IN THE SUPREME COURT
OF FLORIDA

BYRON B. BRYANT,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

CASE NUMBER SC03-1618
l.t. case number 92-791 CF A02

INITIAL BRIEF OF APPELLANT

On appeal from the Criminal Division of the Circuit Court of
the Fifteenth Judicial Circuit in and for Palm Beach County.

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Due March 4, 2004

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PRELIMINARY STATEMENT

The record on appeal concerning the original court proceedings (the second trial) shall be referred to as AR ____@ followed by the appropriate page numbers. The trial transcript shall be referred to as AT ____@ followed by the appropriate page numbers. The postconviction records shall be referred to as APC-R ____@ followed by the appropriate page numbers. The postconviction transcript shall be referred to as APC-T ____@ followed by the appropriate page numbers.

No Request for Oral Argument

STATEMENT OF FACTS AND CASE

This case involves a retrial. *Bryant v. State*, 785 So. 2d 422 (Fla. 2001)(second trial direct appeal); *Bryant v. State*, 656 So.2d 426 (Fla. 1995)(first trial direct appeal)(R 1993-2005). Byron Bryant was charged by way of indictment with count one first degree murder and count two armed robbery with a firearm on February 6, 1992 (R 15-16). Mr. Bryant was charged with the first degree murder of Leonard Andre during an armed robbery of Andre's Market in Delray Beach, Florida on December 16, 1991. *Bryant*, 656 So.2d at 427. Mr. Andre died from two contact gunshot wounds sustained as he struggled with his assailant during the robbery. Neither Andre's wife nor his brother-in-law, who were present during the robbery, identified Bryant as the assailant in photo lineups or at trial. 656 So.2d at 427. A witness who viewed the incident from across the street also was unable to identify Bryant in photo lineups or at trial. No physical evidence tied Bryant to the crime.

The police only developed Bryant as a suspect after his former girlfriend, Cheryl Evans, contacted the police. Evans drove the unsuspecting Bryant with her to the police station and left him in the car to wait while she went inside on an alleged errand. The police surrounded the vehicle and forcibly withdrew Bryant by gunpoint and handcuffed him.

Several hours later, while still handcuffed, the police obtained a taped confession, and the confession was the primary evidence used against Bryant at his trial.

The (second) jury trial was conducted on February 9 through February 13, 1998, before the same trial judge as the first trial (T 1-1052). Mr. Bryant was found guilty as charged on February 13, 1998 (R 2967-68). Defense's motion for a new trial was filed on February 17, 1998 (R 3000-03) and denied on September 14, 1998 (R 3392). The same trial judge from the first trial again imposed the sentence of death without a jury (R 3857-67).

On April 14, 1998 and September 10, 1998, phase II penalty proceedings were conducted (T 1053-1329). A sentencing hearing was conducted on February 5, 1999 (T 1330-42), and a written sentencing order was rendered thereafter (R 3857-67). The trial court sentenced defendant to death by electrocution as to count one and life imprisonment as to count two (R 3868-69). The trial court found three aggravating circumstances: Bryant previously had been convicted of a violent felony; the murder was committed during a robbery; and the murder was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody (R 3857-67). The court found no statutory mitigating circumstances and

only one nonstatutory mitigators, remorse, but gave it very little weight. *Bryant v. State*, 785 So.2d 422, 426-27 (Fla. 2001).

This judgment and sentence were appealed to the Supreme Court of Florida and both were affirmed on April 5, 2001. *Bryant v. State*, 785 So. 2d 422 (Fla. 2001). A petition for certiorari was filed in the United States Supreme Court and was denied on November 12, 2001. The lead trial counsel was Michael Dubiner, Esq., and the trial co-counsel was Gregg Lehrman, Esq. Appellate counsel was Michael Dubiner and Mark Wilensky of the Dubiner & Wilensky law firm.

On November 20, 2002, Bryant filed an initial postconviction motion pursuant to rule 3.851, Florida Rules of Criminal Procedure, for collateral relief after a sentence of death has been imposed and affirmed on direct appeal and sought an evidentiary hearing on the postconviction issues (PC-R 1-69). On December 11, 2002, the state filed a motion to strike defendant's initial postconviction motion (PC-R 71-79), alleging that Bryant failed to comply with rule 3.851(e), Florida Rules of Criminal Procedure by not attaching the judgment and sentence; not pleading his claims separately with a detailed factual basis; and not giving a basis for raising issues in a collateral pleading which either were, should have been or could have been raised on direct appeal (PC-R 72).

Bryant filed a response to the state's motion to strike (PC-R 80-82), and on December 27, 2002, the trial court granted to state's motion to strike the initial postconviction motion (PC-R 83). On January 16, 2003, Bryant filed a motion to amend or supplement the initial postconviction motion (PC-R 84-86); the state responded to that motion (PC-R 87-107); and on February 4, 2003, after a hearing on the merits, the trial court granted Bryant's motion to amend his postconviction motion (PC-R 108). On March 4, 2003, Bryant filed his amended initial postconviction motion (PC-R 109-84), and the trial court allowed the state ninety (90) days in which to file a response (PC-R 185).

On May 2, 2003, the state filed its response to the amended initial postconviction motion (PC-R 186-260). On July 3, 2003, the trial court set a case management conference where the legal portions of the postconviction motion was argued (PC-T 1-58), and on August 11, 2003, the trial court rendered a written order denying Bryant's amended initial postconviction motion without an evidentiary hearing (PC-R 785-93). It is from that order that appellant appeals herein.

In its Order summarily denying appellant's amended initial postconviction motion (PC-R 785-93), the trial court first found that it lacked subject matter jurisdiction to entertain Bryant's amended initial

postconviction motion because it was filed past the one year limitations where the initial postconviction motion was stricken (PC-R 786).

The trial court nonetheless rendered an order on the substantive issues. The trial court determined that the ineffective assistance of counsel claim regarding Bryant's shackling in front of the jury was procedurally barred where it was addressed in the direct appeal (PC-R 787). The trial court determined that the ineffective assistance of counsel claim regarding the motion to suppress is procedurally barred because trial counsel did move to suppress the statement and objected when the statement was admitted at trial; however, the trial court did not address Bryant's claim at the postconviction hearing that trial counsel was ineffective in failing to obtain a false confession expert (PC-T 25-27) or investigating witnesses to dispute the confession or the probable cause to arrest which led to the confession. Trial counsel never attempted to obtain a false confession expert to review Bryant's statement (PC-T 27-28).

The trial court determined that the ineffective assistance of counsel claim regarding the failure to dispute the aggravator of Aavoiding arrest@ was Abased on facts established and found by the jury, contained in the trial records@ (PC-R 789). The trial court determined that the ineffective assistance of counsel claim regarding proceeding with trial during the

defendant's absence failed to show a deficient performance and the resulting prejudice (PC-R 790).

STANDARD OF REVIEW

A postconviction defendant sentenced to death is entitled to an evidentiary hearing unless the response and record conclusively show that the defendant is entitled to no relief. This Court encourages trial courts to conduct evidentiary hearings on initial postconviction motions in capital cases. *See Finney v. State*, 831 So.2d 651, 656 (Fla. 2002). The rules of procedure provide that such a hearing "shall" be held in capital cases on initial postconviction motions filed after October 1, 2001, "on claims listed by the defendant as requiring a factual determination." *See Finney*, 831 So.2d at 656; *see also* Fla.R.Crim.P.3.851(f)(5)(A)(i).

Upon review of a trial court's summary denial of postconviction relief without an evidentiary hearing, the reviewing court must accept all allegations in the motion as true to the extent they are not conclusively rebutted by the record. *Gaskin v. State*, 737 So.2d 509, 516 (Fla. 1999)(citations and footnote omitted).

An appellate court's standard of review of a trial court's ruling on an ineffective assistance claim is two-pronged: (1) appellate courts must defer to trial courts' findings on factual issues but (2) must review *de novo* ultimate conclusions on the performance and prejudice prongs. *Bruno v. State*, 807 So.2d 55, 61-62 (Fla. 2001).

SUMMARY OF ARGUMENT

The trial court erred in denying appellant an evidentiary hearing on his postconviction motion alleging ineffective assistance of counsel where there were disputed issues of fact and where the allegations could not be conclusively refuted by the record. The trial court erred in holding that it did not have subject matter jurisdiction to entertain the amended initial postconviction motion where it was not an abuse of discretion for the previous trial court to allow Bryant to amend.

Trial counsel was deficient in not properly preserving for appeal the issue of the trial court requiring appellant to be shackled during his trial in front of the jury; trial counsel was deficient in not properly preserving for appeal the issue of appellant's confession where trial counsel failed to attempt to obtain a false confession expert or other witnesses to dispute the validity of the probable cause to arrest; trial counsel was deficient in failing to challenge and properly preserve for appeal the Aavoiding arrest@ aggravator.

This Honorable Court should remand this cause back to the trial court for an evidentiary hearing where appellant would be allowed to call witnesses such as trial counsel, a false confession expert, other witnesses

relied on for police probable cause and the defendant himself and for other factual determinations.

ISSUES ON APPEAL

ISSUE I
THE TRIAL COURT ERRED IN RULING THAT IT DID NOT HAVE JURISDICTION TO ENTERTAIN THE AMENDED INITIAL POSTCONVICTION MOTION

In its Order summarily denying appellant's amended initial postconviction motion (PC-R 785-93), the trial court determined that it lacked subject matter jurisdiction to entertain Bryant's amended initial postconviction motion because it was filed past the one year time limitation where the initial postconviction motion was stricken previously (PC-R 786).

Appellant filed his initial postconviction motion on November 20, 2002 (PC-R 1-69), after being granted an extension by this Honorable Court until December 12, 2002, from the original due date of November 12, 2002. On the date of the new deadline, December 12, 2002, the Attorney General filed a motion to strike appellant's initial postconviction motion (PC-R 71-79). On December 20, 2002, the trial court granted the state's motion to strike the postconviction motion (PC-R 83). On January 16, 2003, appellant moved to amend or supplement the initial postconviction motion (PC-R 84-86); it was granted on February 5, 2003 (PC-R 108); and appellant filed his amended initial postconviction motion on March 4, 2003 (PC-R 109-70,

171-84). The state filed its response to the amended initial postconviction motion on May 2, 2003 (PC-R 186-97).

