IN THE

# Supreme Court of Florida

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| COSTA T. VATHIS,<br><br>Petitioner,<br><br>v.<br><br>STATE OF FLORIDA,<br><br>Respondent. | Case No. SC03-2268 |

**INITIAL BRIEF OF PETITIONER**


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## C. STATEMENT OF THE CASE AND FACTS.

On 17 July 1998, Costa T. Vathis (hereinafter Petitioner Vathis) was convicted by a jury of one count of sexual battery on a child under twelve by a person eighteen years of age or older and one count of lewd, lascivious, or indecent assault on a person under the age of sixteen.[1] (R-64).[2] The evidence presented by the State at trial consisted of the testimony of the alleged victim, K.S.[3] (R-68), and Florida Department of Law Enforcement (FDLE) polygraph examiner Tim Robinson (R-84), who testified pursuant to a stipulation with trial counsel that Petitioner Vathis had failed a polygraph examination concerning his involvement in the alleged crime. (R-29). The trial court sentenced Petitioner Vathis to life imprisonment with a twenty-five-year minimum mandatory on count I, and three years' imprisonment on count II. (R-64). Petitioner Vathis subsequently appealed the judgment and sentence, and the First District Court of Appeal affirmed the convictions on 12 March 1999. (R-64). *See Vathis v. State*, 729 So. 2d 453 (Fla. 1st DCA 1999).

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[1] The alleged victim was eleven years old at the time of the purported incident.

[2] References to the First District Court of Appeal record, case number 1D02-3906, will be made by the designation "R" followed by the appropriate page number in parentheses.

[3] Out of respect for all of the parties in this case, only the initials of the alleged victim will be used in this brief. *See J.H.C. v. State*, 642 So. 2d 601, 601 n.1 (Fla. 2d DCA 1994).

On 24 April 2000, Petitioner Vathis filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. In his motion, Petitioner Vathis raised seven claims, two of which are relevant to the instant proceeding: (1) trial counsel rendered ineffective assistance by failing to object and move for an immediate mistrial at the conclusion of the alleged minor victim's testimony when her parents spontaneously rushed to the witness stand, causing a highly emotional display, and thereafter escorted the alleged victim back to the gallery without the trial court's permission and in full view of the jury and (2) trial counsel rendered ineffective assistance by advising Petitioner Vathis to take a polygraph examination and entering a stipulation that the results of the examination would be admissible at trial. (R-5-7).

The trial court summarily denied the postconviction motion on 26 November 2001. Petitioner Vathis timely appealed the denial. On 30 April 2003, the First District Court of Appeal issued an order requiring the State to file an answer brief pursuant to *Toler v. State*, 493 So. 2d 489 (Fla. 1st DCA 1986). In particular, the district court directed the State to respond to Petitioner Vathis' claim that trial counsel was ineffective for failing "to object and move for immediate mistrial at the conclusion of the victim's testimony when her parents spontaneously rushed to the witness stand and escorted the victim back to the gallery without the court's permission and in full view of the jury." 30 April 2003 order, First District Court of Appeal, Case Number 1D02-

3906.

On 24 July 2003, the district court issued a written opinion affirming the trial court's denial of Petitioner Vathis' postconviction motion. *See Vathis v. State*, 859 So. 2d 517 (Fla. 1st DCA 2003). The district court affirmed the denial of six of Petitioner Vathis' postconviction claims without discussion. The remaining issue, addressed in the opinion, was whether trial counsel was ineffective for failing to object and move for immediate mistrial at the conclusion of the alleged minor victim's testimony when her parents spontaneously rushed to the witness stand and escorted her back to the gallery without the trial court's permission and in full view of the jury. The district court concluded that Petitioner Vathis' claim was facially insufficient. *See Vathis*, 859 So. 2d at 518. The Honorable Richard W. Ervin III issued a strongly worded dissenting opinion reasoning that Petitioner Vathis had in fact stated a facially sufficient claim of ineffective assistance of counsel. Judge Ervin explained that the majority failed to follow the proper standard of review for a summary denial of postconviction motion:

> I concur with the majority's decision to affirm the denial of appellant's postconviction motion as to all claims except the one addressed in the opinion, i.e., whether the trial court erred in summarily denying the claim for ineffective assistance of counsel regarding defense counsel's failure to object and move for mistrial at the time the victim's parents spontaneously rushed to the witness stand and escorted the victim back to her seat without the court's permission and in full view of the jury. As to that issue, I would reverse and remand for further

proceedings, because the trial court's order and its attachments fail to show conclusively that appellant is not entitled to relief on this claim. Although the court attached documents suggesting that the issue was addressed in a post-verdict motion, it is impossible to discern whether the vague allegation in the motion, "Witness misconduct by the victim's mother," is the same as appellant's allegation, which was made under oath, that the parents rushed to the stand and accompanied their daughter to her seat.

