT: You suppose it's possible that a lawyer who has been practicing criminal law for 14 years both for the prosecution and the defense might already know that people shed hair and that they can

leave them in different places?

THE WITNESS: I don't know this attorney but I would – I generally have found that it doesn't hurt to review.

R5, p. 805.

Despite the trial court's acknowledgment of trial counsel's stature as an experienced lawyer , the trial transcripts indicate that the Defendant's trial lawyer failed to elicit these "known" facts about hair shedding and mobility for the benefit of the jury. Dr. Nute's testimony at the evidentiary hearing for the subject motion for post-conviction relief indicates that utilization of a defense hair expert would have revealed just how mobile and inconclusive hair-type evidence really is. The failure to utilize experts warrants reversing a conviction where it results in counsel failing to adequately investigate, prepare and otherwise function as the government adversary. Osborne v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988), quoting United States v. Chronic, 466 U.S. 648, 666 (1984). Ineffective assistance of trial counsel claims which are based on trial counsel's failure to utilize expert witnesses are properly asserted in post-conviction, collateral relief proceedings. Lawrence v. State, SC00-2290 (Fla. 2002). *See also* Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed. 2d 53 (1985) regarding denial of expert witness assistance constituting a denial of due process.

It appears that defense counsel's decision against using any defense expert witnesses at trial was based on the belief that they would not make any difference and based on the desire to make both first and last closing arguments to the jury. R7, p. 1313-1314. Defense counsel's earlier decision not to use defense expert witnesses at trial also appears to be based some vague and ambiguous confidential statements made by the Defendant which defense counsel apparently construed as admissions of guilt. R7, p. 1319-1322. However, at the evidentiary hearing on the subject motion for post-conviction relief defense counsel himself admitted that, even where the defendant admits guilt, " . . .the defense lawyer's obligation is to test the State's evidence as severely as you can" and defense counsel admitted that the defendant steadfastly denied committing the crimes charged. R7, p. 1321-1323.

The harmful effects of a defense attorney failing to use experts to develop useful impeachment and rebuttal evidence are addressed in the murder case of Cox v. State 555 So.2d 352 (Fla. 1989). *Cox* had many of the same expert and proof issues which exist in the subject case. The state's experts claimed that various pieces of found evidence implicated the defendant. The state's hair expert testified that the hair found resembled the defendant's hair, although the state's hair expert conceded that hair analysis is not absolutely certain or reliable. The state's blood

expert testified that the defendant had "type O" blood and fell within that 45 percent of the world population that has type O blood. A non-expert who had never examined the Defendant's boots testified that a boot print that had been found resembled that which would be left by a military boot (the defendant was in the U.S. Army). In reversing the defendant's conviction, the Court stated, "Although state witnesses case doubt on Cox's alibi, the state's evidence could have created only a suspicion, rather than proving beyond a reasonable doubt, that Cox, and only Cox, murdered the victim." In the present case, had defense counsel utilized expert witnesses and adequately presented an alibi defense, the defense would have demonstrated that state failed establish the Defendant's guilt beyond a reasonable doubt but rather had, at most, raised nothing more than a "reasonable suspicion" of defendant's guilt.

With regard to hair evidence in particular, the Cox court, cited Horstman v. State, 530 So.2d 368 (Fla. 2d DCA), *review denied*, 539 So.2d 476 (Fla. 1988) and Jackson v. State, 511 So.2d 1047 (Fla. 2d DCA 1987), in support of its own statement that ". . . hair analysis and comparison are not absolutely certain and reliable."

In Cole v. State, 700 So.2d 33 (Fla. 5th DCA 1997), the Court described as per se deficient representation defense counsel's act of proceeding through the trial

". . . without a coherent theory of the case, seeking only to attack the State's witnesses on cross-examination without having any idea what the witnesses' responses would be . . ."

In the subject post-conviction proceedings, the trial court erred in not recognizing trial counsel's dereliction in failing to use a defense hair expert. Moreover, as Dr. Nute explained in the evidentiary hearing on the subject post-conviction motion, " . . . the pubic hair is the single most critical piece of evidence . . . it cannot be explained as easily as the head hair and it has considerably more discriminatory value than the blood work . . ." R4 p. 792. In view of this, it is difficult to understand the trial court's statement, in its order denying the subject motion for post-conviction relief, that " . . . Dr. Nute's testimony failed to offer anything to indicate that there was anything incorrect about the State's hair evidence at the trial or that there was anything detrimental about the manner in which it was presented." R3, p. 518. The Defendant was denied his right to effective assistance of counsel when his attorney went to trial without a hair expert because it is reasonably probable that the failure to effectively challenge this very persuasive, adverse evidence affected the outcome of Defendant's trial. Strickland v. Washington, 466 U.S. 668 (1984).

3. THE TRIAL COURT ERRED IN NOT HOLDING THAT DEFENSE

COUNSEL'S FAILURE TO USE A BLOOD-TYPE EXPERT DENIED DEFENDANT THE EFFECTIVE ASSISTANCE OF COUNSEL

At the Defendant's jury trial, the State produced the testimony of Paul Doleman, a serologist and Crime Laboratory Analyst for the FDLE. He described his expertise as involving the examination of blood components. TT 627. He further described his specialty of forensic serology as a science dealing with the "identification and the classification of body fluids as they relate to crime scenes . . . . including such things as blood, . . . saliva, seminal fluid, vaginal secretions, any fluid that is produced by the body." TT 630. Paul Doleman testified that the deceased victim's blood was of the "type O secretor" type, meaning that her blood type *could* be detected in other body fluids besides blood, such as saliva and vaginal secretions. TT 631-632. Paul Doleman tested a sample of Defendant's blood and determined that the Defendant was of the "type O *nonsecretor*" type, meaning that the Defendant's blood type *could not* be detected in his other body fluids, such as saliva and semen. TT 634. Paul Doleman tested the liquid obtained from a swabbing of the deceased victim's vagina. TT 635. Microscopic examination revealed semen . TT 636-637. Testing of that fluid indicated that it came from an individual with "type O" blood. TT 637-638. By implication then, this fluid came from someone quite unlike the Defendant,

whose blood type could be discerned in their other body fluids such as their saliva, their semen or their vaginal secretions. However, Paul Doleman's final statement during direct examination was that the Defendant fell into that portion of the male population that could have had sexual intercourse with the victim. TT 638. In this fashion, Paul Doleman indicated, falsely, that the test pinpointed the Defendant was the source of the semen found in the vagina of the murdered victim.

Defense counsel never objected or required proof of chain of custody of the body-fluid evidence.

On cross-examination, Paul Doleman admitted that the testing revealed the Defendant to be among the 56 to 57 percent of the entire male population that could have contributed the semen. TT 639. Unfortunately, defense counsel did not understand enough about serology or blood typing or Paul Doleman's testimony to ask the pivotal question: How could the "Type O" vaginal fluid have possibly come from the Defendant, whose blood type *cannot* be identified in his semen? The answer to this question would not be known until 16 years later, at the evidentiary hearing on Defendant's subject motion for post-conviction relief.

The Defendant's allegations regarding the damage caused by his trial lawyer's failure to use an adequate defense blood-type expert appear at pages 30 to 41 of Defendant's subject motion for post-conviction relief. R1, p. 69-80.

At the evidentiary hearing on the subject motion, the Defendant once again called criminology expert Dr. Dale Nute once again, this time to explain what contributions a defense blood-type expert (serologist) could have made to the defense. Dr. Nute explained that the first thing he would have done would be explaining the concepts of "secretor" blood-type persons versus "non-secretor" blood-type persons. Dr. Nute would have also explained the implications of the swabbed body fluid being a mixture of both semen and vaginal secretions. R5, p. 806-807.

According to Dr. Nute, persons with "type O secretor" blood have an "antigen" in their blood which functions as a sort of blood-type identifier. That "type O" identifying antigen appears in the blood and other body fluids of persons with "type O secretor" type blood. R5, pp 812-813.

Dr. Nute explained that the weakness of the body-fluid test done in the subject case is that there is no way to tell whether the telltale "type O secretor" antigen detected in the swabbed liquid came from the semen or from the victim's own vaginal secretions. R5, p815-816 and 818. Moreover, because this test did not reveal the source of the type O secretor antigen, it could not eliminate the possibility that the semen came from someone other than the Defendant, who, like the victim, showed the type O secretor antigen in all their body fluids. R5, p. 816-

821.

Dr. Nute elucidated the problems with the vaginal swab test further in response to a hypothetical question. When asked , hypothetically, about what "type O secretor" test results would mean if the vaginal swab happened to pick up nothing but seminal fluid, Dr. Nute explained that, in such a situation, the presence of the type O secretor antigen would completely eliminate the defendant himself and all other persons with type O nonsecretor blood as possible sources of the semen. R5, p. 853 Dr. Nute testified that a blood-type expert like himself could have assisted the defense by suggesting ways to present this information to the jury. R5, p. 821-822.

Dr. Nute summed up the significance of the vaginal swab evidence by explaining that the defendant could have been in the majority of all American males, 56 percent, who could have contributed the semen. R5, p. 821. Dr. Nute also indicated that a blood-type expert like himself could have assisted the defense by recommending a motion to exclude the body-fluid evidence altogether on grounds that the potential for prejudice greatly outweighs its probative value. R5, p. 814. Beyond this, if Dr. Nute or an expert like himself had been retained by the defense, they would have suggested ways to explain to the jury how, given the technology of the time, the test was not very revealing. Dr. Nute would have emphasized the weak

identification power of the test by showing that the semen found in the victim's vagina could have come from an individual of any of the following blood types:

1. Type O secretor
2. Type A nonsecretor
3. Type B nonsecretor
4. Type AB nonsecretor

(R5, p. 807-808, 825)

Dr. Nute would have also suggested to Defendant's trial counsel that he make the jury aware that semen can be present in a woman's vagina for a period of hours or even a day or so, raising the possibility that the semen came from someone else, such as the victim's husband, or someone unconnected to the subject offenses. R5, p. 822-824.

Given the exaggerated and unchallenged claims of the State's blood-type witness, there is no basis for the trial court's conclusion that " . . . nothing in his (Dr. Nute's) testimony reveals any way in which the evidence presented to the jury was inaccurate, incomplete or fundamentally unfair to the Defendant. R3, p. 519. That the use of a defense blood-type expert would have affected the outcome of this case is evident in notes submitted by two separate jurors expressing confusion over the State's blood-type evidence. [2]

[2]Appellant is concurrently filing a motion to supplement the record to include these November 20, 1986 notes of Jurors Pam DeLay and David Booker.

At the evidentiary hearing, the Defendant's first lawyer testified that he had prepared a motion to incur the costs of mental health, blood and hair-type experts. R7, p. 1212-1213. There is no reason why Defendant's second lawyer failed to follow up on this.

It appears that trial counsel's decision not to use any defense experts at trial was based on his belief that they would not make any difference and based on the desire to make both first and last closing arguments to the jury. R7, p. 1313-1314. More information about this explanation is included in the argument for Issue 4 below. Trial counsel's earlier decision not to use defense experts at trial also appears to be based some vague and ambiguous confidential statements of the Defendant's which defense counsel construed as admissions of guilt. R7, p. 1319-1322. However, at the evidentiary hearing, defendant's trial counsel admitted that, even where the defendant admits guilt, " . . .the defense lawyer's obligation is to test the State's evidence as severely as you can." Defendant's trial attorney also testified that the defendant steadfastly denied committing the crimes charged. R7, p. 1321-1323.

With regard to the lack of defense experts, the trial court concluded that there was nothing inaccurate, incomplete or fundamentally unfair about the evidence presented against the Defendant. R3, p. 8-10. However, as the foregoing

demonstrates, the unchallenged testimony of the State's serologist unfairly suggested that the fluid swabbed from the victim's vagina came exclusively from the Defendant.