The state simply is trying to eliminate a death penalty case on a technical argument instead of its merits. Under rule 3.851(f)(4), Florida Rules of Criminal Procedure, a postconviction motion may be amended up to thirty days prior to the evidentiary hearing upon motion and good cause shown. The trial court may in its discretion grant a motion to amend provided that the motion sets forth the reason for the amendment. *See* Rule 3.851(f)(4), Florida Rules of Criminal Procedure. In this case, appellant filed the motion to amend or supplement and stated good cause, i.e., that the initial motion was stricken by the previous trial court on the last day of the deadline (R 84-86). The trial court did not abuse its discretion.

Where the action of the trial court is discretionary, the order of the lower court should not be disturbed on appeal unless an abuse of discretion is clearly shown. *See Huff v. State*, 569 So.2d 1247, 1249 (Fla. 1990)("Discretion is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man [or woman] would take the view adopted by the trial court" (citing *Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (Fla. 1988)).

As the trial judge stated at the motion to amend or supplement hearing: The Attorney General cannot complain that death sentences take too long to be carried out and then also do everything in its power to prevent the wheels of justice from transporting appellant's claims.

ISSUE II
THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON APPELLANT'S AMENDED INITIAL POSTCONVICTION MOTION

In order to succeed on a claim of ineffective assistance of counsel, a defendant must show: 1) that defense counsel's representation was deficient, i.e., that counsel's representation fell below an objective standard of reasonableness; and, 2) that as a result of counsel's deficient performance, the proceedings were rendered fundamentally unfair or unreliable. *See* Rule 3.851(e), Florida Rules of Criminal Procedure; *Williams v. Taylor*, 120 S.Ct. 1495, 1511 (2000); *Strickland v. Washington*, 104 S.Ct. 2052, 2064-65 (1984); *Nixon v. Singletary*, 758 So.2d 618 (Fla. 2000).

A recent Eleventh Circuit case has held that the prejudice may be in another forum, i.e., the appellate court, and not necessarily in the trial court, in pursuing an ineffective assistance of trial counsel claim. *See Davis v. Crosby*, 341 F.3d 1310, 1312 (11th Cir. 2003)(when reviewing an ineffective assistance of counsel claim involving a failure to properly preserve an issue for appeal, the proper analysis requires a reviewing court to focus on how

the error affected the outcome of the appeal and not merely the outcome of the trial).

In this case, trial counsel was ineffective for numerous reasons listed in the postconviction motion, including the following: counsel failed to proffer or attempt to proffer the reasons that the shackling decision by the trial court was an abuse of discretion, counsel failed to submit any written memorandum or documentation regarding the shackling issue to preserve this issue properly for direct appeal, counsel failed to make any attempt at refuting the allegations of Bryant's past courtroom behavior; trial counsel failed to properly dispute and preserve for appeal the issue of the confession; and, trial counsel failed to dispute the most weighty one of the three aggravators.

Specifically, trial counsel was ineffective in failing to dispute the finding of the trial court that the killing was committed for the purpose of avoiding or preventing lawful arrest or affecting an escape from custody (R 3860). There is absolutely no evidence in the record to support this conclusion. *See Willacy v. State*, 696 So.2d 693, 695 (Fla. 1997)(appellate court must have competent, substantial evidence to support trial court's findings in order to affirm). The trial court in the instant case used an aggravator that was originally applied to defendants accused of the murder

of law enforcement attempting an arrest and was then extended to defendants accused of killing a potential witness who could provide information for an arrest. There is nothing in this case to indicate that the victim, Mr. Andre, was effectuating a citizen's arrest and that was the dominant or only motive of appellant in shooting him. The trial court improperly applied the statute and erred in failing to interpret the statute more favorably to the defendant. There is no evidence that the defendant thought the authorities were on their way to the store to arrest him or that Mr. Andre intended on effectuating a citizen's arrest in grabbing the gun.

The defendant's alleged statements indicated that he and Mr. Andre struggled for the gun and when the defendant obtained control of the gun, he shot Mr. Andre, several times: AWe was struggling and it was like both of us was fighting for our life. And my only out, the only way I could leave that store was to shoot him.@ (R 3863). There is no evidence in the record to support the conclusion that the victim intended to detain the defendant to effectuate a citizen's arrest. As such, the third aggravating factor of the victim's attempt to effectuate a lawful arrest can not be upheld as an applicable aggravator, and trial counsel was ineffective for failing to challenge it.

Trial counsel was ineffective for failing to preserve properly as an appellate issue the trial court's erroneous order denying defense's motion to suppress the defendant's statements as involuntary. Trial counsel was deficient in failing to obtain a false confession expert to testify at the suppression hearing.

Trial counsel was also ineffective for allowing the trial to proceed without the presence of appellant and without the participation of appellant in jury selection.

The Supreme Court of Florida has held that where the individual errors of trial counsel may not be sufficient in and of themselves to require a new trial, the cumulative effect of the errors may nonetheless be so prejudicial so as to render the trial unreliable and the proceedings fundamentally unfair that the defendant must be given a new trial. In the instant case, the errors as set forth in the amended initial postconviction motion together cumulatively operated to deny appellant a fair trial. *See State v. Gunsby*, 670 So. 2d 920 (Fla. 1996); *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995).

Appellant was improperly shackled in front of the jury, and the trial counsel failed to properly object to and preserve this issue for appellate review. AThe presence of shackles and other physical restraints on the

defendant tend to erode th[e] presumption of innocence.@ *United States v. Durham*, 287 F.2d 1297, 1304 (11th Cir. 2002). AA decision to apply leg shackles to the defendant must be subjected to close judicial scrutiny to determine if there was an essential state interest furthered by compelling a defendant to wear shackles, and whether less restrictive, less prejudicial methods of restraint were considered or could have been employed.@ *Durham*, 287 F.2d at 1304 (quoting *Elledge*, 823 F.2d at 1451 (quotation marks omitted). Here, the trial counsel failed to refute evidence of petitioner's prior violent courtroom behavior and failed to dispute that any of the acts had occurred. *Bryant*, 785 So.2d at 429-30.

Trial counsel failed to proffer any contrary evidence or indicate that the trial court was in error, submit any evidence or witness statements into the record regarding Mr. Bryant's present appropriate behavior, or failed to obtain or proffer evidence to show that less restrictive, less prejudicial methods could have been employed or should have at least been considered. *Bryant*, 785 So. 2d at 430 (ATrial counsel did not take exception to these facts [that Judge Mounts alleged], nor did the defense proffer or attempt to proffer any significant change in circumstance that would indicate to the court that its decision [was] an abuse of discretion.@).

An evidentiary hearing was warranted in this case because appellant's claims of ineffective assistance of counsel involved disputed issues of fact. Specifically, an evidentiary hearing is necessary to resolve the claims because, if proven, they would warrant reversal of the conviction and command a new trial. *See Meeks v. Singletary*, 963 F.2d 316, 319 (11th Cir. 1992)(habeas petition is entitled to an evidentiary hearing if he alleges facts, that if proved at the hearing, would entitle him to relief), *cert. denied*, 507 U.S. 950 (1993); s*ee also Thomas v. Kemp,* 796 F.2d 1322, 1324 (11th Cir. 1986)(if record is insufficient to permit a determination of whether counsel's decision not to present mitigating evidence was strategic or negligent, it is proper to hold an evidentiary hearing); *Code v. Montgomery*, 725 F.2d 1316, 1321-22 (11th Cir. 1984)(same).

The trial court erred in denying an evidentiary hearing when there were disputed issues of fact. As an example, a factual determination was necessary to demonstrate that trial counsel's decision not to list or call witnesses to dispute the confession given by appellant was a matter of deficient performance and not one of strategy. Trial counsel could have called appellant's family who came to see him at the police station immediately before he confessed and/or the witnesses upon whom the police allegedly relied on for probable cause to arrest appellant; and/or a false

confession expert who would have testified that appellant's confession is typical of those which are false (i.e., Awe struggled for the gun after the victim grabbed it@).

This was clear error because an evidentiary hearing is required to determine whether counsel's actions were tactical since that issue is a question of fact. *See Hardwick v. Crosby*, 320 F.3d 1127, 1163 (11th Cir. 2003); *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991); *Young v. Zant*, 677 F.2d 792; 798 (11th Cir. 1982), *cert. denied*, 476 U.S. 1123 (1976).

It is also ineffective assistance of counsel to proceed to trial with a chosen defense, i.e., attacking the validity of a confession, but not be properly prepared to present evidence to support said defense. *See Young*, 677 F.2d at 798. Likewise, counsel is ineffective when he fails to investigate and adequately present evidence to support a chosen defense, which might have affected the jury's comparison of conflicting evidence. *See Code v. Montgomery*, 799 F.2d 1481, 1483-84 (11th Cir. 1986)(defense counsel attempted to present an alibi defense with no alibi witnesses); *see also Hardwick*, 320 F.3d at 1164 (failure to present mitigation evidence particularly when defense counsel was aware of the evidence and that the mitigation was the sole defense is ineffective assistance of counsel).

Defense counsel's unreasonable failure to present petitioner's only defense to the jury rendered his trial fundamentally unfair. *See Tejada v. Dubois*, 142 F.3d 18, 25 (1st Cir. 1998)(counsel is insufficient where he failed to argue petitioner's only defense); *see also Strickland*, 466 U.S. at 694 (result of proceeding can be rendered unreliable and hence the proceeding itself unfair, even if the errors of counsel cannot be shown to have determined the outcome). The only evidence which incriminated appellant was his confession; there was no eyewitness testimony or physical evidence linking appellant to the murder; therefore, the failure of trial counsel to properly dispute and preserve for appellate review his confession was deficient and prejudiced the outcome of appellant's trial and appeal.

In *Tejeda*, the Eleventh Circuit Court of Appeals held that in evaluating the prejudice component of *Strickland*, the analysis is not limited to an outcome determination, but that the district court must consider "whether the result of the proceeding was fundamentally unfair or unreliable as a result of defense counsel's conduct." 142 F.3d at 22. The *Tejada* court held that while it is impossible to conclude whether but for defense counsel's conduct the jury would have decided the case differently, nonetheless, because of counsel's failure to adequately present and argue the only defense, counsel "took the question away from the jury and deprived

the defendant of his only defense." 142 F.3d at 25. Because counsel deprived the petitioner of his only viable defense, the trial was rendered fundamentally unfair or unreliable, and thus the Court of Appeals granted the habeas petition due to counsel's ineffective assistance. 142 F.3d at 25; *see also Washington v. Texas*, 388 U.S. 14, 19-20 (1967)(the right to present a defense, including facts which support the defendant's version, to the jury so that they may decide where the truth lies is a fundamental element of due process of law).