With due respect to the majority, I cannot agree that appellant's motion is legally insufficient under the rule established in *Strickland v. Washington*, 466 U.S. 668 (1984). . . . In assessing [Petitioner Vathis'] allegations, this court must not only consider the dictates of *Strickland*, but it must also consider the requirements set forth in Florida Rule of Criminal Procedure 3.850. Here, the trial court issued an order to show cause requesting the state to file a response to appellant's motion. This action implies that the trial court found the motion facially sufficient to require a response under rule 3.850, which states: "Unless the motion, files, and records of the case conclusively show that the movant is entitled to no relief, the court shall order the state attorney to file an answer[.]"

Although this court must indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance, appellant has sufficiently alleged deficient performance by asserting that counsel failed to object to a highly emotional display in the jury's presence. The parents' conduct, if true, could have unduly bolstered the victim's credibility. *Compare People v. Adams*, 23 Cal. Rptr. 2d 512 (Cal. Ct. App. 1993) (concluding that the presence of a support person at the witness stand while the victim testified affects the presentation of demeanor evidence by changing the dynamics of the testimonial experience); *State v. Suka*, 777 P.2d 240 (Haw. 1989) (holding it was error to permit a counselor to accompany a 15-year-old witness at the witness stand). Moreover, possible prejudice caused by emotional displays in the courtroom is a proper subject of objection and instruction by the court. *See, e.g., Beasley v. State*, 774 So. 2d 649, 669 (Fla. 2000); *Burns v. State*, 609 So. 2d 600, 604-05 (Fla. 1992).

The trial court denied this claim, in part, for the reason that the lack of objection was a matter of trial tactics, and the majority appears to uphold that ruling when it states that "[s]ome lawyers might conclude that

> the jurors would see the parents' emotional display for what it is, and that an objection would be out of place." Whether an objection was wise under the circumstances is a matter of trial tactics, and this court has said that postconviction motions should not generally be denied based on tactical decisions by counsel in the absence of an evidentiary hearing. *See Walker v. State*, 678 So. 2d 924, 925 (Fla. 1st DCA 1996) ("when a court is confronted with a claim of ineffective assistance, a finding that some action or inaction by defense counsel was tactical is generally inappropriate without an evidentiary hearing").
>
> As for the prejudice prong, the majority ignores appellant's allegations, made under oath, that the emotional display tainted the jury's verdict due to consideration of sympathy. Although the majority might disagree, as previously stated, nothing attached to the order conclusively shows otherwise. The majority's reliance on the standard instruction to the jury, admonishing the jurors not to decide the case based on sympathy or anger, is misplaced, because that instruction, given at the conclusion of trial, was too remote to counter the prejudicial effects of the improper emotional display occurring during the state's case-in-chief.
>
> In that I conclude that appellant's motion stated a facially sufficient claim for ineffective assistance of counsel on this point, I would reverse and remand for further proceedings.

*Vathis*, 859 So. 2d at 519-21 (Ervin, J., dissenting). Judge Ervin argued that the case should be remanded for an evidentiary hearing on Petitioner Vathis' claim.

Petitioner Vathis timely sought discretionary review with this Court, asserting that the opinion below expressly and directly conflicts with *Beasley v. State*, 774 So. 2d 649, 669 (Fla. 2000), concerning whether prejudice caused by emotional displays in the courtroom is a proper subject of objection and instruction by the trial court. Petitioner Vathis also argued that the decision below expressly and 1directly conflicts with *Rose v. State*, 774 So. 2d 629, 632 (Fla. 2000), concerning the proper standard of review of

a trial court's summary denial of a postconviction motion. Petitioner Vathis further claimed that the decision below expressly and directly conflicts with *Reaves v. State*, 826 So. 2d 932, 938 (Fla. 2002), concerning whether a finding that some action or inaction by defense counsel was "tactical" is appropriate without affording the defendant an evidentiary hearing. Finally, Petitioner Vathis alleged that the decision below expressly and directly conflicts with *Seminole Shell Co. v. Clearwater Flying Co.*, 156 So. 2d 543 (Fla. App. 1963), concerning whether a trial court should immediately instruct a jury in order to cure potential prejudice caused by improper conduct or evidence. On 25 March 2004, the Court accepted jurisdiction of the case below and directed the parties to submit briefs on the merits.