The harmful effects of a defense attorney's failure to use experts to develop useful impeachment and rebuttal evidence is addressed in the case of Cox v. State, 555 So.2d 352 (Fla. 1989). *Cox* had many of the same expert and proof issues which exist in the subject case. The State's experts claimed that various pieces of found evidence implicated the defendant. The State's hair expert testified that the hair resembled the defendant's hair, although the State's hair expert conceded that hair analysis is not absolutely certain or reliable. The State's blood expert testified that the defendant had type O blood and fell within that forty-five percent of the world population that has such blood. A non-expert who never examined the defendant's boots testified that a boot print from the crime scene was like those left by military boots (the defendant was in the U.S. Army). In reversing the defendant's conviction, the Court stated, "Although state witnesses cast doubt on Cox's alibi, the state's evidence could have created only a suspicion, rather than proving beyond a reasonable doubt that Cox, and only Cox, murdered the victim." In the present case, had defense counsel utilized expert witnesses and adequately presented the alibi defense, the State would have been unable to convince the jury

of that the Defendant was guilty beyond a reasonable doubt and had, at best, shown nothing more than a suspicion of Defendant's guilt.

In Cole v. State, 700 So.2d 33 (Fla. 5th DCA 1997), the Court found that defense counsel's act of proceeding through trial ". . . without a coherent theory of the case, seeking only to attack the State's witnesses on cross-examination without having any idea what the witnesses responses would be . . ." is per se deficient representation. The Defendant has satisfied the criteria of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). He was denied the effective assistance of counsel.

4. THE TRIAL COURT ERRED IN NOT HOLDING THAT DEFENSE COUNSEL'S FAILURE TO USE A FINGERPRINT EXPERT DENIED DEFENDANT THE EFFECTIVE ASSISTANCE OF COUNSEL

At trial, the State called Bruce Scott, a former Latent Fingerprint Examiner with the Florida Department of Law Enforcement, to testify regarding the fingerprint evidence. TT 666-677. Initially, Bruce Scott touted his own expertise by claiming that he had compared "hundreds of thousands" of fingerprints during his nine to nine and a half years as a latent fingerprint examiner. TT 679-680, 703.

Bruce Scott was presented with personal check number 369. He testified that he had to use a "ninhydrin" fingerprint development liquid to make the fingerprint visible and that the extremely strong, quick reaction yielding a dark

purple color indicated that the fingerprint was no more than ten days old. TT 685 to 687. Because he developed the fingerprint on March 4th, 1986, this indicated that the fingerprint had been placed on the check around the time of the subject, February 27, 1986 murder. TT 687-688. Bruce Scott also testified that this strong, immediate ninhydrin fingerprint development reaction indicated to him that the person who left the fingerprint "was probably perspiring heavily" at the time. TT 689. On cross-examination, Bruce Scott said that the fingerprint could *not* have been as much as twenty days old. TT 706-707. Defendant's trial attorney cross-examined Bruce Scott very vigorously in an obviously unsuccessful attempt to get Bruce Scott t retract his statements about the age of the fingerprint and the perspiration of the person who left it. TT 697-711.

Bruce Scott testified that only one fingerprint of value existed on this same check number 369. TT 686, 692. Bruce Scott explained that the other checks and deposit slips found with check number 369 did not contain any latent fingerprints or palm prints of value for identification. TT 695-696. Bruce Scott also said that his opinion that the subject fingerprint was within 10 days old was based on his experience conducting "hundreds of thousands" of such fingerprint developments and examinations. TT 702.

Defendant alleged that his trial attorney rendered ineffective assistance of

counsel by failing to obtain the assistance and testimony of a defense fingerprint expert. R1, p. 92-115.

At the evidentiary hearing, Defendant presented the testimony of fingerprint expert Ron Fertgus to show what a fingerprint expert could have done for the defense, had one been utilized by defense counsel. Ron Fertgus had been a latent fingerprint examiner with the Jacksonville Sheriff's Office for nearly ten years. R5, p 864. Before that, he was an evidence technician and fingerprint person with the City of Fernandina Beach Police Department. R5, p. 864-865. The State stipulated to his qualifications as a fingerprint expert. R5, p. 865.

Ron Fertgus flatly denounced State fingerprint expert Bruce Scott's claims that he could tell the age a sweatiness of a fingerprint by the speed and intensity of the ninhydrin development solution reaction. R5, p. 873-878. Mr. Fertgus explained that such claims were contrary to all of the professional literature and contrary to Mr. Fertgus' own, lengthy experience. R5, p. 878-879. Mr. Fertgus explained that Mr. Scott's claim to have chemically developed hundreds of fingerprints was implausible in that the work is very time-consuming and is done under a fume hood. R5, p. 880. Mr. Fertgus testified that throughout his own, lengthy fingerprint career, he had chemically developed only a few thousand fingerprints. R5, p. 880. Accordingly, Mr. Fertgus was of the opinion that Mr.

Scott's claim was false and a "gross exaggeration" and wrongfully boosted his credibility with the jury. R5, p. 881-882.

Mr. Fertgus reviewed the transcript of Bruce Scott's trial testimony. Mr. Fertgus stated that it has never been possible to date a fingerprint. R5, p. 883-884. Mr. Fertgus testified that the impossibility of dating fingerprint is well established in professional publications issued by the International Association for Identification and was taught as a fundamental truth in Mr. Fertgus' own FBI fingerprint training. R5, p. 886-887.

Mr. Fertgus also refuted Mr. Scott's claim that a he could tell that the fingerprint on the check had been left by a sweaty person. Mr. Fertgus explained that the ninhydrin chemical reacts to trace amounts of amino acids, not sweat. R5, p. 888. Furthermore, Mr. Fertgus testified that there was no scientific data and nothing in Mr. Fertgus' own experience that supported Mr. Scott's claim to be able to tell the sweatiness of a fingerprint. R5. P. 889.

Mr. Fertgus noted that Mr. Scott claimed that only one latent fingerprint of value existed whereas the fingerprint documentation for this case indicated that two had been found. R5, p. 895. Mr. Fertgus testified that it would be highly irregular to evaluate only one of two prints of value. R5, p. 896. Mr. Fertgus indicated that he could have assisted the defense in recognizing all possible identifiable

fingerprints in the records produced during discovery. R5, p. 898. Mr. Fertgus considered Mr. Scott's testimony to be so far-fetched that Mr. Fertgus had serious concerns about Mr. Scott's concentration level during the fingerprint identification process. R5. P. 899.[3]

Mr. Alan Chipperfield, the Defendant's first attorney, testified at the evidentiary hearing and explained the common knowledge on dating fingerprints back in 1986, the year of Defendant's trial. Mr. Chipperfield explained that, at the time of Defendant's trial, it was fairly well established in the scientific community that one could not date a fingerprint based on an examination of the fingerprint itself. R6, p. 1200 - R7, p. 1201.

After withdrawing from the case and being replaced by attorney Richard Nichols, Mr. Chipperfield came to court and observed some of the jury trial proceedings as a spectator. Mr. Chipperfield was present during the testimony of State fingerprint expert Bruce Scott. Mr. Chipperfield was aware even then, in 1986, that Bruce Scott's claims about being able to date a print based on the way it developed were "bologna." Indeed, Mr Chipperfield was "shocked and surprised" by such claims. R7, p. 1202.

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[3] The effect and subsequent discovery of Mr. Scott's cocaine-related problems are discussed later in the argument for Issue 6 in this brief.

At the evidentiary hearing on the subject motion for post-conviction relief, the Defendant's trial attorney testified that he himself understood that there was no way to date a fingerprint. R7, p. 1307-1308. With regard to the Defendant's fingerprint that had been found on the victim's personal check the defense strategy had been to argue that it had been been inadvertently left there earlier, when the defendant was living in the victim's home. R7, p. 1310. Defendant's trial attorney considered Bruce Scott's claims to being able to date a fingerprint to be a "low blow" which caught him completely off guard. R7, p. 1310-1312.

In its order denying the subject motion for post-conviction relief, the trial court conceded that defendant's trial counsel was "stunned" by Bruce Scott's claim that the fingerprint of the defendant which had been found on the personal check discovered in the victim's yard was a "fresh" print. R3, p. 520-521. The trial court denied this claim based on what it perceived to be very incriminating evidence of the check being found outside of the victim's house shortly after the murder and also based on the strong evidence that the fingerprint on the check was indeed the Defendant's. R3, p. 520-522. This ruling ignores the fact that the defendant had previously lived permissibly in the victim's home and had undoubtedly left some fingerprints back then.

Defense counsel was completely unprepared for Bruce Scott's claim that the

fingerprint on the check was less than 10 days old and left by someone with "sweaty" hands. This testimony was completely without scientific support or acceptance and falsely suggested that a nervous and sweaty Defendant handled the victim's checkbook at the time of the murder. Although the Defendant had lived as a guest in the victim's house and could have legally touched the check up until approximately nine weeks before the day of the murder, (TT 373, 377-190) Bruce Scott's groundless and uncontradicted testimony that the Defendant left a fresh, sweaty fingerprint on the victim's check around the time of the murder devastated the defense.

In Cole v. State, 700 So.2d 33 (Fla. 5th DCA 1997), the Court found that defense counsel's act of proceeding through the trial ". . . without a coherent theory of the case, seeking only to attack the State's witnesses on cross-examination without having any idea what the witnesses' responses would be . . . " is per se deficient representation.

Because defense counsel lacked a defense fingerprint expert, and was unprepared to challenge the State's fingerprint expert, defense counsel lost opportunities to exclude the State's fingerprint evidence as inadmissible and too circumstantial to support a conviction

To support a conviction, circumstantial fingerprint evidence must not only be

probative, it must also not be supportive of any reasonable theory of innocence. The Florida Supreme Court applied this principle to fingerprint evidence in the case of Jaramillo v. State, 417 So.2d 257 (Fla.1982). In reversing the trial court's conviction first-degree murder and ordering the trial court to discharge the Defendant, the court explained: "The State failed to establish that Jaramillo's fingerprints could only have been placed on the items at the time the murder was committed."

Evidence based on a novel scientific theory is inherently unreliable and inadmissible in a legal proceeding in florida unless the theory has been adequately tested and accepted by the relevant scientific community. Stokes v. State, 548 So.2d188 (Fla. 1989) and Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). *See also* Smith v. Singletary, 170 F. 3d.1051 (C.A. 11 Fla. 1999) as an example of fingerprint dating not passing the *Frye* test.

"A bald assertion by the expert that his deduction is premised upon well-recognized scientific principles is inadequate to establish its admissibility if the witness's application of these principles is untested and lacks indicia of acceptability". Ramirez v. State, 810 So.2d 836 (Fla. 2001). New and novel forensic testing techniques do not reach the threshold for admissibility under *Frye*. Ramirez. Because defense counsel did not have a separate defense fingerprint

expert on hand for trial, he was ill-prepared for the pseudo-science of Bruce Scott and completely ineffective in refuting it.

The failure to utilize experts warrants reversing a conviction where it results in counsel failing to adequately investigate, prepare and otherwise function as the government adversary. Osborne v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988), quoting United States v. Chronic, 466 U.S. 648, 666 (1984). Ineffective assistance of trial counsel claims which are based on trial counsel's failure to utilize expert witnesses are properly asserted in post-conviction, collateral relief proceedings. Lawrence v. State, SC00-2290 (Fla. 2002). *See also* Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed. 2d 53 (1985) regarding denial of expert witness assistance constituting a denial of due process. In the case at hand, there is no real justification for the decision to forego a defense fingerprint expert at trial. The damage, in the form of Bruce Scott's fantastic claims about Defendant's sweaty, recent fingerprint being on the victim's check, is obvious. At the very least, trial counsel should have asked the Judge for a curative instruction or a motion for mistrial based on the Frye violation. Accordingly, the Defendant has demonstrated that he was denied the effective assistance of counsel under the criteria of Strickland v. Washington, 466 U.S. 668, 104 So. Ct. 2052, 80 L.Ed.2d 674 (1984). Bruce Scott's groundless testimony was likely motivated by a desire

to redeem himself in the law enforcement community following his cocaine problems and departure from the FDLE. This motivation is discussed more fully in Issue 6 below.