Despite findings of this Honorable Court on direct appeal that appellant's trial counsel had failed to properly preserve the shackling issue, which would otherwise have won appellant a new trial, the trial court denied appellant an evidentiary hearing on his ineffective assistance of counsel claims. Because there are factual disputes regarding trial counsel's conduct which merit an evidentiary hearing, due process was denied.

Under Rule 3.851(5)(A)(i), Florida Rules of Criminal Procedure, the trial court shall hold an evidentiary hearing to make factual determinations, and this Honorable Court encourages an evidentiary hearing on an initial postconviction motion. *Finney v. State*, 831 So.2d 651, 656 (Fla. 2002). The trial court must hold an evidentiary hearing when the postconviction motion, files and records in the case do not conclusively show that the

petitioner is not entitled to relief. *Ford v. State*, 825 So.2d 358, 361 (Fla. 2002). In federal court, upon habeas review, a petitioner is entitled to an evidentiary hearing if he alleges facts which, if proven, would entitle him to relief. *See Cave v. Singletary*, 971 F.2d 1513, 1516 (11th Cir. 1992).

Because the trial court summarily denied appellant's postconviction motion and refused to grant an evidentiary hearing, appellant's claims were not adjudicated on the merits. *Cf. Wiley v. Wainwright*, 709 F.2d 1412, 1413 (11th Cir. 1983)(an evidentiary hearing is required where the relevant factual issues were not developed at the state level); *Porter v. Wainwright*, 805 F.2d 930, 938 (11th Cir. 1986)(summary denial of state postconviction claim and its summary affirmance is not afforded a presumption of correctness in federal court); *Thompson v. Keohane*, 516 U.S. 99, 109-10 (1995)(presumption of correctness applies only to basic or historical facts, and questions of law are not subject to the presumption).

Even if trial counsel had testified at an evidentiary hearing that his decision not to investigate and/or obtain a false confession expert or present defense witnesses to refute the confession or probable cause, or not to properly preserve the shackling issue for appeal was tactical, that strategic decision would have been unreasonable and thus would have constituted ineffective assistance of counsel. *See Porter v.* W*ainwright*, 805 F.2d 930,

935 (11th Cir. 1986)(decision not to present mitigating character evidence in death case could not have been a reasonable tactical decision where counsel had breached their affirmative duty to investigate potential mitigating evidence); s*ee also Ford v. State*, 825 So.2d 358, 361 (Fla. 2002)(without an evidentiary hearing or any record attachments refuting the petitioner's allegations, the trial court was bound to assume that the allegations of ineffectiveness by failing to investigate and call witness were true and not a tactical decision).

The trial court erred in denying an evidentiary hearing on appellant's initial postconviction motion. *See Finney*, 831 So.2d at 656; Fla.R.Crim.Proc. 3.851(f)(5)(A)(i). Trial counsel's performance was deficient, and that deficiency affected both the outcomes of the trial and the appeal.

ISSUE III
THE TRIAL COURT ERRED IN DETERMINING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE

A. SHACKLING ISSUE

Trial counsel was ineffective in failing to properly preserve for appeal the shackling of appellant before the jury.

Appellant was improperly shackled in front of the jury, and the trial counsel failed to properly object to and preserve this issue. AThe presence of shackles and other physical restraints on the defendant tend to erode th[e] presumption of innocence.@ *Durham*, 287 F.2d at 1304 (citing to *United*

States v. Mayes, 158 F.3d 1215, 1225 (11th Cir. 1998)). AA decision to apply leg shackles to the defendant must be subjected to close judicial scrutiny to determine if there was an essential state interest furthered by compelling a defendant to wear shackles, and whether less restrictive, less prejudicial methods of restraint were considered or could have been employed.@ *Durham*, 287 F.2d at 1304 (quoting *Elledge*, 823 F.2d at 1451 (quotation marks omitted). Here, the trial counsel failed to refute evidence of petitioner's prior violent courtroom behavior and failed to dispute that any of the acts had occurred. *Bryant*, 785 So.2d at 429-30.

In *United States v. Durham*, 287 F.3d 1297 (11th Cir. 2002), the Eleventh Circuit Court of Appeals addressed an issue of apparent first impression in the Southern District of Florida regarding the use of a stun belt to restrain the defendant at trial. In *Durham*, the defendant was arrested for numerous violent bank robberies in Gainesville and Pensacola. While awaiting the disposition of charges in Tampa, the defendant attempted to escape from jail. He slipped out of a set of leg irons, using a key concealed on his person, scaled an eight foot fence topped with razor wire, jumped from the fence onto an armed guard and attempted to wrestle the officer's shotgun away from him. The defendant then climbed another fence, jumped to the ground, and was apprehended by other deputies. 287 F.3d at 1301.

After pleading guilty to weapons and robbery charges in the middle district, defendant was transferred to the northern district to face other robbery charges. During his pretrial detention in Pensacola, Durham plotted another escape with his sister in a letter regarding hacksaw blades and other instructions. Because courtroom security personnel were aware of Durham's recent history of escape attempts and the violence of his alleged crimes, Durham's legs were shackled and a stun belt was placed around his midsection. 287 F.3d at 1301-02. (A stun belt is a device that uses electric shock to temporarily disable the defendant. The belt is controlled by a remote device held by corrections official in the courtroom. If the belt is activated, the defendant will receive a powerful electric shock sufficient to incapacitate him temporarily (*Durham*, 287 F.3d at 1301-02)).

Once aware of the Court's intention to use the stun belt at trial, defense counsel moved to prohibit its use. In its motion, defense claimed that most stun belt models were designed to administer 50,000 to 70,000 volts of electricity sustained over an eight second period. Shock of that magnitude typically causes the recipient to lose control of his limbs, to fall to the ground and often to defecate or urinate upon himself. *Durham*, 287 F.3d at 1301-02 (quotations omitted). The defense requested an evidentiary hearing to present these claims and to explore a number of other questions

relating to the operation and physical effects of the stun belt. The defense also argued that the stun belt interfered with the defendant's right to confer with counsel, to participate in his own defense, and that the stun belt could prejudice the defendant to the jury, as the belt's presence implies that the defendant is a violent individual who can be controlled only through extraordinary means. Defense counsel sought to introduce information about the error rate of the device, the criteria for triggering the belt, medical evidence that the shock may cause long term physical damage to the recipient, and information on the training of the deputy charged with the responsibility for activating the belt. *Durham*, 287 F.3d at 1302. Moreover, the defendant was concerned with the fear and anxiety that the stun belt created in him in that an attempt to consult with counsel would come at the price of unremitting fear and uncertainty that this act would be misinterpreted as inappropriate behavior and would precipitate a shock. *Durham*, 287 F.3d at 1302, footnote 2.

The government responded that due to Durham's recent attempted escapes from two separate jails, the stun belt was necessary to protect the security of those in the courtroom. The trial court addressed the possibility of attaching the device in a different manner so as to minimize the defendant's discomfort at wearing the stun belt, and whether there was any

possibility of an accidental discharge. The court did not receive evidence on these issues, although it questioned the deputy marshal who had the responsibility for courtroom security. The response of the deputy marshal, who was not under oath, indicated that the belt was attached properly and could not be adjusted and that there would not be an accidental discharge.

After hearing the deputy's statement, the trial court ruled that there was a minimal intrusion into the defendant's liberties and that there was no rational basis for the defendant to be unduly apprehensive regarding his ability to participate and consult with his attorney as part of his defense. 287 F.3d at 1303.

The Eleventh Circuit noted that trial judges are accorded reasonable discretion to balance the interests involved and to decide which measures are necessary to ensure the security of the courtroom, but that appellate courts should review whether that discretion was abused. *Durham*, 287 F.3d at 1303-04. The *Durham* court also noted that courts have long held that physical restraints should be used as rarely as possible. 287 F.3d at 1304. *See Allen v. Montgomery*, 728 F.2d 1409, 1413 (11th Cir. 1984)(seldom will the use of handcuffs be justified as a courtroom security measure); *Zygadlo v. Wainwright*, 720 F.2d 1221, 1223 (11th Cir. 1983)(use of shackles to restrain a defendant at trial should rarely be employed as a security device);

see also Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976)(the presumption of innocence is an integral part of a criminal defendant's right to a fair trial); *Illinois v. Allen*, 397 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970)(shackles visible to the jury might have a significant effect on the jury's feelings about the defendant); *United States v. Mayes*, 158 F.3d 1215, 1225 (11th Cir. 1998)(presence of shackles on the defendant in front of a jury erodes the presumption of innocence).

It has been held that shackles inhibit the defendant's right to a fair trial because the defendant can become confused, his ability to confer with counsel will be impaired, and may significantly affect the trial strategy he follows. *See, e.g., Zygadlo*, 720 F.2d at 1223. A decision to apply leg shackles Amust be subjected to close judicial scrutiny to determine if there was an essential state interest furthered by compelling a defendant to wear shackles and whether less restrictive, less prejudicial methods of restraint were considered or could have been employed.@ *Durham*, 287 F.3d at 1304 (quoting *Elledge v. Dugger*, 823 F.2d 1439, 1451 (11th Cir.), *withdrawn in part*, 833 F.2d 250 (11th Cir. 1987)).

In *Bryant*, this Honorable Court held that it was error for the trial court to deny an evidentiary hearing to determine whether restraints were necessary. 785 So.2d at 429. The Supreme Court of Florida had previously

Aestablished the requirement that a hearing on necessity must precede the decision to shackle if a defendant timely objects and requests an inquiry into the necessity for the restraints.@ *Bryant*, 785 So.2d at 429 (citing *Bello v. State*, 547 So.2d 914 (Fla. 1989)); *see also Finney v. State*, 660 So.2d 674, 682-83 (Fla. 1995)(trial court must not defer to the sheriff's apparent judgment that restraints are needed without first inquiring into the reasons for that decision).