## D. SUMMARY OF ARGUMENT.

Petitioner Vathis raises two issues in this brief. First, the district court erred by

affirming the summary denial of Petitioner Vathis' claim that trial counsel was ineffective for failing to object and move for an immediate mistrial at the conclusion of the testimony of the alleged victim when the parents of the witness rushed to the witness stand and escorted her back from the stand in a highly emotional display in full view of the jury. The district court did not apply the correct standard of review for reviewing a trial court's summary denial of a postconviction motion. Rather than accepting as true Petitioner Vathis' factual allegations set forth in his postconviction motion, the district court *weighed and rejected* Petitioner Vathis' allegations. Prejudice caused by emotional displays in the courtroom is a proper subject of objection and instruction by the trial court. Therefore, Petitioner Vathis raised a facially sufficient claim of ineffective assistance of counsel due to trial counsel's failure to object to the improper emotional display that occurred at trial. Petitioner Vathis is entitled to an evidentiary hearing on this postconviction claim.

Second, the district court erred by affirming the summary denial of Petitioner Vathis' claim that trial counsel was ineffective for advising Petitioner Vathis to take a polygraph examination and entering a stipulation that the results of the examination would be admissible at trial. Polygraph results are inadmissible at trial to prove the guilt or innocence of a defendant. Petitioner Vathis raised a facially sufficient claim of ineffective assistance of counsel based on trial counsel's stipulation that the results of

the polygraph examination would be admitted at trial. Petitioner Vathis is entitled to an evidentiary hearing on this postconviction claim.

## E. ARGUMENT AND CITATIONS OF AUTHORITY.

**1. The district court erred by affirming the summary denial of Petitioner Vathis' claim that trial counsel was ineffective for failing to object and move for an immediate mistrial at the conclusion of the testimony of the alleged victim when the parents of the witness rushed to the witness stand and escorted her back from the stand in a highly emotional display in full view of the jury.**

**a. Standard of Review.**

The Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. *See* Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). The instant case concerns a trial court's summary denial of a criminal defendant's postconviction motion pursuant to Florida Rule of Criminal Procedure 3.850. In *McLin v. State*, the Court reiterated that appellate courts must adhere to the following standard of review when considering a summary denial of a postconviction motion:

> To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record.

827 So. 2d 948, 954 (Fla. 2002).[4]

[4] As explained in *McLin*, the standard of review after a summary denial is in contrast the standard of review following an evidentiary hearing, "where the

**b. Argument.**

In *Vathis v. State*, 859 So. 2d 517 (Fla. 1st DCA 2003), the First District Court of Appeal held that trial counsel was not ineffective for failing to object to an emotional outburst at the witness stand in the presence of the jury. Contrary to the district court's opinion, Petitioner Vathis submits that the presence of nontestifying third-parties at the witness stand at the same time as the testifying witness, in the presence of the jury, can and did lead to a prejudicial emotional outburst. Petitioner Vathis further submits that the emotional outburst was so egregious that no reasonable and effective attorney would have failed to object, failed to move for a curative instruction, and failed to move for a mistrial.

Petitioner Vathis submits that the district court's decision in *Vathis* was contrary to established Florida precedent. As explained below, the district court improperly applied the standard of review of a trial court's summary denial of a criminal defendant's postconviction motion. Upon examining the merits of Petitioner Vathis' claim, it is clear that Petitioner Vathis has stated a facially sufficient claim of ineffective assistance of counsel and is therefore entitled to an evidentiary hearing on his claim.

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appellate court affords deference to the trial courts factual findings" . . . "and independently reviews deficiency and prejudice as mixed questions of law and fact." *McLin*, 827 So. 2d at 954 n.4 (citations omitted).