5. THE TRIAL COURT ERRED IN NOT HOLDING THAT DEFENSE COUNSEL'S FAILURE TO PRESENT AN ALIBI DEFENSE DENIED THE DEFENDANT THE EFFECTIVE ASSISTANCE OF COUNSEL

The Defendant alleged that his trial attorney was ineffective in failing to investigate and present a credible alibi defense. R1, p. 115-125. Two types of alibi evidence existed which are relevant to the subject motion and to this appeal. First, there was evidence that it would have been difficult for the Defendant to travel the distances needed to commit the murder in the 5:40 p.m. to 9:50 p.m. time period. Second, there was evidence that the Defendant was at home at the trailer park where he lived when the murder occurred.

Irvin Oermann, the victim's husband, testified at the jury trial. His testimony indicates that the murder must have occurred on February 27, 1986, between 5:40 p.m. and 9:50 p.m., while he was away from home teaching a church youth class. TT 377-387. His wife was alive when he left at 5:40 p.m. (TT 385) and dead when he returned at 9:50 p.m. (TT 385-387).

The fact that the Defendant lacked an automobile and was forced to travel on foot is fundamental to an understanding of the Defendant's alibi. During the jury

trial, Mike Shelburne testified that he left the defendant near a friend's house at 7234 Ricker Road , around lunch time on the day of the murder. He did this so that the Defendant could to attempt to repair their broken-down car there. TT 489-491. At the time of the murder, the Defendant lived in Ware's trailer park, in Jacksonville, Florida. TT 485. Another trial witness named Debra Hipp testified that she observed the defendant traveling on foot when he returned to the trailer park. TT 500-501. A trial witness named Lisa Smith testified that the Defendant returned to the trailer park on foot, ("jogging") and complaining about the car being broken down. TT 509-510.

Yet another trial witness named Michael Shelburne testified that the Defendant returned to the trailer park "shortly before dark" at around 5:00 or 5:15 p.m. TT 492. In other words, evidence existed which indicated that the Defendant had arrived back home at his trailer park at 5:00 or 5:25, while Irvin Oermann was still at home with his living wife.

At trial, Detective J.D. Warren of the Jacksonville Sheriff's Office testified that the distance from the 7234 Ricker Road automobile break-down point to the trailer park was 5.1 miles. The victim's home was yet another 1.2 miles beyond that . TT 570-571. The distances between all of these places is great, for one who does not possess an operable automobile.

At the jury trial, witness Mark Rainey's testimony was limited to describing how he gave the Defendant the unique ball cap that was later found at the site of the murder. TT 476-482. However, the Defendant's first lawyer, Alan Chipperfield, had previously taken the deposition of witness Mark Rainey, and had previously heard him testify that the Defendant had returned to his own trailer around 5:00 p.m. and had remained there in the company of others, including his live-in girlfriend (Chris Niznik) until around 8:30 or 9:00 p.m. on the night of the murder. R1, p. 117-118. Unlike the Defendant's second lawyer, Mr. Chipperfield had educated himself about Mark Rainey's value as an alibi witness.

Mark Rainey testified at the evidentiary hearing. He explained that he was at the trailer park on the day of the murder. R4, p. 758. He remembered testifying earlier, in his deposition, that he had arrived back at the trailer park at 5:00 p.m. on the day of the murder and observed that the defendant was already there. R4, p. 762. At the evidentiary hearing, Mark Rainey initially testified that it was already dark outside when he (Mark Rainey) arrived back at the trailer park. However, he also admitted that his memory was clearer back at the time when he gave his deposition. R4, p. 762-765. Mark Rainey remembered testifying earlier in his deposition that he saw the Defendant at the trailer park when Mark Rainey and Patrick Hipp returned there at 5:00 p.m. on the day of the murder. R4, p. 766.

Shortly after his own arrival back at the trailer park, Mark Rainey observed the Defendant and another person named "Lee" fighting in front of the trailer park. R4, p. 762 and 765, L 13-20. In short, Mark Rainey places the Defendant in the trailer park at 5:00 on the evening of the murder, and for awhile thereafter when the Defendant was fighting with Lee. Defendant's trial counsel should have presented this information to the jury.

Ms. Christine Niznik lived with the Defendant in Ware's Trailer Park at the time of the murder. R7, p. 1249. She was not called to testify at trial. However, she testified at the evidentiary hearing. She and the defendant had been living with the victim in the victim's home for " . . a few weeks, maybe two weeks. . ." before moving into the trailer park. R7, p. 1250.

Ms. Niznik had a clear recollection of where the defendant was on the day of the murder. Around 1:00 in the afternoon, the defendant and Mike Shelburne left the trailer park in Deborah Hipp's car to buy beer at the store. R7, p. 1251-1253. When "hours went by" without the defendant returning, Chris Niznik became angry and threw all of the Defendant's belongings out of their trailer. It was still daylight, "in the afternoon" when she did this. R7, p 1253-1254. Chris Niznik then went to the nearby trailer of a friend named Lisa Smith. Ms. Smith telephoned the police. R7, p. 1254-1255. That call was made at ". . . about 4:00, between 4:00 and 5:00

. . .” while it was still daylight outside. R7, p. 1255.

A police officer arrived around 4:00 to 5:00 p.m. Ms. Niznik was throwing the Defendant’s belongings out of their mobile home. R7, p. 1282, 1286. The officer said that he could not do anything for Ms. Niznik. R7, p. 1254-1255.

The police returned a second time, after “it had just gotten dark” because of the fight between the Defendant and Lee. R7, p. 1283-1284. The sun set at 6:46 p.m. that evening. R6, p. 1169-1107. Accordingly, Ms. Niznik places the Defendant in the trailer park from approximately 5:00 to 7:00 on the evening of the murder.

From the moment of the defendant’s second return to the trailer park, when it was first “starting to get dark, ” and continuing through midnight on the evening of the murder , the defendant remained home in his trailer with Chris Niznik. R7, p. 1255-1256. This accounts for where the Defendant remained for the rest of the evening and completes the alibi. Ms. Niznik also testified that the trailer that she and the defendant shared was about two miles from the victim’s house. (R7, p. 1258) As such, it is highly unlikely that the Defendant could have traveled on foot to and from the victim’s house without his absence being noted by Observed by Ms. Niznik.

Chris Niznik gave a deposition and then received no further contact from any

lawyers. Ms. Niznik gave her Tennessee phone numbers and addresses to defendant's lawyers. However, the Defendant's lawyers called only to confirm her whereabouts and availability for trial R7, p. 1256-1258. She never got an opportunity to testify at trial.

At the evidentiary hearing, Ms. Niznik testified that she did not remember ever seeing the defendant *wearing* the unique, incriminating ball cap. R7, p. 1264.

Officer Summersill reviewed police computer print-outs of citizen calls for police assistance made from the trailer park where the Defendant lived on the day of the murder. R5, p. 922, 927-929. Those print-outs indicated that two calls came from Ware's trailer park. One call came in at 6:46 p.m. and a second call came in at 9:15 p.m. Both calls were logged in as "Code 63" calls, which denotes a "disturbance." A Code 63 "disturbance" could include a verbal or physical altercation. R5, p. 927-930. The print-outs bear the date of the murder, 2/27/86. R2, p 357-359. These records should have been obtained and used by trial counsel to support to the other testimony which indicated that the Defendant was at home, getting into altercations at the trailer park, and not out committing crimes during the night of the murder.

There was also evidence which suggested that the defendant lacked the energy and automobile transportation needed to complete the travel necessary to

commit the crimes. Officer Summersill personally encountered the Defendant at 7200 Ricker Road in the afternoon of the day of the murder. He was dispatched to this location to investigate a suspicious person. R5, p. 941. Upon arrival, at 4:00 p.m., Officer Summersill interviewed the Defendant. R5, p. 944. Officer Summersill completed a Field Investigation Report. That Field Investigation Report form bears the Defendant's name and describes the Defendant as having a cross tatoo on his right shoulder, a mustache, a beard, and Opryland T-shirt and blue jeans. R2, p. 360. Officer Summersill noted that a call had been dispatched directing him to check out a person passed out behind the wheel of a car. Officer Summersill noted that alcohol was involved in the investigation and that the Defendant had been drinking. Officer Summersill listed "beer" as the "contents of vehicle." R2, p. 360.

This interview occurred at 4:00 p.m, a mere 100 minutes prior to the 5:40 p.m. to 9:50 p.m. time period that the murder occurred in. Officer Summersill testified that if the Defendant had been wearing a unique article of clothing such as an Opryland T-shirt or a Dr. Pepper Cap, he would have made note of it in his report. R5, p. 946-947. The report contains no mention of the unique, incriminating ball cap which was later found at the murder site. R2, p. 360.

Given the the Defendant's alcohol consumption, passed-out condition,

distance from the murder site at 4:00 p.m., and the lack of the incriminating ball cap, the testimony and report of Officer Summersill's should have been used to show the unlikelihood that the Defendant was the perpetrator of the crimes.[4]

The Defendant's first attorney, Mr. Alan Chipperfield testified at the evidentiary hearing. He testified that he had indeed been investigating an alibi defense when he represented the Defendant and that the alibi defense had been one of the Defendant's main concerns. R6, p. 1168-1169. Attorney Chipperfield also remembered doing some research into the time of sunset on the day of the murder because it was significant to the alibi defense. R6. P. 1169-1170.

Mr. Chipperfield remembered making notes to himself that Mark Rainey's deposition testimony was good for the alibi defense and that Mark Rainey claimed that it was 5:00 p.m. when the Defendant ("him") and several other witnesses

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[4]It is probable that Defendant's first attorney, Alan Chipperfield, would have located Officer Summersill and these police reports if he had continued on the case. The State failed to disclose Officer Summersill or the police reports that Officer Summersill interpreted at the evidentiary hearing in the State's written discovery disclosures. The Appellant is concurrently filing a motion to supplement the to include the State's discovery responses in the record on appeal. The Defendant disclosed his intent to call Officer Summersill as a witness in support of the subject motion in Defendant's witness list R2, p. 317. Arguably, the State's failure to disclose Officer Summersill and the police documents he testified about constitute a violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed. 2d 215 (1963) and its progeny. It is also arguable that Defendant's trial attorney would not have pursued or used this evidence even if he had known about it for the ethical reasons which follow.

including Chris (Chris Niznik, the Defendant's girlfriend) arrived at the trailer park and remained there until 8:30 or 9:00. R6, p 1172. In other words, the Defendant's first attorney, Mr. Chipperfield, possessed ample information indicating that the Defendant did not have much time within which he could have committed the murder.

Attorney Chipperfield personally traveled to the neighborhood where the murder occurred and to the trailer park where the defendant lived to determine the if the murder could have occurred as alleged by the State. R6, p. 1175-1176.

Mr. Chipperfield recognized a note he had written to himself when he had been preparing for trial. He had written, "Need to nail down alibi - Mark Steven Rainey, Depo Pat Hipp, Chris , Debora Hipp, Lee (black guy)." R6, p. 1180. Back then, attorney Chipperfield felt it was important to follow up and talk to these individuals about an alibi. R6, p. 1181. He remembered contacted police lieutenant Adams to request a record of police emergency calls from the trailer park.