In *Bello*, because the trial court made no inquiry into the necessity for the shackling during the penalty phase, the defendant was entitled to a new sentencing proceeding before a jury. 547 So.2d at 918. The *Bryant* Court, while noting that defense counsel objected and requested the trial court make an inquiry into the necessity of the shackles, held that the error was harmless due to the unrefuted evidence of Bryant's prior violent courtroom behavior and the trial court's personal knowledge of such conduct. However, it should be noted that Bryant was not shackled for any pre-trial or post-trial hearings.

The Supreme Court of Florida in *Bryant* held that it is error for the trial court to fail to have a hearing, and had the trial court had a hearing in *Bryant*, then it could have considered a variety of sources, including petitioner's prison records, witnesses, and correctional and law enforcement

officials to determine the present necessity for shackles and as such, the defense would have had an opportunity to challenge the validity and the importance of the information provided. However, in the same breath, the Supreme Court of Florida in *Bryant* states that there was unrefuted evidence of Bryant's prior violent courtroom behavior that Bryant had thrown a book at another judge in another proceeding and that Bryant had other violent charges pending. 785 So.2d at 429-30, footnote 4. Trial counsel was ineffective in failing to refute that evidence.

Essentially the reasoning in the direct appeal is that because the trial court made assertions, assumptions and repeated hearsay on the record and then erroneously denied an evidentiary hearing on that matter where defense counsel could have disputed and explored these allegations or submitted proof that Bryant's sudden outburst with the chair in court seven years prior was too remote in the past to consider in the present and brought in witnesses to testify to Bryant's current courteous and professional behavior in numerous courtroom settings after the Achair incident,@ the trial court's error was harmless because the Aproof@ of Bryant's prior violent courtroom behavior was unrefuted.

However, it is appellant's assertion that the Supreme Court of Florida in the *Bryant* case discussed yet affirmed the shackling issue on direct

appeal because it was better addressed on an ineffective assistance of counsel claim during the postconviction process. That explains the *Bryant* Court reasoning in holding that it was error but since counsel failed to take exception to Judge Mounts' allegations or proffer or attempt to proffer the significant changes in Bryant's circumstances over the past 7 years, that it was harmless on direct appeal. When trial counsels fails to address an error committed by the trial court, that issue must be heard on postconviction motion, not direct appeal. *See McKinney v. State*, 579 So.2d 80, 82 (Fla.1991) (claims of ineffective assistance of counsel are not reviewable on direct appeal but are properly raised in a motion for postconviction relief.); *Kelly v. State*, 486 So.2d 578, 585 (Fla. 1986)(same).

Trial counsel could have submitted the volumes of transcripts of pretrial hearings that Mr. Bryant attended for his second trial (after the Achair@ incident seven years prior during his first trial) where Mr. Bryant was courteous and well behaved. Mr. Bryant did not have one instant of inappropriate courtroom behavior after the first trial's Achair episode.@ Trial counsel could have submitted Mr. Bryant's DOC records and disciplinary reports. Trial counsel could have explored the allegations and circumstances around an aggravated assault charge and the courthouse rumor-mill about

the book throwing eight years prior. Trial counsel failed to testify or proffer their own testimony themselves about how petitioner currently acted with their investigators, experts, and counsel. Trial counsel failed to request that the trial judge give a warning to Mr. Bryant before jury selection began at the second trial that if Mr. Bryant engaged in any inappropriate courtroom behavior, he would then be shackled.

The trial court cannot rule that Mr. Bryant is competent for trial based in part on Mr. Bryant's rationality, on Mr. Bryant's good behavior in court, and his good behavior while incarcerated, *see Bryant*, 785 So.2d at 427, footnotes 2 and 3, and allow Mr. Bryant to approach the bench for jury selection and bench conferences, and then in the converse, rule that Mr. Bryant is still so unpredictable and violent that he must be shackled in front of the jury. There was no evidence at all in the record that petitioner gave any kind of indication that he intended to disrupt the trial or put the safety of court personnel at risk during the second trial. While trial counsel failed to refute the trial court's reasons for failing to afford an evidentiary hearing on this matter, the trial court also failed to submit any reasons or indications that Mr. Bryant was presently violent or had the future intention of disrupting the proceedings.

The choice that the trial court gave Mr. Bryant was between a stun belt and the shackles which were more visible to the jury than the stun belt was no choice at all. That choice is akin to the choice of being shot in the head or shot in the heart, and then when the prisoner chooses the head, the firing squad terms the shooting suicide of the prisoner because he chose the method. Bryant's choice of shackles or a stun gun was either "a dilemma of constitutional magnitude"[1] or a mere Hobson's choice.[2]

Mr. Bryant was concerned with participating in the trial while wearing a stun belt because he feared that the corrections staff may inappropriately trigger the device, and Mr. Bryant was concerned with participating in the trial while wearing shackles in front of the jury. Both restraining devices erodes the presumption of innocence, interferes with the defendant participating in the trial where the defendant can become confused, his ability to confer with counsel will be impaired, and could significantly affect the trial strategy he follows. The choice of shackles over a stun belt cannot be constitutionally voluntary when such a dilemma exists.

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[1] *Sanchez v. Mondragon*, 858 F.2d 1462, 1465 (10th Cir. 1988)("a defendant's choice between incompetent and unprepared counsel and appearing pro se is 'a dilemma of constitutional magnitude'"), *overruled on other grounds*, *United States v. Allen*, 895 F.2d 1577 (10th Cir. 1990).

[2] Hobson's choice: something or nothing between what is offered and nothing at all. Named for English liveryman Thomas Hobson (1554-1631) who would let his customers take only the horse nearest the door or none at all. *Encarta World English Dictionary* (North American Edition) 2003 Microsoft Corporation.

Petitioner is entitled to an evidentiary hearing to determine whether he intended to disrupt the court proceedings and jeopardize the safety of courtroom personnel at his second trial. The State should have the burden of showing some evidence of present violence or disruptive behavior and not rely on years old conduct. If the trial court finds that there was no substantial, competent evidence to support the necessity of shackles at that present time, then the trial court should grant petitioner a new trial on the guilt phase. Trial counsel tried to preserve the shackling issue for appeal, but failed to do so properly when it failed to take exception to the Judge's allegations and failed to proffer or attempt to proffer any significant change in circumstance that would have indicated to the court that its decision was an abuse of discretion. *See Bryant,* 785 So.2d at 430. So, additionally, appellant is entitled to an evidentiary hearing to question trial counsel whether the failure to properly preserve the shackling issue for appeal was a matter of trial strategy or deficient performance. *See Davis v. Crosby*, 341 F.3d 1310, 1312 (11th Cir. 2003).

In *Davis v. Crosby*, 341 F.3d 1310, 1312 (11th Cir. 2003), the Eleventh Circuit Court of Appeals recently held that, when reviewing an ineffective assistance of counsel claim involving a failure to properly preserve an issue

for appeal, the proper analysis requires a reviewing court to focus on how the error affected the outcome of the appeal and not merely the outcome of the trial.

In the *Davis* case, Mr. Davis submitted on direct appeal a *Batson* [3] issue, arguing that the trial court erred in overruling defense counsel's *Batson* challenge. The Third District Court of Appeal found that the *Batson* claim was Awell taken,@ but refused to address the issue because trial counsel had failed to properly preserve that issue for appeal. Davis then filed a postconviction motion, asserting that he received ineffective assistance of trial counsel because his trial counsel failed to preserve the *Batson* claim. That motion was denied and the appellate court affirmed that denial. Mr. Davis filed a petition (in the federal court) for a writ of habeas corpus, alleging ineffective assistance of counsel and both the Magistrate Judge and the district court denied the petition. 341 F.3d at 1312-13.

On appeal to the Eleventh Circuit, Mr. Davis again asserted that he received ineffective assistance of counsel when his trial counsel failed to preserve his *Batson* claim. In addressing Davis' claim, the Court noted the

[3] *Batson v. Kentucky*, 476 U.S. 79, 98 (1986)(improper use of a preemptory challenge of a venireperson based solely on race).

test set forth in *Strickland v. Washington*[4], 466 U.S. 668, 687 (1984), which requires a habeas petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. 341 F.3d at 1314. The Court found, as was previously determined by the Third District Court of Appeal, that the trial counsel performed deficiently by failing to renew the *Batson* challenge before accepting the jury and had thus failed to properly preserve that issue for appeal.

In addressing the prejudice standard, the *Davis* court discussed whether a reviewing court should look to the outcome of the trial or whether it should look to the outcome of the appeal in determining whether a petitioner was prejudiced by his trial counsel's performance in failing to properly preserve an issue for appeal. 341 F.3d at 1314.

In holding that the prejudice showing required by *Strickland* is not restricted to the forum in which counsel performs deficiently, the *Davis* Court relied on *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000), in stating that Aeven when it is trial counsel who represents a client ineffectively in the

[4] *Strickland* and its progeny set forth the criteria in order to succeed on a claim of ineffective assistance of counsel. A petitioner must show: one, that defense counsel's representation was deficient (representation that fell below an objective standard of reasonableness); and two, that deficient performance prejudiced the defense in that but for counsel's errors, the result of the proceeding would have been probably different. *But see Lockhart v. Fretwell*, 506 U.S. 364, 368-69 (1993)(*Strickland* analysis must include the prejudice of whether the result of the proceeding was fundamentally unfair or unreliable and not be restricted to the effect of the prejudice to the outcome of the trial).

trial court, the relevant focus in assessing prejudice may be the client's appeal.@ 341 F.3d at 1315. The *Davis* Court explained that under the unique circumstances in the *Davis* case, i.e., where counsel proceeded with an objection or claim, and thereafter failed to preserve it properly for appeal, the only effect of trial counsel's deficient performance was on the defendant's appeal:

> To now require Davis to show an effect upon his trial is to require the impossible. Under no readily conceivable circumstance will a simple failure to preserve a claim as opposed to a failure to raise that claim in the first instance have any bearing on a trial's outcome. Rather, as when defense counsel defaults an appeal entirely by failing to file timely notice, the only possible impact is on the appeal. Accordingly, when a defendant raises the unusual claim that trial counsel, while efficacious in raising an issue, nonetheless failed to preserve it for appeal, **the appropriate prejudice inquiry asks whether there is a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved**.

Davis, 341 F.3d at 1315-16 (emphasis added).