**(1). The district court in *Vathis* did not apply the correct standard of review of a trial court's summary denial of a postconviction motion.**

Florida Rule of Criminal Procedure 3.850 provides that "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion shall be denied without a hearing . . . [and] a copy of that portion of the files and records that conclusively shows that the movant is entitled to no relief shall be attached to the order." Fla. R. Crim. P. 3.850(d). "On appeal from the denial of relief, unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing or other appropriate relief." Fla. R. App. P. 9.141(2)(D). For an appellate court to uphold the trial court's summary denial of the claims raised in a rule 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. *See Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999). Furthermore, when no evidentiary hearing is conducted on such claims, an appellate court must accept the defendant's factual allegations to the extent they are not refuted in the record. *See Peede*, 748 So. 2d at 257.

**(a). Circuit court postconviction proceedings.**

In his postconviction motion, Petitioner Vathis claimed that trial counsel

rendered ineffective assistance[5] by failing to object and move for an immediate mistrial at the conclusion of the testimony of the alleged victim when the parents of the witness rushed to the stand and escorted her back from the stand in a highly emotional display in full view of the jury. (R-7).[6] The trial court denied Petitioner Vathis' claim without

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[5] "The test to be applied by the trial court when evaluating an ineffectiveness claim is two-pronged: The defendant must show both that trial counsel's performance was deficient and that the defendant was prejudiced by the deficiency." *Bruno v. State*, 807 So. 2d 55, 61 (Fla. 2002) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

[6] In his postconviction motion, Petitioner Vathis alleged:

> Trial counsel rendered ineffective assistance by failing to object and move for an immediate mistrial at the conclusion of the testimony of the alleged victim, [K.S.]. At the conclusion of the testimony of [K.S.], her parents spontaneously rushed to the witness stand without permission from or request by the Court, and escorted her back to the gallery in full view of the jury. Such an emotional display should not have been permitted by the Court, and the trial judge failed to exercise proper control over courtroom proceedings. The failure to object by defense counsel resulted in the physical display being omitted from the record, and the failure to object further prevented any appellate review of the issue of whether the silent accord of the Court constituted vouching and bolstering of the credibility of the alleged victim. Further, the failure to object and move for mistrial prevented appellate review of the harmful and prejudicial nature of such an emotional display in close proximity to the jury. The spontaneous display of emotion by the parents served solely to garner sympathy for the alleged victim, thereby tainting the subsequent jury verdict due to the consideration of sympathy and the silent bolstering of the testimony of the alleged victim by the Court absent a timely objection and motion for mistrial. But for the omission by counsel, the trial court would have admonished the parents for violating court procedure, immediately instructed the jury to focus only upon the evidence,

an evidentiary hearing. In its order summarily denying relief, the trial court stated the following regarding the witness misconduct claim:

> The record reflects that Defendant's attorney did raise this issue. *See* Answer Brief of Appellee on Appeal at 20. When Defendant's attorney filed the renewed judgment of acquittal in this case, he filed a supplement stating that it "provides this Court with additional matters to consider while ruling on the Defendant's motions." *See id*. at 20. One of the "additional matters" listed in the motion was "Witness misconduct by the victim's mother." *Id.* The trial court orally denied Defendant's motion for new trial and renewed motion for JOA. *See id*. Therefore, the trial court obviously took Defendant's argument into consideration, but determined that any alleged misconduct was insufficient to show prejudice to Defendant. Defendant has failed to show prejudice under the *Strickland* [*v. Washington*, 466 U.S. 668 (1984)] standard. Nothing in the record supports an allegation of misconduct by the victim's mother, and no basis for an allegation of ineffective assistance of counsel exists.
>
> The record reflects that the judge, at the close of the evidence, instructed the jury that the case had to be decided on the evidence from the witnesses, exhibits, and the judge's instructions. *See* Trial Transcript at 261. The jury was further instructed that the case "must not be decided for or against anyone because you feel sorry for anyone or are angry at anyone." *Id*. Therefore, the jury was instructed to focus only on the evidence of the case, and the Defendant has failed to prove prejudice.
>
> Defense counsel also exercised the right to make a strategic decision by not objecting to any alleged misconduct by victim's mother. "Advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment." *Strickland* []. There is nothing in the record to indicate, and Defendant has failed to prove, that his attorney did not rely upon his professional judgment.

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> and/or granted the motion for mistrial.

(R-7).