According to Mr. Chipperfield, Ms. Niznik reported that on the night of the murder, she and the defendant had been involved in a domestic argument. There had also been some noisy partying. The police came to the trailer park twice to investigate disturbances. R6, p. 1184-1185. Clearly, the Defendant's first

lawyer, Mr. Chipperfield, was well on his way toward developing the alibi defense and acquiring that the police records that supported it. If Mr. Chipperfield had remained on the case, he would have likely found police officer David Summersill and the telephone call records and investigation report.

Mr. Chipperfield considered it important to follow up and at least attempt to talk to the various individuals who might possess information relevant to an alibi defense. R6, p. 1181. At the evidentiary hearing, Mr. Chipperfield had no present recollection about communicating with successor defense attorney Richard Nichols. However, it was his normal practice to summarize the case in spoken word or writing for a successor defense attorney. R6, p. 1182.

Mr. Chipperfield testified that it was his practice to file and serve a notice of intent to claim alibi once he had made up his mind to present an alibi defense. R6, p 1176. Indeed, Mr. Chipperfield filed a notice of intention to claim alibi in the subject case on July 24, 1986. He listed Mark Rainey as an alibi witness. R6, p. 1178. Mr. Chipperfield explained that when he handled this case, the defense strategy was indeed to present an alibi defense. R7, p. 1214.

Defendant's trial lawyer, Mr. Richard Nichols, also testified about the alibi defense at the evidentiary hearing. He indicated that his decision not to utilize expert witnesses or present an alibi defense was based on his own conclusion that

the Defendant was guilty as charged and based on the desire to retain the right to make first and last closing arguments. On the subject of hair evidence, attorney Nichols explained, ". . .Mr. Reed made it pretty clear to me that that hair had been deposited at the time of the crime and to call an expert would just cause us to lose opening and closing argument." R7, p. 1315.

However, when defendant's trial counsel was asked to be specific about what the defendant said with regard to hair and semen evidence, the Defendant's trial lawyer explained:

> Mr Reed never, in a direct, explicit way said I did this or I did that, but when I confronted him with evidence I thought the State was going to present, he would make *what I saw* as sort of thinly veiled admissions about it. With regard to the semen and the pubic hair and the pubic combing, . . . he said things to me to try to make me think that there had been some consensual sex with this woman and it had not been a rape, that the suggestion was that he had had sex with her and that somebody else had killed her.
>
> (R7, p 1319-1320; emphasis Appellant's)

When asked what the defendant said with regard to the check found in the back yard which bore the defendant's fingerprint, the Defendant's trial lawyer similarly said:

> "He made similar obtuse comments that clearly *suggested* to me that he was surprised that the check had been dropped there. He didn't say, yeah, I picked up the check and I -- I mean he didn't specifically describe things to me . . . .he made a comment in the nature of – that

> he was – he didn't realize he had dropped the check." R7, p. 1320-1321 (emphasis Appellant's)

Appellant's trial lawyer took the Defendant's comment that he didn't realize he had dropped the check as an admission that Defendant did indeed handle check during the commission of the crimes. R7. P. 1321.

During the evidentiary hearing on the subject motion, the State asked defendant's trial attorney what he thought of the Defendant's comments as follows:

> Q: Were Grover Reed's comments about pieces of the evidence or aspects of the evidence, a – cumulative comments that he made, did that or did that not leave you with a *sense* that he had in fact committed this crime?
>
> A: Yes, it did, and I mean – well, yeah, it did.
>
> (R7, p. 1321-1322; emphasis Appellant's)

The Defendant's only clear and unambiguous comment on the subject of guilt or innocence, according to Defendant's trial attorney, was as follows:

> " . . . Mr. Reed often said to me *I didn't do this, I didn't kill that woman, I didn't do this . . .*"
>
> (R7, p. 1321-1322; emphasis Appellant's)

Defendant's trial lawyer acknowledged that the Defendant was interested in an alibi defense. R7, p. 1323-1324. However, Defendant's trial lawyer revealed his own mistaken beliefs that the alibi must leave no possibility whatsoever that the

Defendant committed the crime and must be supported by an additional, independent witness as follows:

> The – as I understand it even if you took that evidence in its best light it still left enough time relative to the fairly small distances that Mr. Reed – even if he had witnesses to say that he had been – that suggested where maybe he had been if that made sense he still physically could have committed the crime, and I had a conversation with him about essentially saying to him *I don't want to go out there and spend a lot of my time and energy looking for somebody if there is nobody out there*, and he acknowledged to me, he said, yeah, it would be kind of a waste of your time and I took that as part of another of his acknowledgment that he had been there when the crime was committed and that an alibi didn't exist.
>
> (R7, p 1324; emphasis Appellant's)

Defense counsel obviously failed to understand himself that one does not need additional or independent witness to present an alibi defense. The above-quoted question that defense counsel asked of the defendant was a "loaded" one that suggested to the Defendant that there could be no alibi defense without additional, independent alibi witnesses. In so misleading the Defendant, trial counsel provided ineffective representation.

With regard to presenting an alibi defense, the Defendant's trial attorney explained how he reached his conclusion that the Defendant was guilty and not entitled to the alibi defense as follows:

> . . . For example, if a defendant acknowledges they have committed a

> crime I don't feel like I have got to go out and try to find somebody who is going to be and alibi witness. I think that's kind of a type of subornation of perjury so I would not do that in that situation . . . . "
>
> (R7, p. 1323)

Rule 4-1.2, Florida Rules of Professional Conduct requires an attorney to abide by his client's wishes. However, the Committee Comment to Rule 4-3.3 of the Florida Rules of Professional Conduct specifies that where the client expects the attorney to put on perjured testimony or false evidence, the attorney must first remonstrate with the client confidentially and then, if that fails, seek to withdraw.

In the present case, defense counsel simply ignored the defendant's wishes. This was wrong. Since he believed his client had admitted to the crimes, Defense counsel should have instead remonstrated the Defendant and, if that failed to alleviate the conflict, defense counsel should have moved to withdraw. See Rule 4-3.3 Florida Rules of Professional Conduct and the Committee Comment to same. Where the Defendant clearly denies guilt, failing to present a defense which is desired by the client and supported by the evidence is not effective representation.

In its order denying this claim, the trial court stated, "In considering this particular claim, one must remember that trial counsel had *deduced* that the defendant had actually admitted the crimes to trial counsel. One must also remember that the defendant had *intimated* to trial counsel that the search for alibi

witnesses would be fruitless." R3, p. 523 (emphasis appellant's). On the question of guilt or innocence, defense counsel should never have to "intimate" or "deduce." Defense counsel must determine what happened and what the client expects early on, for defense counsel to be able to effectively represent a defendant.

In its order denying the subject motion, the trial court also noted that witnesses Debra Hipp and Lisa Ann Smith testified that the Defendant returned to the trailer park at 7:30 or 8:00 p.m., such that it was possible for the defendant to have committed the crimes. R3, p. 523. The trial court also seems to share trial counsel's view that presenting an alibi defense in this case would have been unethical. R3, p. 527. Considering that alibi evidence existed and the Defendant denied guilt, this was error. It was up to the jury to decide the guilt or innocence, not the trial court and not defense counsel.

Defendant's trial lawyer should have never assumed the various vague and ambiguous statements made by the Defendant admitted guilt. Defendant's trial lawyer should have clarified the guilt/innocence issue in clear, unequivocal terms so that he could counsel the Defendant appropriately.

Defendant's trial lawyer was also mistaken in believing and indicating to the Defendant that an alibi must render it completely impossible for the defendant to

commit the crime. It is true that the evidence of alibi must pertain to relevant time period. Costantino v. State, 244 So.2d 341 (Fla 3d DCA 1969). However, because an alibi is a denial of guilt rather than an affirmative defense, the proof of an alibi need not establish it conclusively or beyond a reasonable doubt. Ingram v. State 198 So. 464 (Fla. 1940), Murphy v. State, 12 So. 453 (Fla. 1893). *See also* Flowers v. State, 12 So.2d 772 (Fla. 1943). The proof of an alibi need not establish that it was impossible for the Defendant to have been present at the site of the crime, nor must the proof be absolutely clear. Flowers v. State, id.; Caldwell v. State, 39 So. 188 (Fla. 1905).

If Defendant's trial counsel had presented the alibi evidence and argument to the jury, he would have likely persuaded the jurors that the State raised nothing more than a "reasonable suspicion" of the Defendant's guilt, insufficient to sustain a verdict of guilty. Cox v. State, 555 So.2d 352 (Fla. 1989). The failure to call alibi witnesses can constitute ineffective assistance of counsel where, as here, the alibi testimony is identified and the failure to present such testimony is shown to have prejudiced the Defendant. Greeson v. State, 729 So.2d 397 (Fla. 1st DCA 1998). For all of these reasons, the trial court erred in not finding that the Defendant received ineffective assistance of counsel with respect to the alibi defense.

6. THE TRIAL COURT ERRED IN NOT HOLDING THAT THE STATE'S FAILURE TO DISCLOSE INFORMATION ABOUT POLICE OFFICER DAVID SUMMERSILL AND FINGERPRINT EXPERT BRUCE SCOTT VIOLATED THE DISCLOSURE REQUIREMENTS OF *BRADY v. MARYLAND* AND ITS PROGENY

As noted in the argument for Issue 4 above, the Defendant's trial attorney was caught off guard and unprepared for State fingerprint witness Bruce Scott's claim that the Defendant's fingerprint which had been found on the victim's check was fresh and had been left by a sweaty hand. Subsequent, post-conviction records demands led to the discovery of an apparent motive for Bruce Scott's over-zealous testimony: Bruce Scott had recently left his employment with the FDLE when he had been investigated for cocaine consumption.

As noted in the argument for Issue 5 above, the State failed to disclose the existence of a police officer David Summersill, who possessed information about Defendant's whereabouts on the afternoon of the murder and who was needed for the alibi defense.

The Defendant alleged that he was prejudiced by the State's failure to disclose this material evidence beneficial to the defense, and newly discovered evidence in general, in his subject motion for post-conviction relief. R2, p. 241-244.

As noted above in the argument to Issue 4, Fingerprint Expert Ron Fertgus

testified that there was no scientific basis for FDLE fingerprint expert Bruce Scott's claim that the fingerprint of the Defendant's which appeared on the victim's check had been left recently by a sweaty hand. The testimony of Bruce Scott's FDLE superiors revealed the pressures which may have affected Bruce Scott's testimony at trial.

FDLE Bureau Chief Steven Platt testified regarding Bruce Scott's activities at the FDLE crime lab in June of 1986, shortly before the jury trial in the subject case. R5, p. 962-963. FDLE fingerprint expert Bruce Scott admitted to Steven Platt back then that he had been consuming cocaine in the FDLE crime lab. R5, p. 962-963 and p. 965. It was cocaine which had been submitted to the crime lab for analysis. R5, p. 963. At the time, Bruce Scott had been working as a latent fingerprint analyst with the FDLE crime lab. R5, p. 964. Based on Steven Platt's observation of Bruce Scott's eyes, body movements and speech, Steven Platt felt that Bruce Scott was under the influence. R4, p. 964. Bruce Scott confessed to Steven Platt that he (Bruce Scott) had ingested cocaine while he was on the job at the crime lab and that it had indeed intoxicated him. R4, p. 973. Bruce Scott showed Steven Platt how he shook the cocaine out of the bags and scraped it into piles for ingestion. R4, p984. Steven Platt was so concerned with Bruce Scott's work that he reviewed all of Bruce Scott's work between January of

1985 and June of 1986. R4, p. 967. It is noteworthy that this time period encompassed the date of the subject murder: February 27, 1986. Bruce Scott ultimately approached Steven Platt, expressed embarrassment over these events, and expressed an intention to resign from the FDLE. R4, p. 980-981

At the evidentiary hearing on the subject motion, Steven Platt testified, "I believe it was June 4th, 1986 when he made those statements to me concerning removing cocaine from evidence containers and ingesting it and I suspended him from all action at that time. He later resigned during the course of an internal investigation." R4, p. 968. The Bruce Scott cocaine matter was referred to the State Attorney's Office to determine if a prosecutable case could be made against Bruce Scott. R4, p. 969. According to Steven Platt, Bruce Scott's actions caused Bruce Scott to be suspended from the FDLE crime lab. R5, p. 1006. Steven Platt explained that the FDLE would inform the State Attorney's Office about Bruce Scott's cocaine situation and the fact that Bruce Scott no longer worked at the FDLE whenever one of the cases Bruce Scott worked on came up for trial. R4, p. 970-971. However, Bruce Scott was never prosecuted. R4, p. 992.