Similarly, in the instant case, Mr. Bryant's trial counsel attempted to prevent Bryant's shackling before the jury, but failed to properly preserve that issue for appeal. 785 So.2d at 428-30. While the Supreme Court of Florida agreed with Bryant that it was error to deny an evidentiary hearing to determine whether restraints were necessary, it noted that trial counsel failed to take exception to the judge's allegations or attempted to proffer any

significant change in circumstance that would have indicated to the court that its decision was an abuse of discretion. 785 So.2d at 430.

Trial counsel in the instant case failed to proffer any contrary evidence or indicate that the trial court was in error, submit any evidence or witness statements into the record regarding Mr. Bryant's present appropriate behavior, and failed to obtain or proffer evidence to show that less restrictive, less prejudicial methods could have been employed or should have at least been considered. 785 So. 2d at 430 (ATrial counsel did not take exception to these facts [that Judge Mounts alleged], nor did the defense proffer or attempt to proffer any significant change in circumstance that would indicate to the court that its decision [was] an abuse of discretion.@).

Based upon the errors and omissions by trial counsel, appellant was prejudiced in both his trial and appeal.

B. **CONFESSION ISSUE**

Trial counsel was ineffective in failing to properly preserve for appeal and dispute appellant's confession.

One of the issues at trial was that Bryant's statement was obtained pursuant to an unlawful arrest and illegal coercion by the police. There was a motion to suppress, and the trial court denied that motion (R 2270-71, 2570-72, 2878-82). This was a crucial issue at trial because there was no other evidence linking Bryant to the robbery and murder. There was no independent evidence to connect the defendant to this crime: No eyewitness identification; no physical evidence linking defendant to the crime scene; no physical evidence linking defendant to the firearm that was used to kill Mr. Andre.

The only evidence that incriminated the defendant was his alleged statement to the police and other interested parties. There were swabs taken from the victim and not analyzed because they were destroyed or mistakenly believed to be swabs from the floor of the store where the shooting took place. There was a ski cap found at the scene which could have been used by the shooter, but the State failed to have it analyzed by the FDLE crime lab. Mr. Andre's clothes and fingernails and hands were not examined for any evidence that the shooter could have left, such as his own blood, salvia, clothing fibers, etc.

The lack of physical evidence connecting Mr. Bryant to this crime goes to the importance and emphasis placed on his statement, which was the only evidence against Bryant introduced at trial. From December 16, 1991, the night of the robbery and shooting, until January 16, 1991, when the police took a statement from Betty Bueie accusing Bryant of admitting to the robbery and shooting, the police had nothing to connect Bryant to the robbery and shooting (R 3486-87). *Bryant*, 785 So. 2d at 426. When Betty Bueie came into the police station that night, she was very upset because Bryant had allegedly beaten up her sister to the extent that her sister was in the hospital (R 3487). Based only upon the hearsay statements of several people**C**all with grudges and complaints against Mr. Bryant**C**the police arrested Mr. Bryant for the robbery and shooting. Within four hours after the arrest, the police obtained an incriminating statement from Mr. Bryant. There was no probable cause to arrest the defendant; as such, his confession was obtained pursuant to the unlawful arrest and should have been suppressed. *See, e.g., Swartz v. State*, 857 So.2d 950, 952 (Fla. 4th DCA 2003)(independent evidence of criminal activity on the part of the suspect is a prerequisite before a tip can justify probable cause for an arrest); *Pinkney v. State*, 666 So.2d 590 (Fla. 4th DCA 1996)(due to the inherent unreliability

of tips, the police must establish the reliability independently before it can be used for probable cause to arrest); *Holmes v. State*, 549 So.2d 1119 (Fla. 1st DCA 1989)(while a reliable tip can form the basis for probable cause, if it is sufficiently detailed and independently verified by a law enforcement officer using evidence other than the tip itself, the tip is insufficient to validate an arrest where there is no evidence which supports the tipster's allegation that the suspect had committed the crime); *Cunningham v. State*, 591 So.2d 1058, 1060 (Fla. 2d DCA 1991)(an arrest of a person is not authorized after an anonymous tip unless the officer develops independent evidence that the suspect is engaged in criminal activity); *compare State v. K.V.*, 821 So.2d 1127 (Fla. 4th DCA 2002)(probable cause can develop when officer acquires additional information corroborating tip).

One month after the robbery and shooting, Delray Beach Police officer Hartman was contacted by Mr. Bryant's girlfriend's sister and was told that Mr. Bryant had made statements to that he was the robber and shooter in the Andre's Market robbery. Based on this statement along with other alleged statements from other interested individuals, Hartman arrested Bryant.

The defense filed a motion to suppress and argued that there was no probable cause to arrest Mr. Bryant. At the motion to suppress hearing, the first witness, Hartman from the Delray Beach Police Department testified that he was the lead detective in the Andre shooting (R 3445). He testified that approximately one month after the shooting, he was contacted by Betty Bueie, accompanied by Mary Williams, who came into the Delray police station asking for whomever was in charge of the Andre homicide (R 3446). They said they knew who committed the murder at the grocery and told Hartman that it was Byron Bryant (R 3449). Betty Bueie allegedly told Hartman that she was mad at Bryant for getting into a fight with her sister-Bryant's then-girlfriend, Tara Bueie, and that she had heard Bryant speak in Afront of her that he shot and killed the man in a robbery attempt; that he didn't mean to shoot and kill him but it happened.@ (R 3450). Hartman testified that Mary Williams also told him that Bryant stated in front of her that he committed this homicide and that he had given the gun used in it to his other girlfriend, Cheryl Evans, who in turn gave the gun to her other boyfriend (R 3451) Damien Remy.

Hartman then testified that he spoke to Tara Bueie who had had a fight with Mr. Bryant that day about Mr. Bryant's other girlfriend, Cheryl

Evans (R 3452). Hartman testified that Tara had told him that Bryant had told her that he was in a struggle with the victim and that the victim pulled the ski mask off that Bryant was wearing (R 3452).

Hartman then testified that he spoke to Cheryl Evans' other boyfriend, Damien Remy, regarding that the alleged murder weapon that Remy disposed of (R 3453). Remy was being held in jail in Martin County under federal narcotics charges, and Remy told Hartman that he had just found out that Bryant was dating Cheryl Evans at the same time Remy was dating Cheryl Evans, although Remy had thought that Bryant was Cheryl's cousin (R 3454). Hartman testified that Remy told him that Cheryl told Remy that it was her cousin Byron Bryant who murdered Mr. Andre (R 3455). Hartman further testified that Remy told him that Cheryl said that Bryant used her gun for the robbery and homicide and Remy discovered the gun in his car after talking to Cheryl (R 3455). Hartman testified that Remy told him that he took the gun and threw it out the window on 1-95 (R 3455).

Due to these hearsay statements from Evans, Remy, Williams, Tara Bueie and Betty Bueie, Hartman testified that he felt that he had probable cause to arrest Byron Bryant (R 3455). Hartman was able to effectuate the arrest by having Cheryl Evans pretend to need to obtain something from the

Delray Beach Police Department and ask Byron Bryant to accompany her on the drive to the Delray Beach Police Department (R 3456). Once Evans was inside the Delray police station, numerous law enforcement officers surrounded the car with guns drawn and arrested Bryant while Bryant had been waiting for Cheryl Evans in the parking lot (R 3461, 3467). Immediately after this arrest, he was brought into an interview room with handcuffs behind his back (R 3467). Hartman testified that he read Mr. Bryant his *Miranda* warnings from the standard *Miranda* card, but that Bryant could not sign it acknowledging same because his arms remained handcuffed behind his back (R 3476). Initially, Hartman testified, Bryant denied involvement in the case (R 3476).

Hartman testified that he did nothing to determine the reliability of Betty Bueie's allegations against Bryant prior to arresting Bryant (R 3487-88). Hartman testified that he did nothing to determine the reliability of Mary Williams' allegations against Bryant prior to arresting Bryant (R 3487-88). This is evidenced by the fact that both Betty Bueie and Mary Williams told Hartman that Bryant was wearing a ski mask, but that the eyewitnesses at the store during the robbery and shooting did not indicate that the shooter had on a ski mask (R 3489-91). Hartman also testified that he did nothing to

determine the reliability of Tara Bueie's allegation against Bryant prior to arresting Bryant (R 3493). It is clear that Hartman failed to determine the reliability of Remy's allegation against Bryant. Each one of these witnesses had a personal vendetta and grudge against Mr. Bryant. None of these witnesses were disinterested, concerned citizens. Cheryl Evans was a ten time convicted felon whose gun, by her own admission, was used in the robbery and shooting. Due to Evans' cooperation with the police by pointing the finger at Bryant, she was not charged in connection with the murder or robbery. Damien Remy was Byron Bryant's girlfriend's other boyfriend who had just found out about the romantic nature of their relationship. Remy, by his own admission, had disposed of the alleged murder weapon and was facing federal narcotic charges. Remy was not charged in connection with disposing of the murder weapon after pointing the finger at Bryant.

The three other witnesses, Tara Bueie, Betty Bueie, and Mary Williams, were mad at Mr. Bryant for getting into a physical altercation with Tara and cheating on Tara with Cheryl. Without more, none of these witnesses provided the reliability that the police needed to effectuate a lawful arrest on Mr. Bryant.

Hartman failed to investigate Bryant before the arrest and failed to corroborate any of these "tips" in order to develop lawful probable cause to arrest. Hartman could have followed Bryant to determine whether he was acting suspiciously since there were no exigent circumstances. Hartman failed to obtain a search warrant for Bryant's house to look for a weapon or money from the store or clothes worn the night of the robbery. Hartman failed to obtain a search warrant for Bryant's telephone to see if he could intercept a conversation where Bryant admitted to the robbery and homicide. Hartman failed to ask one of the informants to wear a wire in order to capture a conversation on tape between the informant and Bryant regarding the robbery and homicide. There were no exigent circumstances because the robbery and shooting was already over a month old, and Hartman could have tried to corroborate these tips in numerous ways in order to develop lawful probable cause to arrest. Hartman also failed to present his witness statements and police reports to the Office of the State Attorney, so that the State Attorney could file for a warrant after a neutral magistrate had examined the allegations and usually authorized same.