Accordingly, Defendant's motion is denied as to Claim Three.

(R-68-69). The trial court attached the following documents to its order: (1) two pages from the State's Answer Brief from Petitioner Vathis' direct appeal before the First District Court of Appeal, Case No. 97-3228, listing certain issues that were allegedly raised by defense counsel in a post-verdict motion for new trial,[7] (2) a page

[7] The trial court attached pages 20 and 21 of the State's direct appeal brief, wherein the State asserted that defense counsel, after the jury rendered its verdict, filed a motion for new trial and a renewed motion for judgment of acquittal, arguing, among other things, "[w]itness misconduct by the victim's mother." (R-91). In the direct appeal Answer Brief, the State acknowledged that no written order was entered by the trial court; the trial court orally denied both motions at the 10 July 1997 sentencing hearing. (R-91-92). The court did not offer any reasons for its denial of the motions.

It was improper for the trial court in the instant proceeding to attach portions of the *State's* direct appeal Answer Brief in support of its denial of Petitioner Vathis' claim. Appellate briefs were not a part of the trial court record; even if they were, it is inappropriate to attach the State's pleadings for the purpose of establishing what issues were raised by Petitioner Vathis. The trial court should have attached the actual defense pleading, filed in the trial court, wherein the alleged issue was raised. Additionally, the trial court should have attached a copy of the trial court's order denying relief setting forth the reasons for the denial. In the instant case, the trial court did not attach a copy of defense counsel's motion for new trial or renewed motion for judgment of acquittal; nor did the court attach a copy of the trial court's order or ruling on the motions.

Moreover, due to the original trial court's failure to provide reasons for its ruling on defense counsel's motion for new trial and renewed motion for judgment of acquittal, the court's denial of the post-verdict motions is not persuasive regarding whether the issue has previously been ruled upon on the merits by the trial court. *See, e.g., Bruno v. State,* 807 So. 2d 55, 66 (Fla. 2002) (stating that when it is not clear whether a previous court denied a claim on the merits or because the claim was not preserved, it must be assumed that the claim was denied because it was not preserved, thereby allowing the defendant to raise the issue in a postconviction motion). From the sparse record in the instant case, it is not even

from the original trial record wherein the court read Florida Standard Jury Instruction (Criminal) 3.10 to the jury, and (3) excerpts of the alleged victim's testimony at trial. (R-91-92, 93, 98-118). No evidentiary hearing was ever held on Petitioner Vathis' postconviction claim.

**(b). First District Court of Appeal postconviction proceedings.**

On appeal, the district court affirmed the trial court's summary denial of Petitioner Vathis' postconviction claim. *See Vathis v. State*, 859 So. 2d 517 (Fla. 1st DCA 2003). However, the district court did not rely on any of the reasons provided

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clear that the "[w]itness misconduct by the victim's mother" claim cited in the State's direct appeal Answer Brief is the same issue raised by Petitioner Vathis in his postconviction motion. Assuming, *arguendo,* that the claim cited in the State's direct appeal Answer Brief actually related to the specific instance of misconduct now alleged by Petitioner Vathis, defense counsel failed to lodge a contemporaneous objection and a timely motion for a mistrial when the misconduct occurred at trial. Thus, any belated attempt by counsel to revive the claim would have been properly denied by the trial court as untimely. The law is well- settled that a timely objection and motion for mistrial are prerequisites to preservation of the issue for review. *See Lukehart v. State*, 776 So. 2d 906, 927 (Fla. 2001); *see also Schummer v. State*, 654 So. 2d 1215, 1216 (Fla. 1st DCA 1995) (holding that raising issue regarding the court's erroneous disallowance of a peremptory challenge cannot be raised for the first time in a motion for new trial; the issue should have been raised contemporaneously with the trial court's ruling); *Card v. State*, 803 So. 2d 613, 620 (Fla. 2001) (holding that recusal motion was not preserved for review because motion was not raised until after the trial court ruled; raising the issue for the first time in a post-ruling motion for new trial was not sufficient).

by the trial court in its order summarily denying Petitioner Vathis' claim.[8] Rather, the district court held that Petitioner Vathis' claim was "facially insufficient." *Id.* at 518.[9]

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[8] The district court relied on an alternative basis for affirmance. *See Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002) ("This longstanding principle of appellate law, sometimes referred to as the 'tipsy coachman' doctrine, allows an appellate court to affirm a trial court that reaches the right result, but for the wrong reasons so long as there is any basis which would support the judgment in the record.") (citations omitted). In *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999), then-Chief Justice Harding explained the origins of the "tipsy coachman" doctrine:

> The pupil of impulse, it fore'd [sic] him along,
> His conduct still right, with his argument wrong;
> Still aiming at honour, yet fearing to roam,
> The coachman was tipsy, the chariot drove home.