Former State Attorney Steven Kunz testified at the evidentiary hearing for the subject motion. He testified that the FDLE did send his State Attorney's Office

information about Bruce Scott's cocaine consumption for investigation and possible prosecution. R5, p. 1013-1014 and p. 1017. Mr. Kunz testified that the State Attorney's office declined to prosecute Bruce Scott because it lacked any proof beyond Bruce Scott's own admissions. R5, p. 1014-1015. The fact that Bruce Scott spoke frankly about his cocaine problem based on a promise of immunity also factored in Mr. Kunz's decision not to prosecute. R6 p. 1023. Mr. Kunz realized that having an FDLE employee accused of cocaine problems could, depending on circumstances, jeopardize prosecutions. R5, p. 1020. However, he also felt that the prosecutions involving Bruce Scott would not be jeopardized because formal charges were not being brought against Bruce Scott. R5, p. 1020. Nevertheless, Mr. Kunz was personally convinced that Bruce Scott did indeed use the cocaine. R6, p. 1028.

An internal investigator with the FDLE named Wayne Thompson testified at the evidentiary hearing on the subject motion. He testified that the FDLE did not consider it acceptable for a crime lab to be staffed by an individual known to be using cocaine. R6, p. 1071. Wayne Thompson testified that Bruce Scott asked for his job back at the FDLE but was considered unsuitable for rehire. R6, p. 1079-1080 and p. 1085. In 1986, at the time of the investigation and prosecution of the subject case, the FDLE prohibited employees from using illegal drugs. R6,

p. 1092.

As noted in the argument for Issue 4 above, the defendant's public defender and trial attorney testified at the evidentiary hearing on the subject motion. Both testified that they were taken aback by Bruce Scott's claim that the fingerprint of the Defendant's which had been left on the victim's check was fresh and sweaty. The State never disclosed Bruce Scott's cocaine problems nor his related investigation and departure from the FDLE in its written discovery responses.[5]

The Defendant's prosecutor, Mr. George Bateh, conceded that if he had known about Bruce Scott's suspension from the FDLE crime lab, it is something that hew probably would have notified the defendant about. R7, p. 1297.

The trial court, citing Breedlove v. State, 580 So.2d 605 (Fla. 1991) and Breedlove v. Moore, 2002 WL 63184 (11th Cir. 2002) rejected the defendant's claim that the nondisclosure of Bruce Scott's cocaine-related problems violated the Defendant's rights. R3, p 544-555. The trial court denied this claim on grounds that Bruce Scott's cocaine-related conduct was not relevant to the evidence presented at trial and would not have led to the discovery of any other, admissible

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[5]The Appellant is concurrently filing a motion to supplement the record on appeal to include the Defendant's written discovery demand and the State's two written responses which do nothing to disclose Bruce Scott's cocaine problems.

evidence. R3, p. 544-545.

The State possessed evidence of Bruce Scott's cocaine problems as is evident in Former Assistant State Attorney Steven Kunz' testimony about how Bruce Scott's cocaine problems had been referred to him. It is also clear from the above-summarized testimony of prosecutor George Bateh and defendant's trial attorney that the State did not disclose its information about Bruce Scott's cocaine problems to the defense prior to trial.

The only apparent explanation for Bruce Scott's concocted testimony about the fingerprint being fresh and sweaty (which suggested that a nervous Defendant handled the victim's checkbook at the time of the murder) is that Bruce Scott's thinking was impaired by the effects of the cocaine and by his own desire to restore his reputation in the law enforcement community. There is a reasonable probability that the outcome of the case would have been different if the evidence of Bruce Scott's cocaine problems and investigation had been disclosed. The evidence of the cocaine problems would have reduced Bruce Scott's credibility at trial. At the very least, an awareness of Bruce Scott's cocaine problems would have put defense counsel on notice that Bruce Scott was a "loose cannon" requiring the use of a separate, reliable defense fingerprint expert at trial. Accordingly, the evidence of Bruce Scott's cocaine problems and investigation

constitute exculpatory evidence that the State unconstitutionally withheld from the Defendant. Brady v. Maryland, 373, U.S. 83 (1963).

It is not necessary that prosecuting attorney George Bateh personally knew about Bruce Scott's cocaine problems for a Brady violation to occur. Knowledge of law enforcement agencies is imputed to the state. Griffin v. State, 598 So.2d 254 (Fla. 1st DCA 1992), State v. Del Gaudio, 446 So.2d 605 (Fla. 3d DCA 1984), Kyles v. Whitley, 514 U.S. 437(1995). The Brady disclosure requirement applies to impeachment evidence as well as ordinary exculpatory evidence. Giglio v. United States, 405 U.S. 150 (1972), United States v. Bagley, 473 U.S. 667 (1985).

The trial court's reliance on Breedlove v. State, 580 So.2d 605 (Fla. 1991) is misplaced for several reasons. Breedlove, involved police officers' whose corrupt activity was not discovered or known to the state until after the Defendant's trial. In the present case, Bruce Scott's cocaine problems were known to the State before the Defendant's trial. In Breedlove, the corrupt police officers' knowledge of their own corrupt activities could not be imputed to the State because it was likely that they would invoke their right to remain silent and not confess. In the subject case, Bruce Scott did not invoke his right to remain silent. He spoke freely of his cocaine consumption in June of 1986, nearly five months before the Defendant's jury trial. R6, p. 962-963.

In the present Defendant's case, Assistant State Attorney Steven Kunz knew about Bruce Scott's cocaine use on August 28, 1986, nearly three months before the subject Defendant's jury trial. R7, p. 361 and R6, p. 1013, 1016-1017. At all relevant times Assistant State Attorney Steven Kunz (who investigated Bruce Scott's cocaine problems) and Assistant State Attorney George Bateh both worked in the Duval County State Attorney's Office. R2, p. 361 and R2, p. 2. Under such circumstances, it is fair to say that the State knew, both actively and constructively, of Bruce Scott's cocaine problems and investigation. The State wrongfully suppressed this strong impeachment evidence.

It would be overly literalistic to say that the subject of the internal investigation of Bruce Scott and his cocaine consumption were not directly related to the charges against the defendant. Indeed, Bruce Scott spoke as a fingerprint expert, not a law enforcement officer, at the Defendant's jury trial. Accordingly, his cocaine problems and investigation should receive a different analysis than that given in connection with the law enforcement officers in Breedlove v. State, 580 So.2d 605 (Fla. 1991) and Breedlove v. Moore, 2002 WL 63184 (11th Cir. 2002).

Bruce Scott's preposterous claim that he could tell that Defendant's fingerprint was fresh and sweaty led another fingerprint expert to " . . . have serious concerns about (Bruce Scott's) concentration level during the (fingerprint)

identification process. R5, p. 899. In other words, there appears to have been a very strong connection between Bruce Scott's cocaine problems and investigation and the unfounded testimony he gave at the Defendant's trial.

If Bruce Scott's cocaine problems and investigation had been disclosed to the defense, Defendant's trial counsel would have probably viewed Bruce Scott as a "loose cannon" and would have probably had a separate defense fingerprint expert on hand to testify at the jury trial. Alternatively, Defendant's trial counsel would have been able to minimize the damage caused by Bruce Scott's groundless testimony by cross-examining Bruce Scott on whether his ingestion of lab cocaine and subsequent investigation had affected his thinking and discernment. For all of these reasons, the trial court erred in failing to hold that the State's nondisclosure of Bruce Scott's cocaine problems violated the disclosure principles set forth in Brady v. Maryland, 373 U.S. 83 (1963).

There are additional reasons why Bruce Scott's cocaine problems should have been disclosed and not permitted to compromise the integrity of this prosecution. The case of Taylor v. State, 662 So.2d 1031 (Fla. 1st DCA 1995) dealt with a defendant who sought to withdraw his plea of guilty after receiving news that his arresting officer had been forced to resign under the onus of allegations of his falsification of police reports and his investigation by the Sheriff's

Office, the FBI, and the Federal Drug Enforcement Administration. The trial court concluded that such allegations " . . .are sufficient to call into question the integrity of the process by which he was accused and therefore to suggest that a 'manifest injustice' occurred." The appellate court directed the trial court to conduct an evidentiary hearing and allow the defendant to withdraw his plea if the defendant subsequently convinced the trial court that a manifest injustice had occurred. The defendant in the subject case, submits to this reviewing court that a manifest injustice has occurred in his case in the form of Bruce Scott's groundless, prejudicial testimony about Defendant Grover Reed leaving a fresh, sweaty fingerprint on the victim's check. This a good reason why Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963) and Breedlove v. State, 580 So.2d 605 (Fla. 1991) should be applied to this case and others like it to require disclosure of impeachment evidence.

Florida Courts have long recognized that situations which place a witness under great pressure to assist in a conviction violate the defendant's due process rights under Article I, Section 9 of the Florida Constitution. Hunter v. State, 531 So.2d 239 (Fla. 4th DCA 1988). In the present case, Bruce Scott left his FDLE employment under a cloud of suspicion. Naturally, he would be desirous of reestablishing his reputation in the law enforcement community. Indeed , Wayne

Thompson of the FDLE testified at the evidentiary hearing on the subject motion that Bruce Scott did try to get his job back at the FDLE, albeit without success. R6, p. 1079-1080. The Defendant submits to this appellate court that the State's use of Bruce Scott against the Defendant without revealing Bruce Scott's cocaine problems and investigation violated the Defendant's Article I, Section 9, Florida Constitution due process rights.

These are all reasons why Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963) and Breedlove v. State, 580 So.2d 605 (Fla. 1991) should be applied to the facts of this case and others like it in a fashion that requires disclosure.

In determining whether or not "material" evidence has been wrongfully withheld to the point of undermining confidence in the outcome of a trial, the court is to consider the cumulative effects of all of the incorrect activities and actions given the facts of the individual case. Kyles v. Whitley, 514 U.S. 437(1995). *See also*, Stickler v. Greene, 527 U.S. 263, at 281 (1999). The present Defendant, and his girlfriend Chris Niznik had at one time been close to the victim and her husband. TT372-373. The Defendant and Chris Niznik lived permissibly in the victim's home and had helped her out with household chores such as vacuuming, dusting, cleaning. They even used the victim's laundry facilities. R7,

p. 1258-1259. The victim and her husband provided the Defendant with cash loans of $200. TT274-275. Because of this, no one would be surprised to hear that the police found some of the Defendant's hair, fingerprints and perhaps other items on the victim's premises and belongings. However, for the same reasons, Bruce Scott's substantially unimpeached testimony about finding the Defendant's "fresh" and "sweaty" fingerprint on the victim's personal checks was especially prejudicial. By denying the Defendant information about Bruce Scott's unprofessional behavior and cocaine use, the State precluded any opportunity to anticipate and challenge Bruce Scott's groundless testimony. The trial court erred in failing to hold that the State's failure to disclose Bruce Scott's cocaine problems and related internal investigation violated the defendant's due process rights and the disclosure requirements of Brady v. Maryland, 373 U.S. 83 (1963) and its progeny.