Because there was no arrest warrant, no exigent circumstances, and no probable cause to arrest, the arrest itself was unlawful. *See Dunaway v. New*

York, 442 U.S. 200 (1979)(police must have probable cause to believe the individual is committing or has committed a crime in order to arrest that individual); s*ee also Rolling v. State*, 695 So.2d 278, 293 (Fla. 1997)(a key ingredient of the exigency requirement is that the police lack time to secure an arrest or search warrant); *Swartz* (no probable cause with undeveloped tip); *Holmes* (same); *Cunningham* (same). Because the arrest was unlawful, the statement obtained several hours after the arrest was unlawfully obtained. *See generally Wong Sun v. United States*, 371 U.S. 471 (1963)(if police do not have probable cause for arrest and a confession is obtained after that arrest, the confession must be suppressed)*; Brown v. Illinois*, 422 U.S. 590, 595 (1975)(subsequently obtained confession is illegal when arrest is illegal and intervening *Miranda* warnings will not validate the confession); *see Taylor v. State*, 355 So.2d 180 (Fla. 3d DCA 1978)(subsequently obtained consent to search unlawful when officer illegally began search first).

Because the police statement was the only piece of evidence at trial linking Mr. Bryant to the crime, the conviction was due to use of evidence obtained pursuant to an unlawful arrest. However, because appellate counsel did not present this issue for appellate review, this Court did not address this

issue. As a crucial issue, this Court would have reviewed whether the trial court erred in denying Bryant's motion to suppress his confession.

When Bryant was arrested for the instant offense, he had accompanied Cheryl Evans to the police station and stayed in the car while Evans went into the police station. While he was sitting in the vehicle, the police blocked in the vehicle, and made a felony arrest of Mr. Bryant for the robbery and shooting. Mr. Bryant was immediately arrested by gunpoint, handcuffed and transported into an interrogation room at the Delray police station. Mr. Bryant was handcuffed from the time that the officers forced him out of the vehicle until he gave a confession, some four hours later (R 3494-95, 3514-15).

Officer Hartman was in possession of his firearm while in the interrogation room at the police station with Bryant (R 3485-86). Officer Brand was in possession of at least one firearm while in the interrogation room at the police station with Bryant (R 3496). Petitioner later alleged that Brand had put a firearm to petitioner's head in order to procure a confession.

Both police officers, Hartman and Brand, testified that Bryant stated that he would give them a statement if he were allowed to see and talk to his mother (R 3510). Mr. Bryant's statement was conditioned on the production

of his mother. The police procured Mr. Bryant's mother, as promised to him, as a condition to his giving a statement. After the police obtained Mr. Bryant's mother and produced her at the police station for Mr. Bryant to talk to, Mr. Bryant gave a statement implicating himself in the robbery and shooting. Because there was a promise made in exchange for a statement, the statement should have been ruled as involuntary and suppressed. *See Traylor v. State*, 596 So.2d 957, 964 (Fla. 1992)(the mind of the accused should, at the time, be free to act, uninfluenced by fear or hope; to exclude a confession, it is not necessary that any direct promises or threats be made to the accused); *Johnson v. State*, 696 So.2d 326 (Fla. 1997)(A confession is not freely and voluntarily given if it has been elicited by direct or implied promises, however slight), *cert. denied*, 522 U.S. 1095 (1998); *Bruno v. State*, 574 So. 2d 76, 79-80 (Fla. 1991)(same); *Grasle v. State*, 779 So.2d 334 (Fla. 2d DCA 2000).

In the instant case, the erroneous admission of petitioner's statement is not harmless beyond a reasonable doubt because that statement was the only piece of evidence linking petitioner to the crime. "A confession is like no other evidence ... the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him ...."

Arizona v. Fulminante, 499 U.S. 279, 296 (1991). Here, the State cannot meet its burden of showing that admission of the coerced statements was harmless beyond a reasonable doubt. Because these statements were admitted in error, Mr. Bryant's convictions cannot stand, and a new trial must be ordered. After a motion hearing to suppress appellant's statement as coerced, the trial court denied the motion, relying on the ruling in the first trial: AI find that this was not a promise of the type that you endeavored to describe, it was an accommodation and an act of courtesy and kindness on the part of the police for which I commended them in the last trial and I commend them now. And the statement was voluntary then and it's voluntary now.@ (R 3528).

Mr. Bryant conditioned his statement on the police production of his mother at the police station. Mr. Bryant told the police that he would give them a statement if he could first talk to his mother. The police produced Mr. Bryant's mother at the police station, and then after Mr. Bryant met with his mother, he gave a statement implicating himself in the robbery and shooting. Because there was a promise by the police of doing something for Mr. Bryant, i.e., bringing his mother to the police station, in order to obtain a

statement from Mr. Bryant, that statement was not voluntary and it should have been suppressed as such.

If a statement is given in exchange for something, then that statement is involuntary. An involuntary or coerced confession violates the Fifth Amendment privilege against compelled self-incrimination. *See Colorado v. Connelly*, 479 U.S. 157, 163 (1986). For a confession or inculpatory statement to be voluntary, the totality of the circumstances surrounding the statement must indicate the statement was the result of a free and rational choice. *Walker v. State*, 771 So. 2d 573, 574 (Fla. 1st DCA 2000); *See Johnson v. State*, 696 So.2d 326 (Fla.1997), *cert. den.*, 522 U.S. 1095, 118 S.Ct. 892, 139 L.Ed.2d 878 (1998); *see also Traylor v. State, 596 So.2d 957, 964 (Fla.1992)*. The mind of the accused should, at the time, be free to act, uninfluenced by fear or hope. *See Traylor*, 596 So.2d at 964.

To exclude a confession or an inculpatory statement, it is not necessary that any direct promises or threats be made to the suspect. *See id.* A confession or inculpatory statement is not freely and voluntarily given if it has been elicited by direct or implied promises, however slight. *See Johnson*, 696 So.2d at 330*; Bruno v. State*, 574 So.2d 76, 79-80 (Fla.1991); *See also Grasle v. State*, 779 So.2d 334 (Fla. 2d DCA 2000).

In *Albritton v. State*, 769 So.2d 438 (Fla. 2d DCA 2000), the Second District held that the defendant's confession was not voluntary in light of the promise of the interrogating detective made to the defendant that if the offense was part of a religious ritual, then the defendant would not be charged with a crime. In that case, the defendant had claimed she had made incriminating statements in order to protect her son who actually committed the crime. She made the incriminating statement after the police told her that if it was part of a religious ceremony, then that conduct would be constitutionally protected. 769 So.2d at 440.

The trial court found that the detective's statements did not constitute a promise. However, the Second District Court held that a promise does not have to be direct to render a confession involuntary, but can be implied. 769 So.2d at 441-42 (citing to *Almeida v. State*, 737 So.2d 520 (Fla. 1999)).

A defendant is entitled to suppression of a confession which is induced by direct or implied benefit. *Rivera v. State*, 547 So.2d 140 (Fla. 4th DCA 1989), *rev. denied*, 558 So.2d 19 (Fla. 1990); *Hanthorn v. State*, 622 So.2d 1370 (Fla. 4th DCA 1993). If the totality of the circumstances were calculated to exert undue influence over him, the confession must be excluded. *Frazier v. State*, 107 So.2d 16 (Fla. 1958); *G.G.P. v. State*, 382 So.2d 128, 129 (Fla. 5th DCA 1980). If the actions of the interrogator were

such that they induced the suspect to confess by promises of a benefit, then the statement is untrustworthy and should be excluded. *GGP v. State*, 382 So.2d 128, 129 (Fla. 5th DCA 1980); *Fillinger v. State*, 349 So.2d 714 (Fla. 2d DCA 1977). The State carries the burden of proof that the confession was freely and voluntarily made. *Hanthorn*, 622 So.2d at 1370.

Petitioner in the instant case was a young man of twenty-four years of age. There was substantial testimony that he suffered from mental disability due to a severe blow to the head at age 18; a childhood bout of meningitis; and loss of blood when he was victimized by a drive-by shooting. While it is alleged that Mr. Bryant was read *Miranda* warnings, there was no showing that he was capable of understanding them, or that he waived them by since he did not sign the *Miranda* card. He was promised that he could see his family before giving a statement. He was handcuffed behind his back for over four hours after being surrounded by gunpoint in a surprise arrest. The officers induced Mr. Bryant into giving a statement by granting him the benefit of seeing his mother. It is undisputed that immediately after visiting with his mother, Mr. Bryant gave the officers the incriminating statement. Under these circumstances, the police conduct was sufficient to make Bryant's statement inadmissible. By the police procuring Mr. Bryant's mother, this exchange exacerbated an already coercive atmosphere.

See, e.g., Gaspard v. State, 387 So. 2d 1016, 1022 (Fla. 1st DCA 1980)(defendant's incriminating statements were properly suppressed because they were the product of a coercive interrogation).

The burden of establishing voluntariness is on the prosecution, by a preponderance of evidence. *See Lego v. Twomey*, 404 U.S. 477, 489 (1972). If a coerced statement is admitted in error, reversal is required unless the State can show the error to have been harmless beyond a reasonable doubt. *See Arizona v. Fulminante*, 499 U.S. 279, 295-96 (1991). In the instant case, the erroneous admission of petitioner's statement is not harmless beyond a reasonable doubt because that statement was the only evidence linking petitioner to the crime. "A confession is like no other evidence ... the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him ...." *Fulminante*, 499 U.S. at 296 (citation quotation marks omitted). Here, the State cannot meet its burden of showing that admission of the coerced statements was harmless beyond a reasonable doubt when there was no other evidence at trial linking petitioner to the crime. Because these statements were admitted in error, Mr. Bryant is entitled to a new trial. An additional reason why the confession should have been suppressed is that the the police did not have probable cause to arrest petitioner. Because petitioner was unlawfully arrested, his confession

obtained from that arrest should have been suppressed. The police essentially arrested Mr. Bryant on the basis of allegations or Atips@ from unreliable sources. It is undisputed that none of the sourcesCMary Williams, Betty Bueie, Tara Bueie, Cheryl Evans, Damien Remy, were checked for reliability or used in prior cases. These people were essentially anonymous informants, or at best, citizen informants, but in either category, they still do not meet the standard for the police for probable cause to effectuate an arrest. The informants involved in this case are not ordinary citizens, mere eyewitnesses, disinterested bystanders or victims whose statements are entitled to a presumption of veracity. *See, e.g.*, *Roper v. State*, 588 So. 2d 330 (Fla. 5th DCA 1991).