(Quoting *Carraway v. Armour & Co.*, 156 So. 2d 494 (Fla. 1963)).

[9] As pointed out by Judge Ervin in his dissenting opinion below, "the trial court issued an order to show cause requesting the state to file a response to [Petitioner Vathis'] motion[, which] implies that the trial court found the motion facially sufficient to require a response." *Vathis*, 859 So. 2d at 520 (Ervin, J., dissenting). In its response to the order to show cause, the State did not assert that Petitioner Vathis' claim was facially insufficient. In *Delissio v. Delissio,* 821 So. 2d 350, 355 (Fla. 1st DCA 2002), Judge Browning reasoned that the "tipsy coachman" doctrine is applicable if one of the parties advanced the alternative basis for affirmance:

> [A]ffirmance is based upon the "tipsy coachman rule," which provides that a trial court's erroneous ruling may be affirmed if another basis supports affirmance. However, in those cases where application of the rule determines a case's outcome, the opposing party has always advanced the alternative basis for affirmance. *Here, the parties will, for the first time, become acquainted with the argument which forms the basis and rationale of this court's decision upon receipt of the majority's opinion*. Because the basis for affirmance was not an

The decision in *Vathis* is in conflict with the decisions from this Court and all other district courts regarding the proper standard of review to be applied to a trial court's summary denial of a postconviction motion.

**(c). Argument.**

When a trial court denies postconviction relief without conducting an evidentiary hearing, an appellate court "must accept [the defendant's] factual allegations as true to the extent they are not refuted by the record." *Rose v. State*, 774 So. 2d 629, 632 (Fla. 2000).[10] Pursuant to *Rose*, the district court below was required to accept as true Petitioner Vathis' representations regarding the "emotional display" that occurred as

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> alternate theory presented by the former husband, I believe the majority misapplied the "tipsy coachman rule." Moreover, in my judgment, when an appellate court affirms a trial court's erroneous ruling by searching for a basis for affirmance not argued by the parties, as the majority does here, an unintended byproduct is the impression that the court is a part of the adversarial process rather than a neutral judicial arbitrator. I realize that an appellate court must act *sua sponte* on issues involving jurisdiction, public policy, and illegality. However, this case involves the parties' private agreement that does not touch upon these exceptions. *Furthermore, when a case is decided on an issue unnoticed to the parties, serious due process considerations are raised*.

(Browning, J., dissenting) (citations omitted) (emphasis added).

[10] *See also Jancar v. State*, 711 So. 2d 143, 145 (Fla. 2d DCA 1998); *Saint-Fleur v. State*, 840 So. 2d 261, 262 (Fla. 3d DCA 2002); *Whitfield v. State*, 549 So. 2d 779, 779 (Fla. 4th DCA 1989); *Hatten v. State*, 698 So. 2d 899, 900 (Fla. 5th DCA 1997).

a result of the witness's parents "rush[ing] to the witness stand."[11] Yet a review of the district court's opinion proves that the court did not "accept [the defendant's] factual allegations as true to the extent they are not refuted by the record"; rather, the district court *weighed and rejected* Petitioner Vathis' factual allegations, as demonstrated by the following statements in the opinion:

> However, the defendant has not alleged that an objection was necessary, or even that it would have been wise. *Some lawyers might conclude* that the jurors would see the parents' emotional display for what it is, and that an objection would be out of place.
>
> . . .
>
> . . .The defendant claims that the parents' outburst was a form of nonverbal "bolstering" of the child's testimony, *but that is not necessarily so. A more logical deduction* from these facts is that the parents were trying, in their way, to comfort a child who had been through the ordeal of testifying. In any event, *we would be giving very little credit* to the jurors to say that the incident made them *more likely* to believe the child's account of the crime. Few criminal trials are completely devoid of emotion. *We cannot presume* that the emotion

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[11] In *McLin*, the Court stated the following:

> In this case, because there was no evidentiary hearing to determine the truthfulness of Saldana's statements, the standard of review set forth by this Court in *Foster* [*v. State*, 810 So. 2d 910, 914 (Fla. 2002),] and *Peede* [*v. State*, 748 So. 2d 253, 257 (Fla. 1999),] required both the trial court and the Third District to accept the allegations of Saldana's affidavit as true. Instead, the trial court made a credibility determination that Saldana's affidavit was "probably untruthful" based solely on the letter and the fingerprint report attached to the State's response, and the Third District affirmed the trial court's determination. This basis for summary denial is in conflict with the standard that an evidentiary hearing is required unless the allegations are "conclusively refuted."

> shown in this one must have been prejudicial.
>
> . . . [T]he jurors were instructed that "[the] case must not be decided for or against anyone because [they] feel sorry for anyone or are angry at anyone." This instruction was given for a purpose, and *we must assume* that the jurors followed it in deciding their verdict.

*Vathis*, 859 So. 2d at 518-19 (emphasis added). Petitioner Vathis submits that although "some lawyers might conclude that the jurors would see the parents' emotional display for what it is," for purposes of review of a summary denial of a postconviction motion, the district court was *required* to accept that most lawyers would conclude that the parents' emotional display was improper.[12] Petitioner Vathis submits that although it is "not necessarily so" that "the parents' outburst was a form of nonverbal 'bolstering' of the child's testimony," for purposes of review of a summary denial of a postconviction motion, the district court was *required* to accept that the parents' outburst was, in fact, a form of "bolstering" of the child's testimony.

Finally, Petitioner Vathis submits that for purposes of review of a summary denial of a postconviction motion, the district court should not have engaged in "logical deductions," should not have "give[n] credit to jurors," and should not have

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[12] The record does not contain facts regarding the full extent of the emotional display, as Petitioner Vathis was not afforded an opportunity to develop such a record through an evidentiary hearing. *See McLin v. State*, 827 So. 2d 948, 955 (Fla. 2002) ("[B]ecause no evidentiary hearing was held and thus Saldana never testified, there was never an opportunity to question Saldana about whether his recantation was truthful, or merely a product of McLin's direction as to what to state.").

"presume[d]," "speculate[d]," or "assume[d]" whether the emotion shown was prejudicial or not. Rather, after accepting the factual allegations *as true*, the district court's narrow focus should have been on whether Petitioner Vathis' claim "alleges specific facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance which prejudiced the defendant." *Bethea v. State*, 767 So. 2d 630, 631 (Fla. 5th DCA 2000). Deductions, presumptions, speculations, and assumptions in favor of the State are not appropriate for an appellate court reviewing a summary denial of a postconviction motion. Deductions, presumptions, speculations, and assumptions can only be made by a trial court sitting as a fact-finder, *after an evidentiary hearing*, and after both parties have been afforded an opportunity to present evidence and witnesses in support of their positions. Because there was no evidentiary hearing, the trial court and the district court erred by not accepting as true the allegations set forth in Petitioner Vathis' postconviction motion. *See McLin*, 827 So. 2d at 956 ("In this case, taking the affidavit as true, as the trial court and the Third District were required to do for the purpose of determining whether a summary denial was proper . . . ."). Accordingly, Petitioner Vathis requests the Court to quash the decision in *Vathis* to the extent that the reasoning in that decision is contrary to *Rose* concerning the proper standard of review to be applied to a trial court's summary denial of a postconviction motion.

The decision below is also in conflict with the decisions from this Court and all other district courts concerning whether a finding that some action or inaction by defense counsel was "tactical" is appropriate without affording the defendant an evidentiary hearing. In *Reaves v. State*, 826 So. 2d 932, 938 (Fla. 2002), the Court recognized that "counsel may make a tactical decision [in regards to a particular action or inaction], but a trial court's finding that such a decision was tactical usually is inappropriate without an evidentiary hearing." (Citation omitted).[13] In the opinion below, the First District reasoned that Petitioner Vathis' defense counsel had a strategic reason for not objecting to the improper emotional outburst because "[s]ome lawyers might conclude that the jurors would see the parents' emotional display for what it is, and that an objection would be out of place." *Vathis*, 859 So. 2d at 518. The First District's reasoning is in conflict with *Reaves*. If there was a strategic reason for not objecting to the emotional outburst, then "the evaluation of such strategic decisions generally requires resolution through an evidentiary hearing." *McCann*, 854 So. 2d at 791. Accordingly, Petitioner Vathis requests the Court to quash the decision in *Vathis* to the extent that the reasoning in that decision is in conflict with *Reaves* concerning the requirement that a trial court hold an evidentiary hearing prior to