7. THE TRIAL COURT ERRED IN NOT HOLDING THAT DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO CHALLENGE THE STATE'S CASE BASED ON BLOOD-TYPE EVIDENCE OF APPARENT INNOCENCE

As indicated in the argument for Issue 3 above, State witness and blood-type expert Paul Doleman testified that the Defendant was an individual with "type O secretor" blood type, meaning that the Defendant is an individual whose blood type

cannot be detected in his other body fluids, including his semen. TT 633-634. Paul Doleman indicated that the semen swabbed from the victim's vagina came from an individual whose blood type *could* be detected in their semen as follows:

> . . . I was able to detect on the vaginal swab H antigenic activity. Now H antigenic activity is equivalent to blood type O.

(TT 637-637)

This testimony seems to eliminate the Defendant as a possible source of the semen.

The issue of defense counsel's ineffectiveness in handling this evidence and its apparent elimination of the Defendant as a possible source of the semen was raised in the subject motion. R1, p. 137-145.

At the evidentiary hearing, another blood-type expert, Dr. Dale Nute, testified regarding what a separate blood-type expert could have done for the defense, if defense counsel had chosen to retain one. With regard to the blood type detected in the vaginal swab, Dr. Nute explained:

> Countering it (the State's blood-type evidence) would be to point out that the evidence not only very poorly includes Mr. Reed in the population of possible donors but there is a strong possibility that he could have been excluded since the stain is a mixture and it shows antigen activity. The assumption was that the antigen activity came from the vaginal secretions. There is no evidence that had been introduced that there is any way to tell whether it came from the semen itself or whether it came

> from the vaginal material, so therefore it could have – the evidence has a potential to exclude him (the Defendant) as well . . . " R4, p. 808-809.

The Defendant's trial lawyer's testimony regarding why he chose not to utilize a separate blood-type expert for the defense appears in the argument for Issue 3 above.

In its ruling on this issue, the trial court simply referred to its decision that defense counsel was not ineffective in failing to use a separate, defense, blood-type expert. R3, p. 528, beneath its heading *Claim IV - Failure to Present Expert Testimony Regarding Reed's Non-secretor Status*.

Paul Doleman's testimony that the semen came from an individual whose blood type could be detected in their semen, taken literally, means that the Defendant could not possibly have been the source of the semen. Admittedly, The test used on the vaginal swab was actually incapable of telling whether the blood-type indicator ("antigen") on the swab came from the semen or the victim's vaginal secretions. The Appellant has already candidly pointed this out in his argument for Issue 3 above. However, defense counsel was ineffective in failing to educate himself about this shortcoming of the test and in failing to cross-examine Paul Doleman about it.

For example, defense counsel could have asked Paul Doleman if it was true

that the presence of this "type O" indicator ("antigen") in the semen completely eliminated the Defendant as the source of the semen. Most likely, such a question would have elicited an admission that, given the technology of the time, the test could not distinguish whether the "type O" indicator ("antigen") came from the Defendant or the victim. Such questioning would have also forced Paul Doleman to admit that there remained a very strong possibility that the semen came from someone other than the defendant who had "Type O secretor" blood.

There exists a fair probability that if this evidence been properly presented to the jury, a reasonable doubt would have been entertained. Kuhlman v. Wilson, 477 U.S. 436, 454, n. 17 (1986). A person who is threatened with a capital sentence or who has received a capital sentence is entitled to every safeguard the law has to offer, Gregg v. Georgia, 428 U.S. 153, 187 (1976), including full and fair post-conviction proceedings. *See*, *e.g.* Shaw v. Martin, 613 F.2d 487, 491 (4th Cir. 1980), Evans v. Bennet, 440 U.S. 1301, 1303 (1979). The subject Defendant did not receive effective representation with regard to the blood-type evidence. The Court in Cox v. State, 555 So.2d 352 (Fla. 1989) found that evidence that the Defendant had type O blood, the same blood type as 45% of the world's population, among other circumstantial evidence presented at trial, created only "suspicion" and not proof beyond a reasonable doubt that the Defendant murdered

the victim. The present defendant's trial counsel was remiss in failing to use a separate blood-type expert for the defense and in failing to clarify that the blood-type evidence did very little to narrow down the huge number of males who might have been the source of the semen.

8. THE TRIAL COURT ERRED IN NOT HOLDING THAT DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUIRE PROOF OF THE CHAIN OF CUSTODY OF EVIDENCE

Key pieces of evidence, and expert testimony based on that evidence, were used against the Defendant at trial without any proof of the handling and possession of such evidence. The types of evidence so introduced without proof of chain of custody include hair sweepings (TT 649) and blood samples (TT 633).

The issue of defense counsel's failure to require proof of the chain of custody of evidence was raised in the subject motion. R1, p. 41-47, 67, 69.

The Defendant did not present any new material or testimony on this claim at the evidentiary hearing. Instead, Defendant submitted this issue to the Court based upon the record of jury trial proceedings and other testimony and evidence and argument referenced in the subject motion. The defendant also relied, in support of this claim, upon the testimony of defendant's trial counsel, who was called by the State to testify as its witness in the evidentiary hearing and then cross-examined by Defendant's counsel.

At the evidentiary hearing, Defendant's trial attorney testified that " . . . Mr. Reed . . . made it pretty clear to me that hair had been deposited at the time of the crime. . ." R7, p. 1315. With regard to semen evidence, Defendant's trial attorney explained, "Well, the only strategy was to show that it was not something that could specifically identify the source of the semen but it could only put that person in a large group. That was the only way to deal with it because I didn't know of any other way that we could have dealt with it." R7, p 1316. Finally, with regard to requiring proof of chain of custody in general, Defendant's trial lawyer testified, " . . . my policy has always been to stipulate to chain of custody when I know the state could prove it anyway . . ." R7, p. 1328.

In its order denying the subject motion, the trial court stated the following with regard to the chain of custody of fingerprint evidence:

> " . . . during the course of its direct examination of trial counsel, the state did inquire as to his reasons for entering into the stipulation. From his testimony, the Court concludes that his doing so was appropriate under the circumstances and, in fact, likely enhanced his credibility before the jury. Trial counsel's testimony indicated that he knew that the state could establish the chain of custody and that the evidence would be admitted (this Court infers), but it would have been inappropriate to object. Regarding trial counsel's performance on this issue, a somewhat trite phrase comes to mind. "Do graciously that which you must do anyway."

> This Court concludes that, by failing to offer any evidence on the issue, the defendant has abandoned this claim. Even if he has not done so, the evidence before the Court is such that this Court concludes that trial counsel's performance was not deficient on this issue.
>
> (R3, p. 520)

The trial court's finding that the Defendant "abandoned" this issue is erroneous. This issue was raised in the subject motion and supported by the references to the jury trial record contained therein. This issue was also thoroughly addressed and argued in the Defendant's written closing argument, which was submitted at the Court's direction at the close of evidence in the evidentiary hearing. R2, p. 382-384. There is no support for the trial court's apparent assumption that a post-conviction motion claim is waived unless the Defendant somehow parrots back all of the supporting jury trial testimony that he cited in his post-conviction motion.

The rules regarding the burden of proof in "ineffective assistance of counsel" claims are clear. Initially, the Defendant must show specific serious deficiencies of counsel and prejudice. Knight v. State, 394 So.2d 997, 1001 (Fla. 1981). Next, the court reviews the claims and denies without a hearing those claims which are conclusively refuted by the files and records in the case. Keller v.

State, 551 So.2d 1269 (Fla. 1st DCA 1989). Once the defendant shows a substantial deficiency and has presented a prima facie showing of prejudice, the burden switches to the State to rebut the defendant's claims by showing beyond a reasonable doubt that there was no prejudice. Knight, supra, p. 1001.

Rule 3.850 of the Florida Rules of Criminal Procedure, which is incorporated by reference into Rule 3.851 of the Florida Rules of Criminal Procedure, sets forth the same principles in clearer terms as follows:

> **(d) Procedure; Evidentiary Hearing; Disposition**. On filing of a rule 3.850 motion, the clerk shall forward the motion and file to the court. If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion shall be denied without a hearing. In those instances when the denial is not predicated on the legal insufficiency of the motion on its face, a copy of that portion of the files and records that conclusively shows that the movant is entitled to no relief shall be attached to the order. Unless the motion, files, and records of the case conclusively show that the movant is entitled to no relief, the court shall order the state attorney to file an answer or other pleading within the period of time fixed by the court . . . If the motion has not been denied at a previous stage in the proceedings, the judge, after the answer is filed, shall determine whether an evidentiary hearing is required. If an evidentiary hearing is not required, the judge shall make an appropriate disposition of the motion. If an evidentiary hearing is required, the court shall grant prompt hearing thereon and shall . . . determine the issues, and make findings of fact and conclusions of law with respect thereto.

* * *

> **(e) Movant's Presence Not Required**. A court may entertain and determine the motion without requiring the production of the movant at the hearing.

As the foregoing Rule indicates, there is no requirement that the defendant produce additional evidence beyond the record evidence that the defendant already cited in his subject post-conviction motion to avoid "forfeiting" or "abandoning" his post-conviction claims. Indeed, requiring a Defendant to produce additional evidence would, in many cases, effectively force the defendant to produce the State's own witnesses against himself. There is no such requirement in Florida law. On the contrary, the courts can –and frequently do– dispose of post-conviction motions based on their review of the court files and records alone, without any evidentiary hearing whatsoever. Lecroy v. Dugger, 727 So.2d 236, 239 (Fla. 1998). *See also* Robinson v. State, 462 So.2d 471 (Fla. 1st DCA 1984) regarding *per se* ineffective assistance of counsel.

As noted in the Defendant's motion for a rehearing on the trial court's order denying the subject motion, the trial court based its denial of the claim that trial counsel was ineffective in failing to present mitigation evidence on an acknowledgment form that was contained in the court file but was not mentioned or admitted into evidence at the evidentiary hearing. R3, p. 549-552 and R3, P. 532-

534. It is contradictory for the court first to deny a claim supported jury trial transcripts on grounds that the Defendant has not presented new evidence at the evidentiary hearing and then secondly deny a post-conviction motion claim based on a court file document that is neither presented or admitted into evidence at the evidentiary hearing. Because of this, the trial court erred when it held that the Defendant "abandoned" this claim.[6]

The issue remains one of whether the Defendant's trial attorney was ineffective in failing to require the State to produce evidence of the chain of custody of evidence. It is this Appellant's contention that, by not requiring proof of the chain of custody of evidence, trial counsel gave up a unique opportunity to demonstrate the weaknesses in the State's evidence, especially the blood-type and hair-type evidence. Proof of the chain of custody of the hair evidence would have educated the jurors about the weakness in the hair collection techniques and would have helped the jurors better understand what a defense hair expert could have said about the unreliability of the hair evidence (see Issue 2 above).

Requiring proof of the chain of custody of blood-type evidence would have

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[6] There is some support for the proposition that post-conviction claims which are not *argued* are abandoned. Griffen v. State, 477 So.2d 875, 883 (Fla. 1984). However, the subject Defendant argued all of his post-conviction motion claims. R3, p. 401-423.

similarly educated the jurors about the weakness of the vaginal swabbing technique and the way that it cannot differentiate between semen and vaginal secretions. This information would have helped the jurors better understand what a defense blood-type expert's could have said about the unreliability of the blood-type evidence (see issue 3 above). By failing to require proof of the chain of custody of such evidence, trial counsel failed to function as the government's adversary and therefore provided ineffective representation. Osborn v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988), United States v. Cronic, 466 U.S. 648, 666 (1984).