Without specific details not easily accessible to the general public, a confidential informant's reliability cannot be established. *See Draper v. United States*, 358 U.S. 307 (1959). Because the reliability and veracity of the informants were not established, their statements about Byron Bryant to the Detective failed to establish probable cause for an arrest. *See Illinois v. Gates*, 462 U.S. 213 (1983)(totality of circumstance) analysis is the basis of probable cause (judicial) determinations. *See also State v. Butler*, 655 So.2d 1123(Florida adopting *Gates* to determine whether information for a confidential informant gives rise to probable cause). There is no totality of

the circumstances test in the instant case. The police failed to obtain an arrest warrant which would have been reviewed and authorized by a neutral magistrate. The police failed to obtain a search warrant for Byron Bryant's house or car. The police failed to test the ski cap found at the scene of the crime to determine whether Bryon Bryant had ever come into contact with it. The police failed to corroborate any statements about Byron Bryant by simply monitoring Bryant's activities or obtaining a warrant to wiretap his telephone. The police failed to obtain a statement from Bryant by using one of the alleged five informants to record a possible conversation that Bryant may have with one of the five informants regarding his alleged role in the robbery and shooting. There was no exigent circumstance that prohibited the police from corroborating the tips they received. The police simply were in a hurry to make an arrest for this robbery and shooting and as such, arrested the first person Athe street@ said had done it.

There was no testimony from the prosecution witnesses that any of the sources had a prior history of providing reliable tips that had proven to be accurate; nor were these individuals disinterested citizens. An anonymous tip, without more, is insufficient to demonstrate the informant's basis of knowledge or veracity. *Alabama v. White*, 496 U.S. 325, 329 (1990). An anonymous tip corroborated by independent police work can

exhibit sufficient indicia of reliability to provide reasonable suspicion to conduct a stop or probable cause to search. *White*, 496 U.S. at 330. The reliability of such a tip is evaluated, among other considerations, on its degree of specificity, the extent of corroboration of predicted future conduct, and the significance of the informant's predictions. *Kimball v. State,* 801 So.2d 264, 265 (Fla. 4th DCA 2001)(citing *Gates*, 462 U.S. at 246)). Here, the anonymous tips were combined with nothing, much less independent police observation; and therefore was insufficient to provide probable cause to arrest Mr. Bryant.

C. AGGRAVATING CIRCUMSTANCE OF AVOIDING ARREST

Trial counsel was ineffective in failing to dispute and properly preserve for appeal the aggravator of Aavoiding arrest@

The trial court determined that the ineffective assistance of counsel claim regarding the failure to dispute the aggravator of Aavoiding arrest@ was Abased on facts established and found by the jury, contained in the trial records@ (R 789). Section 921.141(5)(e), Florida Statutes (1997), provided: AAggravating circumstances.--Aggravating circumstances shall be limited to the following: . . . (e)The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.@ The sentencing court determined that at the time of the murder in the instant case, the victim was depriving appellant of his right to leave during the

commission of an armed robbery by effectuating a lawful citizen's arrest, and consequently, an eventual arrest by law enforcement personnel (R 178). There is no competent, substantial evidence to support the trial court's determination that the victim intended to detain appellant to effectuate a citizen's arrest. There is no competent, substantial evidence to support the trial court's determination that appellant decided to murder the victim primarily because he believed the victim was effectuating a citizen's arrest and he chose to murder him to avoid that arrest. The murder was not committed to avoid arrest, but was a by-product of an armed robbery gone awry. Most Aavoiding arrest@ aggravators are found where the defendant has committed a kidnapping or a rape and there is testimony indicating that the defendant wished to kill the victim to avoid identification. *See, e.g., Randolph v. State*, 853 So.2d 1051, 1055 (Fla. 2003)(defendant admitted to horrible beating and cover-up rape); *Philmore v. State*, 820 So.2d 919, 935 (Fla. 2002)(defendant admitted he killed the person whose car he carjacked so he could not be identified and would have enough time to get away with the car); *Feenie v. State*, 648 So.2d 95, 96-97 (Fla. 1994)(victim, while alive, placed in trunk and taken to different location and shot in head); *Preston v. State*, 607 So.2d 404, 409 (Fla. 1992)(victim abducted from the scene of the crime and transported to a different location to be killed); *Cave v. State*, 476

So.2d 180, 188 (Fla. 1985)(avoid arrest aggravator appropriate where defendant kidnapped victim and transported her "some thirteen miles to a rural area in order to kill and thereby silence the sole witness to the robbery").

With regard to the avoid arrest aggravator, this Court has held in *Philmore v. State*, 820 So.2d 919, 935 (Fla. 2002):

> The avoid arrest/witness elimination aggravating circumstance focuses on the motivation for the crimes. Where the victim is not a police officer, "the evidence [supporting the avoid arrest aggravator] must prove that the sole or dominant motive for the killing was to eliminate a witness," and "[m]ere speculation on the part of the state that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator." . . .
>
> In other cases, this Court has found it significant that the victims knew and could identify their killer. While this fact alone is sufficient to prove the avoid arrest aggravator, we have looked at any further evidence presented, such as whether the defendant used gloves, wore a mask, or made any incriminating statements about witness elimination; whether the victims offered resistance; and whether the victims were confined or were in a position to pose a threat to the defendant. *Farina v. State*, 801 So.2d 51, 54 (Fla. 2001).

The trial court's sentencing order in the *Philmore* case stated that;

> Philmore stated to law enforcement that he killed the person whose car he carjacked so he could not be identified and would have enough time to get away with the car; Philmore further stated to law enforcement that once he carjacked Perron's vehicle, Philmore took Perron to a remote area, and upon exiting the vehicle, Philmore shot Perron in the forehead in an execution-style manner; and Perron's body was discovered in an isolated location.

820 So.2d at 935.

This Honorable Court in *Philmore* concluded that the trial court did not err in finding the avoid arrest aggravator where, APhilmore confessed that the reason for killing Perron was witness elimination.@ *Id*. No such statement occurred in the instant case; rather, the trial court based its rationale on that appellant stated in his confession that the victim wrestled appellant for the

gun and Awe was struggling and it was like both of us was fighting for our life@ (R 178).

In order to establish that the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, the evidence must prove beyond a reasonable doubt that the sole or dominant motive for the killing was to eliminate a witness. *See Hurst v. State*, 819 So.2d 689, 695 (Fla. 2002); *Zack v. State*,753 So.2d 9, 20 (Fla. 2000); see also *Riley v. State*, 366 So.2d 19, 22 (Fla. 1978)("the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases.").

In the instant case, there is no competent, substantial evidence to prove that appellant's dominant motive for the murder was to avoid an effectuation of a citizen's arrest and therefore, trial counsel was ineffective in failing to dispute it.

ISSUE IV
THE TRIAL COURT ERRED IN DETERMINING THAT APPELLANT'S *RING* ARGUMENT IS LEGALLY INSUFFICIENT.

The trial court determined that appellant waived his right to a jury during the penalty phase, and as such, appellant's allegation that his sentence of death is unconstitional under *Ring* is legally insufficient (R 792).

In *Ring v. Arizona*, --U.S.--, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the United States Supreme Court held that the Arizona statute allowing a trial judge without a jury to determine the presence or absence of aggravating factors required for the imposition of the death penalty violates the Sixth Amendment right to a jury trial in capital prosecutions. Previously, in *Walton v. Arizona*, 497 U.S. 639, 649 (1990), the Supreme Court of the United States had held that the death penalty statute in Arizona was compatible with the Sixth Amendment because the additional facts found by the trial judge were sentencing considerations and not elements of the offense of capital murder. *Ring*, 122 S.Ct. at 2432. However, in *Apprendi v. New Jersey*, 530 U.S. 466, 483-92, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the Supreme Court of the United States held that the Sixth Amendment prohibits a defendant from being exposed to a penalty exceeding the maximum punishment he could receive if punished according to the jury's findings reflected in the jury's verdict. *Ring*, 122 S.Ct. at 2432. This prohibition applies even if the additional findings made by the trial judge were characterized as sentencing factors. *Ring*, 122 S.Ct. at 2432.

Because the ruling in *Apprendi* conflicts with the holding in *Walton*, the Supreme Court overruled the holding in *Walton* in its decision in *Ring*. As such, defendants in capital cases are now entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.

Because the finding of aggravating factors increases the maximum penalty in a murder case from life to death, a jury must determine whether the State has demonstrated the existence of the aggravators; a judge is no longer able to make this factual determination. In light of this holding in *Ring*, appellant is now entitled to a jury determination whether he should receive life imprisonment or a death sentence after the jury considers all aggravating and mitigating factors. Mr. Bryant is entitled to a new sentencing hearing before a jury to determine whether there is substantial evidence to support the existence of aggravators and whether the aggravators outweigh the mitigators.

In the instant case, Mr. Bryant did not have a jury to make specific findings, and the holdings in *Ring* and *Apprendi* require a jury--not the trial judge-- to make specific findings in order to impose a greater penalty such as death on a defendant. *See Ring*, 122 S.Ct. at 2439 (Aif a State makes an increase in a defendant's authorized punishment contingent on the finding of

a fact, that fact—no matter how the State labels it—must be jury by a decided beyond a reasonable doubt.@); *Apprendi*, 530 U.S. at 482. Because the aggravating factors were not determined by a jury beyond and to the exclusion of all reasonable doubt in the instant case, Mr. Bryant is entitled a new penalty trial. *Ring*, 122 S.Ct. at 2443 (because aggravating factors operate as the Afunctional equivalent of an element of a greater offense,@ the Sixth Amendment requires that they be found by a jury).

In *Bottoson v. State*, 813 So.2d 31, 36 (Fla. 2002), the Supreme Court of Florida rejected the defendant's similar *Apprendi/Ring* claim on the merits, on authority of *Mills v. Moore,* 786 So. 2d 532 (Fla. 2001) and *King v. State,* 808 So.2d 1237 (Fla. 2002)(relying on *Mills*). The premise of the *Mills* decision was that *Apprendi* does not apply to already challenged capital sentencing schemes that have been deemed constitutional. 786 So.2d at 536. However, the United States Supreme Court in *Ring* now has held that *Apprendi* does invalidate previously challenged and upheld capital sentencing schemes. The rule of *Apprendi* as applied in *Ring* invalidated the Arizona sentencing scheme previously upheld in *Walton.* As such, the rule of *Apprendi* as applied in *Ring* also invalidates the Florida sentencing scheme which was used to sentence the petitioner to death.