9. THE TRIAL COURT ERRED IN NOT HOLDING THAT DEFENSE COUNSEL'S CONCESSIONS OF GUILT AND AGGRAVATING CIRCUMSTANCES DENIED DEFENDANT THE EFFECTIVE ASSISTANCE OF COUNSEL

This is a case in which the Defendant was charged with robbing, raping and murdering Betty Oermann on February 27, 1986. R1, p. 1-2. The victim's husband testified that he returned home at 9:50 p.m and found his wife's murdered body, naked from the breasts down. He also found a hat which was later identified as belonging to the Defendant. TT 386-387, 388-391. As indicated in the arguments for Issues 2 and 3 above, the State presented hair-type and blood-type (serology) evidence at trial that suggested that the Defendant was the individual who entered the victim's home and committed the crimes. No one ever suggested

that some other person besides the Defendant committed the crimes. By all appearances, the same person committed all three crimes. Nevertheless, trial counsel made comments to the jury during closing argument which effectively conceded that the Defendant was the robber and, by implication, the perpetrator of the rape and murder as well. Trial counsel did this by making the following, implausible proposition during closing argument:

> And what if there were testimony that he entered the house with the intention of either asking for money and thinking there was no one there and getting money and what if he was horrified to have found Betty Oermann there having been murdered and raped and in that state of confusion and drinking or whatever his – whatever his situation was then, went ahead and took Betty Oermann's purse and left. . . . Being a thief doesn't make you a rapist and a murderer.
>
> (TT 788-789)
>
> I think you can legitimately on this evidence find him guilty of a theft and that theory is every bit as consistent with the established facts as the speculation of the state.
>
> (TT 790)

Trial counsel also effectively conceded the "heinous atrocious or cruel" aggravating circumstance when he urged the jurors not to let the heinousness of the crimes overcome their duty to hold the State to its burden of proving that the circumstantial evidence offered against the Defendant eliminates every other

reasonable hypothesis of how the crime might have occurred:

> Nobody among us is going to say you relax that standard. This is such a heinous event, and it is heinous, and this is such a despicable human being and there's no proof of that, that you should play the odds, that you should find this man guilty on speculation, on the speculation of an event that is no more likely than the scenario that I gave you or others that could be proposed."

(TT 792)

The subject motion cites other record instances of trial counsel improperly conceding guilt and aggravating circumstances. R1, p. 145-149.

The Defendant included in his subject motion a claim that his trial counsel improperly conceded the existence of guilt and aggravating circumstances. R1, p. 145-149.

Following the evidentiary hearing on the subject motion, the trial court held that the Defendant abandoned this claim by not producing any supporting evidence at the evidentiary hearing. R3, p. 528-529. The trial court also held that, "At worst, one might opine that trial counsel suggested to the jury that the defendant might be guilty of some lesser crime." R3, p. 519.

In fact, the Defendant did not "abandon" this claim at all. In his written closing argument for the subject motion, Defendant incorporated all of the record

evidence and argument on this issue which Defendant set forth in the subject motion. R2, p. 400 to R3, p. 401. The Defendant included an argument, based on Mills v. State, 714 So.2d 1198 (Fla. 4th DCA 1998), that these concessions of guilt made without Defendant's record consent support the claim of ineffective assistance of counsel. R3, p. 528-530. Furthermore, this claim cannot be deemed "abandoned" for the same reasons given against abandonment in the argument for Issue 8 above.

Conceding a client's guilt is *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). The cases cited by the trial court, State v. Williams, 797 So.2d 1235 (Fla. 2001) and Atwater v. State, 788 So.2d 223 (Fla. 2001) are inapposite. The facts in the present Defendant's case, unlike the facts in Williams and Atwater, indicate conclusively that one, single person robbed, raped and killed the victim. In the present case, admitting guilt for the lesser theft offense (taking the victim's checks) effectively admitted to the rape and murder as well. The trial court erred in not finding that trial counsel was ineffective in conceding guilt in violation of Nixon v. Singletary, 758 So.2d 618 (Fla. 2000).

10. THE TRIAL COURT ERRED IN NOT HOLDING THAT DEFENSE COUNSEL'S FAILURE TO PRESENT EVIDENCE OF MITIGATING CIRCUMSTANCES DENIED DEFENDANT THE EFFECTIVE

ASSISTANCE OF COUNSEL

Defendant's trial counsel did not present any mitigation evidence to the jury. After the jury recommended death (TT 909-910) trial counsel informed the court of his decision not to presenting mitigation witnesses to the court as follows:

> I want to alert the Court, too, that we had passed the matter to today to try to get witnesses here from out of state to testify in Mr. Reed's behalf, primarily in the fashion of character witnesses and *because of finances and logistics*, none of those people are available and I don't have any reasonable likelihood that they're going to be available so I cannot and will not at this time ask the Court to delay this hearing any further on that basis.
>
> (R1, p. 165; emphasis Defendant's)

There is no justification for trial counsel's failure to ask the court for the time and money needed to present mitigation witnesses. This is a death penalty case. The Defendant was entitled to every protection that the law can offer. Furman v. Georgia, 408 U.S. 238 (1972).

Defendant raised the issue of trial counsel's ineffectiveness in failing to present mitigation evidence and argument in his subject motion. R1, p. 163 to R2, p. 210.

Defendant's trial lawyer testified at the evidentiary hearing that he did not present any live mitigation witnesses because the Defendant instructed him not to

involve his family or friends and not to present any evidence that implied or conceded guilt. R7, p. 1331-1332. The strategy for the sentencing phase, according to Defendant's trial counsel, was to present only non-friend and non-family mitigation evidence to the judge, not the jury. R7, p. 1331-1335. This is entirely inconsistent with the statement he made at trial that he would not be presenting any live mitigation witnesses for reasons of *finances and logistics*.

Defendant's trial counsel did not present the testimony any mental health professional for the judge to consider in mitigation. However, defense counsel provided the trial judge with some of the Defendant's past mental health treatment records from various facilities that had treated the defendant for drug dependency, lead poisoning and gasoline huffing. TT 921-922. These records were apparently accepted by the court without objection by the State. TT 922.

At the evidentiary hearing, the Defendant presented the testimony of the Defendant's family and friends as well as a mental health professional to show what they could have done for the Defendant if they had been called to testify as mitigation witnesses. The Defendant's brother, William Reed, testified first. Nobody ever contacted him about testifying at the Defendant's jury trial. R7, p. 1124-1125. He was not contacted about the case until approximately 10 years after the conviction. R7, p. 1125.-1126.

According to William Reed, the Defendant's mother had a drinking problem. R7, p. 1126. William Reed described how the Defendant's mother shot the Defendant's father when the Defendant was an infant. R7, p. 1126-1127, 1155. After that, the children lived with their grandmother for awhile, until the Defendant's mother married a man named Charles Lassman. R7, p. 1127-1128. Charles Lassman was a mean drunk who would sometimes beat the Defendant ("Bernie") all night long. R7, 1130. The beatings left scars, welts and blood. R7, p. 1132-1133. William Reed explained how he once wielded a shotgun, in the presence of the young Defendant, to stop Charles Lassman from beating their mother. R7, p. 1131. Charles Lassman beat the young Defendant severely for bed-wetting. R7, p. 1140-1141.

William Reed explained that the Defendant's mother had nine children. R7, P. 1150. Unlike their step-siblings, William Reed, the Defendant and their sister Diana were part native American. Charles Lassman repeatedly reminded the children of their mixed parentage and called them "dogs." R7, p. 1131.

William Reed explained that Charles Lassman caused William Reed and Diana so much anxiety that they were prescribed tranquilizers. The Defendant began self-medicating by sniffing gasoline. R7, P. 1133-1134. The gas huffing made the Defendant violent. R7, p. 1134-1137. Eventually, the children moved

back in with their grandparents. The grandfather's authority and respect in the household deteriorated, however, when he was caught molesting the Defendant's sister. R7, 1141-1145.

The Defendant's sister, Diana Reed, testified at the evidentiary hearing. She also talked about the beatings by Charles Lassman. Charles had a special rope that he used for beating the Defendant and his siblings. He would purposefully soak it in water and then dry it out so it would be harder and more painful. R7, p. 1220-1221. The Defendant and Diana Reed were favorite targets because of their bed-wetting. R7, p. 1220. The beatings were a daily occurrence. R7. P. 1220. The children's mother beat the children with electrical cords. R7, p. 1222. Diana Reed said that most of the children grew up having problems with drugs and alcohol. R7, p. 1129.

The Defendant's middle school coach, Ronnie Yates, testified at the evidentiary hearing. Ronnie Yates still remembered the Defendant after 30 years. R7, p. 1232. The Defendant had struggled with his classes, spending two years in the seventh grade and two years in the eighth grade. R7, p. 1233-1234. However, the Defendant showed some ability and leadership in physical education. He served as team captain and helped coach Yates maintain class discipline. R7, p. 1234. Unfortunately, as the Defendant fell farther and farther behind

academically, he became discouraged and dropped out. R7, p. 1235.

Coach Yates remembered some of the strange ways in which the Defendant's emotional problems manifested themselves. The defendant showed up at school events after drinking heavily. R7, p. 1236. He attempted to give his teachers cash gifts at Christmas. R7, p. 1237.

Psychologist James D. Larson testified at the evidentiary hearing. Dr. Larson reviewed various records pertaining to the Defendant's past, including medical and school records. R4, p. 699-700. Dr. Larson testified that a defense psychologist like himself could have assisted the defense by testifying regarding the mitigating circumstances of the Defendant being under an extreme emotional disturbance at the time of the crimes and having an impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. R4, p. 702. Dr. Larson explained that his testimony on these topics would have been based on his own psychological testing as well as many of the kinds of childhood events that William Reed and Diane Reed testified about. R4, p. 703-720.

Dr. Larson could have also assisted by testifying regarding multiple nonstatutory mitigating circumstances including impaired judgment, educational deprivation, defect as a child, child abuse, cultural deprivation, alcohol abuse, adult

child of an alcoholic, drug abuse, lead poisoning, organic brain syndrome diagnosed by medical doctors, personality disorder, history of mental illness diagnosed by other physicians, deficiency of positive role models, and the possible interaction of organic brain syndrome and alcohol or drugs. R4, p. 702-703.

Dr. Larson explained that the Defendant's gasoline huffing caused lead poisoning that was so severe the Defendant had to be hospitalized and given anti-psychotic medications. R4, p. 708-709. Dr. Larson personally observed residual symptoms of the lead poisoning in the form of low intellect, slowness of rhetoric or motor behavior and shakiness. R4, p 710. Dr. Larson said that the Defendant has an anti-social personality, also known as a sociopath or criminal personality. R4, p. 737, 745, 746 However, the Defendant's experiences growing up caused this disorder. R4, p 750.

In its order denying the subject motion, the trial court referred to a Court-file waiver form that was signed by the Defendant but which was not presented or admitted into evidence at the evidentiary hearing. R3, p. 532-533. For unknown reasons, the trial court interpreted that form as a waiver of the right to present mitigation evidence. R3, p. 534. The trial court also misinterpreted Defense counsel's 1986 jury trial comments about not having the time or money to bring in mitigation witnesses (TT 916) as an indication that the witnesses were "unavailable

to testify." R3, p. 534.

The trial court opined, essentially, that the State's cross-examination of the various mitigation witnesses would have brought out negative aspects of the Defendant's character and would have done the Defendant more harm than good. R3, p. 534-539. The trial court emphasized the Defendant's "choice" not to present mitigation evidence.

It is true that a lawyer must abide by a client's decisions. However, a lawyer is also required to consult with the client so that the client can make intelligent choices. *See, e.g.*, Rule 4-1.2, Fla. R. Prof. Conduct. An attorney cannot meaningfully consult with a client and assist a client in making intelligent choices if the attorney has not investigated the case and acquired the information needed for sound decision-making. A defendant's initial desire not to present mitigation evidence does not terminate the attorney's constitutional duties for the penalty phase. *See* Blanco v. Wainwright, 943 F.2d 1477, 1502 (11th Cir. 1991). Decisions limiting investigation must flow from *informed* judgment. Harris v. Dugger, 874 F.2d 756, 763 (11th cir. 1988). Lawyers have a duty to investigate and present to their client the results of investigation and their view of the merits of alternative courses of action. Tafero v. Wainwright, 796, F2d 1134, 1320 (11th Cir. 1986).

If it is assumed, for purposes of argument only, that the Defendant chose not to have certain types of mitigation evidence presented, Defendant's trial counsel would still have been ineffective in not assisting the Defendant in making an intelligent choice. The evidence indicates that Defendant's trial counsel failed to investigate, consider and advise the Defendant regarding the kinds of mitigation evidence that were available and how it could be used to avoid the death penalty.

Trial counsel did present some weak, post-death-recommendation, mitigation evidence in the form of some of the past mental health records which he gave to the judge. Considering the strength of the evidence used against the Defendant in the guilt phase of the trial, common sense dictated investigating, developing and presenting a strong body of mitigation evidence. Defendant's trial counsel told the trial judge that he was not presenting mitigation evidence for logistic and economic reasons. Because of this, his later claim that the Defendant instructed him not to present mitigation witnesses is simply not credible. The evidence indicates overwhelmingly that trial counsel was ineffective in failing to present mitigation evidence.

11. THE TRIAL COURT ERRED IN NOT FINDING THAT DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE THE ISSUE OF FELONY MURDER FUNCTIONING AS AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE

The defendant was charged in a routine first-degree murder indictment which encompassed the possibilities of both felony murder and premeditated murder R1, p. 1-3. The State argued for conviction based on both theories. TT 750-753. The trial judge instructed the jury on both premeditated and felony murder. TT 804-806. As indicated in the arguments on the other issues above, the facts in the subject case indicate that all of the crimes charged in the indictment were committed by one and the same person. There were no codefendants. The jury instruction on the felony murder crime elements (TT 804-806) was functionally the same as the jury instruction on the felony murder aggravating circumstance. TT 864. *See* F.S. 921.141(5)(d), formerly F.S. Section 919.23. Together, these jury instructions functioned as an automatic aggravating circumstance and therefore failed to narrow the class of persons eligible for the death penalty. For this reason, these jury instructions violated the Eighth Amendment of the United States Constitution. *See* Tennessee v. Middlebrooks, 840 S.W. 2d 317 (Tenn. 1992), Enberg v. Meyer, 820 P.2d 70 (Wyo. 1991), State v. Cherry, 257 S.E. 2d 551 (N.C. 1979). Zant v. Stephens, 462 U.S. 862, 876 (1988). Trial counsel was ineffective in failing to object these instructions on grounds that they automatically and unconstitutionally trigger the "killing committed while the Defendant was

engaged in listed felonies" aggravating circumstance in those instances where the first-degree murder verdict is based on felony murder. *See* F.S. 921.141(5)(d), formerly F.S. Section 919.23)

This reviewing court previously struck the "cold, calculated and premeditated" aggravating circumstance for this Defendant, Reed v. State, 560 So.2d 203 (Fla. 1990). Therefore, there is neither the premeditation nor the felony murder needed to sustain a first-degree murder conviction. Trial counsel was ineffective in failing to object to the aforementioned felony murder crime jury instruction and felony murder aggravating circumstance jury instruction and for so waiving the Defendant's right to challenge those jury instructions on appeal. Defendant alleged such ineffectiveness in his subject motion. R2, p. 213-218.

The trial court erred in failing to consider or grant a hearing on this issue. R4, p. 637-639 and 657. This was not harmless error. The Defendant's first-degree murder conviction cannot stand without either the premeditation or the felony murder aggravating circumstance. See, e.g. Kirkland v. State, 684 So.2d 732 (Fla. 1996), Greene v. State, 715 So. 2d 940 (Fla. 1998) Rogers v. State, 660 So.2d 237 (Fla. 1995). Coolen v. State, 696 So.2d 738 (Fla. 1997). *See also* People v. Aaron, 299 NW 2d 304 (Mich. 1980) for a discussion of how the entire concept of felony murder as it currently exists throughout the United States is based on a

misinterpretation of English common law.

12. THE TRIAL COURT ERRED IN NOT HOLDING THAT DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE STATE'S IMPROPER COMMENTS TO THE JURORS DENIED THE DEFENDANT THE EFFECTIVE ASSISTANCE OF COUNSEL

At the Defendant's jury trial, the State made many improper comments and appeals to the juror's emotions without objection by Defendant's trial counsel. Such improper, unopposed comments included repeated references to the victim's widowed husband as a "Reverend" and "a minister" (TT 348, 372-411, 859-860, 878), and identified the victim's husband as a clergyman at Grace Lutheran Church in Jacksonville, the city of the trial court. (TT 348). There were also references to the victim and her widowed husband as people who lived by Christian principles. TT 358. The State elicited testimony, without objection by trial counsel, which indicated that the Defendant and Chris Niznik cohabited without the benefit of marriage. (TT 372). There were comments which depicted the Defendant as an unemployed deadbeat (TT 375-377), a woman beater (TT 504), a drug abuser (TT 512-513), a danger to other inmates at jail (TT 771), and a progenitor of illegitimate children. TT 787.

During closing argument, the State made what was effectively a violation of the prohibition against "golden rule" arguments to the jury by saying, "I ask you to

show the defendant the same mercy and sympathy that he showed Betty Oermann on February 27, 1986 and that was none." TT 878. Bullard v. State, 436 So.2d 962 (Fla. 3d DCA 1983). This was just a roundabout way of asking the jurors to put themselves in the place of the victim and imagine what the victim felt. When such comments in closing argument intentionally inject elements of emotion and fear into the jury's deliberations, the prosecutor has ventured far outside the scope of proper argument. Garron v. State, 528 So. 2d 353, 359 (Fla. 1988). In making these types of comments, the State was engaging in an improper parade of prejudicial emotions and a wrongful exhibition of punitive and vindictive temperament. Stewart v. State, 51 So.2d 494, 495 (Fla. 1951).

Trial counsel was ineffective in failing to object or take any other action against all of these appeals to emotion. He did not even function minimally as the government's adversary. Osborne v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988), United States v. Chronic, 466 U.S. 648, 666 (1984). The trial court erred in not finding that defendant's trial counsel was ineffective in failing to object to these numerous, strong appeals to the jurors' emotions.

Defendant raised the issue of defense counsel's failure to object to the prosecution's improper remarks in his subject motion. R1, p. 149-163. This is a matter in which the record of jury trial proceedings speaks for itself, it is properly

adjudicated based on the argument of counsel and the jury trial transcripts. In the written closing argument that the Defendant submitted following the evidentiary hearing, the Defendant referred to the case of Rachael v. State, 714 So.2d 192 (Fla. 2d DCA 2001) in support of his brief argument that the failure to object to emotional appeals to jurors supports a claim for post-conviction relief. R3, p. 401. In addition, and also as part of his written closing argument on this issue, the Defendant referred to and incorporated by reference all of the argument and evidence identified in the subject motion on this issue. R3, p. 401, R1, p. 149-163

The State called trial counsel to testify at the evidentiary hearing. The only testimony that the state elicited on the subject of trial objections concerned chain of custody. Trial counsel testified that he has a policy of always stipulating to the chain of custody when he knows the state can prove it anyway. R7, p. 1328.

The trial court denied the subject motion on this ground, essentially holding that trial counsel's actions and inactions concerning the State's appeals to the jurors' emotions were justified trial tactics. R3, p. 530-532. The trial court also noted that defense counsel objected to some, but not all of the complained-of comments. R3, p. 531, citing TT 375, 513, 517.

The trial court also stated, "The defendant offered no evidence on this particular issue, either by way of defendant's own testimony or through cross-

examination of trial counsel a the evidentiary hearing. Accordingly, this Court concludes that the defendant has abandoned this particular claim." R3, p. 531. Insofar as the trial court appears to have "ruled" on this claim despite this "abandonment" comment, it may be not be necessary for this Defendant to address this "abandonment" comment at all. However, in an abundance of caution, the Defendant refers to and incorporates here as his argument against such "abandonment" all of the argument and authority which this Defendant submitted on "abandonment" in his argument for Issue 8 above.

With regard to trial court's determination that trial counsel was not ineffective for failing to object to the State's appeals to jurors' emotions, this reviewing court is directed to Brooks v. State, 762 So.2d 879 (Fla. 2000). In Brooks, the court found that a combination of unopposed and objected-to appeals to jurors emotions cumulatively deprived the Defendant of a fair penalty phase.

Of particular prejudice to the Defendant in the present case was the prosecutor's comment, "I ask you to show the defendant the same mercy and sympathy that he showed Betty Oermann on February 27, 1986 and that was none." (TT 878). Florida Courts have consistently forbidden such comments. Urbin v. State, 714 So.2d 411 (Fla. 1998), Rhodes v. State, 547 So.2d 1201, 1206 (Fla. 1989), Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992). In

determining whether such improper prosecutorial comments to the jury deprive a defendant of a fair sentencing phase, the court must consider the cumulative effects of all improper comments. Cochran v. State, 711 So.2d 1159 (Fla. 4th DCA 1998). This Appellant submits to this reviewing court that the improper comments made by the prosecutor in this case, like those in Urbin, "reached the critical mass of fundamental error." Trial counsel was remiss in failing to object to assure that the issue of the impropriety of these prosecutorial comments had been preserved for appeal. Even so, this Appellant submits to this reviewing court that, at the very least, and regardless of any issues regarding trial counsels objections or failure to object, the Defendant is entitled to a new penalty phase pursuant to Brooks.

13. THE TRIAL COURT ERRED IN NOT HOLDING THAT THE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO THE CUMULATIVE ERRORS OF HIS TRIAL ATTORNEY

The Defendant alleged that he received ineffective assistance of counsel due to the cumulative effect of all of the errors of his trial attorney. R2, p. 221-236. The trial court granted a hearing on this issue. R4, p. 645-647 and 657. In its written order denying the subject motion on this ground, the trial court stated, "Lastly, the Court notes that it has also considered the cumulative performance of

trial counsel and still concludes that there has been no deficiency established such as would have affected the outcome of the defendant's trial." R3, p. 592. This is not the correct standard for adjudicating ineffective assistance of counsel claims. Counsel is deemed ineffective when the deficiencies in the Defendant's representation undermine confidence in the outcome of the trial. Strickland v. Washington, 466 U.S. 668 (1984). In determining whether trial counsel's deficiencies rise to this level, the court is to consider the cumulative effect of all of the *errors* of trial counsel, not the cumulative *performance* of trial counsel. State v. Gunsby, 670 So.2d 920 (Fla. 1996).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appellant's Initial Brief has been served by U.S. Mail addressed to Department of Legal Affairs, Office of the Attorney General, Criminal Division, 400 S. Monroe Street, PT-1, The Capitol, Tallahassee, Florida 32301, Attn: Charmaine M. Millsaps, Esquire, and Inmate Grover Reed, DC#105661, P6201 A-1, Union Correctional Institution, P.O. Box 221, Raiford, Florida 32083-0221 on this 26th day of March, 2003.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been printed in Times New Roman 14-point font using Corel WordPerfect 8, in compliance with Rule 9.210, Fla. R. App. P.

Respectfully submitted,

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