The trial court in the instant case should have decided whether the *Apprendi/Ring* rule is to be applied to appellant's case. What is notably different in the instant case compared with *King v. Moore*, 831 So.2d 143 (Fla.), *cert. denied*, 123 S.Ct. 657 (2002), and *Bottoson v. Moore,* 833 So.2d 693 (Fla.), *cert. denied*, 123 S.Ct. 662 (2002), is that this issue is contained in appellant's amended initial postconviction motion. Both Mr. King and Mr. Bottoson were under active death warrants and had completed their entire round of appellate reviews. In the instant case, Mr. Bryant is now only filing his initial postconviction motion. As such, a change in the law which takes place prior to the defendant filing his postconviction motion can be applied to this case.

Under the holding in *Witt v. State*, 387 So.2d 922, 931 (1980), a change in law supports postconviction relief in a capital case when Athe change (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.@ The first two criteria are clearly met in the instant case; the third criteria presents the crucial question. In explaining what Aconstitutes a development of fundamental significance,@ the court in *Witt* included in that category Achanges of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* [*v.*

Denno, 388 U.S. 293 (1967)] and *Linkletter* [*v. Walker*, 381 U.S. 618 (1965)]@. 387 So.2d at 929. The changes of law set forth in *Gideon v. Wainwright* is a prime example of a law change included within this category. 387 So.2d at 929.

The three-fold *Stovall/Linkletter* test considers: A(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule.@ 387 So. 2d at 926. However, any change of law which constitutes a development of fundamental significance is bound to have a broadly unsettling effect on the administration of justice and to upset most courts' reliance on the old rule: AThe issue is a thorny one, requiring that we resolve a conflict between two important goals of the criminal justice system ensuring finality of decisions on the one hand, and ensuring fairness and uniformity in individual cases on the other within the context of postconviction relief from a sentence of death.@ 387 So. 2d at 924-25.

Clearly, the new holding of *Apprendi/Ring* involves a fundamental constitutional change. The purpose of the rule is to change the very identity of the decision maker with respect to critical issues of fact that are decisive of life or death. The aggravating circumstances must now be charged in the information or indictment and proven beyond a reasonable doubt to the jury.

Essentially, this change remedies a Aa structural defect[] in the constitution of the trial mechanism.@ *See Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993).

A capital sentencing proceeding in which the jury has not participated in the fact finding role that the Sixth Amendment reserves to a jury under *Apprendi* and *Ring*, casts serious doubt on the veracity or integrity of the trial court's sentencing proceeding. *See Witt*, 387 So.2d at 929. Mr. Bryant's case had yet to address his postconviction issues when the United States Supreme Court decided to apply the *Apprendi* requirement to capital cases in *Ring*. Mr. Bryant is uniquely able to have the trial court address his *Apprendi/Ring* claim because he is still in the Aappellate pipeline@ when the decision was rendered.

The instant pleading is the direct appeal of his initial postconviction motion; and as such, this court can apply the new ruling in *Ring* to Mr. Bryant's case and grant him a new sentencing phase. Under *Apprendi* and *Ring*, the death sentence imposed on Mr. Bryant is now unconstitutional. In *Jones v. United States*, 526 U.S. 227, 243 n. 6 (1999), the Supreme Court held Aunder the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged

in the indictment, submitted to a jury and proven beyond a reasonable doubt.@ In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that the Fourteenth Amendment affords citizens the same protections under state law. Under the applicable statute, the state must prove at least on aggravating factor in a subsequent proceeding before a person convicted of first degree murder is eligible for the death penalty, but after a jury has found the defendant guilty. *State v. Dixon*, 283 So.2d 1, 19 (Fla. 1973). As such, Florida capital defendants are not eligible for a death sentence simply upon conviction of first degree murder. Another element must be proven, and that is an aggravating factor which would warrant the imposition of the sentence of death. For example, if a trial court were to sentence a defendant immediately after a verdict is rendered, the court, statutorily, could only legally impose a life sentence. Under Florida law, the death sentence is not within the statutory maximum sentence under section 775.082, Florida Statutes. As held in *Apprendi* and *Ring*, a sentence of death increases the penalty for first degree murder beyond the life sentence under section 775.082, Florida Statutes, which the defendant is eligible for based solely on the jury's guilty verdict. Under Florida's death statutes, there are two levels of first degree murder. The first, conviction for first degree premeditated murder or felony murder authorizes a life sentence. The second, if

aggravating circumstances are proved beyond a reasonable doubt, the person so convicted can be sentenced to death.

Florida law makes imposition of the sentence of death contingent on the judge's factual findings regarding the existence of aggravating circumstances. Section 921.141(3), Florida Statutes, provides that A[n]otwithstanding the recommendations of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death.@ To impose a sentence of death, the judge must make Aspecific written findings of fact based upon the circumstances in subsections (5) [aggravating circumstances] and (6) [mitigating circumstances] and upon the records of the trial and the sentencing proceedings.@ If the judge fails to makes the findings requiring the sentence of death within a specific period of time, then the court must impose a sentence of life. S.921.141(3), Fla. Stat. (1998). Thus, in Florida, as in Arizona, although the maximum sentence authorized for first degree murder is death, a defendant convicted of first degree murder cannot be sentenced to death without additional findings of fact that must be made, by explicit requirement of Florida law, by a judge and not a jury. *See Bottoson,* 833 So.2d at 706 (Anstead, C.J., concurring); (Shaw, J., concurring); (Pariente, J., concurring).

Because aggravating circumstances are elements of the offense of capital murder, under *Ring*, Florida law requires that they be charged in the indictment and found unanimously by the jury beyond a reasonable doubt. *Ring* is premised in part on the principle that capital defendants, no less than non-capital defendants, are entitled to due process and jury trial rights that apply to the determination of any fact on which the legislature conditions an increase in their maximum punishment: AThe right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death@. 122 S.Ct. at 2432, 2443. Florida's enumerated aggravating factors operate as Athe functional equivalent of an element of a greater offense.@ *Ring*, 122 S.Ct. at 2443 (quoting *Apprendi*, 530 U.S. at 494 n. 19). Florida law has long recognized that aggravating circumstances Aactually define those crimes . . . to which the death penalty is applicable in the absence of mitigating circumstances.@ *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973); *see also Hootman v. State*, 709 So.2d 1357, 1360 (Fla. 1998)(addition of new aggravating circumstances alters the criminal conduct that may subject the defendant to the death penalty and increases the punishment of a crime),

abrogated on jurisdictional grounds, *State v. Matute-Chirinos*, 713 So.2d 1006 (Fla. 1998).

In the noncapital context, Florida courts have consistently treated aggravating factors that cause an offense to be reclassified to a more serious level or that trigger the application of a minimum, mandatory sentence as elements of an offense that must be charged in the indictment and specifically found by the jury, unanimously and beyond a reasonable doubt. *See Bottoson*, 833 So.2d at 706 (Anstead, C.J. concurring). In contrast, the current procedures for imposing a sentence of death do not require notice of aggravating circumstances, do not require that the jury unanimously agree on the existence of any aggravating circumstances or on the ultimate question whether there are sufficient aggravating circumstances to warrant imposition of the sentence of death, do not require that a finding of sufficient aggravating circumstances be made beyond a reasonable doubt, and are not subject to the rules of evidence. This affords capital defendants fewer rights than defendants facing a three year minimum mandatory sentence for possession of a firearm during commission of a crime, or for a drunk driver who has been convicted of DUI previously. *See Bottoson*, 833 So.2d at 709-10 (Anstead, C.J., concurring).

Taking from the jury its obligation to determine any element of an offense which increases the penalty for that offense is a denial of due process and Aan invasion of the jury's historical function.@ *State v. Overfelt*, 457 So.2d 1385, 1387 (Fla. 1984); *See also Henderson v. State*, 20 So.2d 649 (1945)(it is elementary that every element of a criminal offense must be proved sufficiently to satisfy the jury (not the court) of its existence). Conviction of an offense not within the charging document violates due process and is fundamental error. *State v. Gray*, 435 So.2d 816, 818 (Fla. 1983); *Thornhill v. Alabama*, 310 U.S. 88 (1940), *De Jonge v. Oregon*, 229 U.S. 353 (1937). For example, a defendant's sentence for attempted murder cannot be enhanced for use of a firearm if the information did not allege use of a firearm. *Bryant v. State*, 744 So.2d 1225 (Fla. 4th DCA 1999); *accord Gibbs v. State*, 623 So.2d 551 (Fla. 4th DCA 1993); *Peck v. State*, 425 So.2d 664 (Fla. 2d DCA 1983). Similarly, a court cannot reclassify an armed burglary charge from a first-degree felony punishable by life to a life felony for burglary with assault, without an allegation in the charging document of an assault. *See Wright v. State*, 617 So.2d 837, 841-42 (Fla. 4th DCA 1993).

Florida's capital sentencing procedure is unconstitutional under the holding and reasoning of *Ring*, and under Florida law that requires elements of an offense to be alleged in the charging document and found by a jury

unanimously and beyond a reasonable doubt. The Florida statute is therefore unconstitutional under the Sixth and Fourteenth Amendments as applied to appellant.

CONCLUSION

The trial court erred in denying an evidentiary hearing on petitioner's postconviction claims. Trial counsel's conduct was deficient and such deficient performance prejudiced appellant in both the trial outcome and the outcome of his direct appeal. Appellant respectfully requests that this Honorable Court remand this cause for an evidentiary hearing on his postconviction motion.

Respectfully submitted this _____ day of February, 2004.

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_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via US Mail to AAG Leslie T. Campbell, OAG, criminal appeals, 1515 N. Flagler Drive, 9th Floor, WPB, FL 33401; and to ASA Paul Zacks, SAO, 401 N. Dixie Hwy, WPB, FL 33401, on this _____ day of February, 2004.

_____
Jo Ann Barone Kotzen, Esq.

CERTIFICATE OF TYPE FONT

I hereby certify that the font requirement of Rule 9.210(a) has been complied with in this brief and Times New Roman 14-point has been used.

_____
Jo Ann Barone Kotzen, Esq.