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[13] *See also McCann v. State*, 854 So. 2d 788, 791 (Fla. 2d DCA 2003); *Gordon v. State*, 608 So. 2d 925, 925-26 (Fla. 3d DCA 1992); *Hall v. State*, 754 So. 2d 70, 70 (Fla. 4th DCA 2000); *Lopez v. State*, 773 So. 2d 1267, 1268 (Fla. 5th DCA 2000).

determining whether some action or inaction by defense counsel was "tactical."

**(2). Petitioner Vathis raised a facially sufficient postconviction claim as prejudice caused by emotional displays in the courtroom is a proper subject of objection and instruction by the trial court.**

The district court below held that the failure to object to an emotional outburst at the witness stand in the presence of the jury *can never amount* to ineffective assistance of counsel *as a matter of law*. *See Vathis*, 859 So. 2d at 518 ("We cannot say that the trial lawyer in this case made an error at all, much less an error so serious as to be the equivalent of a deprivation of the constitutional right to counsel."). The *Vathis* holding is in conflict with this Court's opinion in *Beasley v. State*, 774 So. 2d 649, 669 (Fla. 2000). In *Beasley*, the Court recognized that possible prejudice caused by emotional displays in the courtroom is a proper subject of objection and instruction by the trial court. The Court explained that when such outbursts are brought to the trial court's attention, the trial court must "maintain[] vigilance," "caution[] the audience to keep its . . . emotions in check," and "direct[] counsel to advise family members accordingly." *Beasley*, 774 So. 2d at 669. The Court concluded that the trial court in *Beasley* properly imposed safeguards to prevent improper emotional outbursts in front of the jury. *See id.* Therefore, as noted by Judge Ervin in his dissenting opinion below, "possible prejudice caused by emotional displays in the courtroom is a proper subject of objection and instruction by the court." *Vathis*, 859

So. 2d at 520 (Ervin, J., dissenting) (citing *Beasley*).

"The presence of a second [unauthorized] person at the [witness] stand affects the presentation of demeanor evidence by changing the dynamics of the testimonial experience for the witness." *People v. Adams*, 23 Cal. Rptr. 2d 512, 527 (Cal. Ct. App. 1993). The Confrontation Clause of the federal constitution requires that a witness give a statement under oath and submit to cross-examination, and that the jury be able "to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." *Maryland v. Craig*, 497 U.S. 836, 846 (1990). "[T]he right . . . to have the trier of fact observe the testifying witness" is one of the "more central[ ] confrontation interests." *Coy v. Iowa*, 487 U.S. 1012, 1028 (1988) (Blackmun, J., dissenting). Demeanor evidence is relevant on the issue of credibility. *See California v. Green*, 399 U.S. 149, 160 (1970). As explained by Judge Learned Hand:

> [A witness's] demeanor – is a part of the evidence. The words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may, and indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness. This we have again and again declared, and have rested our affirmance of findings of fact of a judge, or of a jury, on the hypothesis that this part of the evidence may have turned the scale.

*Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952) (footnote omitted).

"Demeanor evidence . . . can have a dispositive effect in the outcome of a case in which the existence or nonexistence of a determinative fact depends upon the credibility to be given to testimonial evidence." *Adams*, 23 Cal. Rptr. 2d at 527.

In *State v. Suka*, 777 P.2d 240 (Haw. 1989), the Hawaii Supreme Court held that it was error to allow a counselor to accompany a fifteen-year-old witness at the witness stand. The court reasoned that:

> The jury might very well have concluded that [the counselor] being present supported complainant's story or re-assured complainant's veracity. The jury could very well have surmised that [the counselor] had extensive talks with the complainant, and/or knows of other information not presented to the jury that convinces [the counselor] that complainant is telling the truth. Thus, [the counselor's] presence with and laying her hand on the shoulder of complainant during her testimony could have had the effect of conveying to the jury [the counselor's] belief that complainant was telling the truth, thereby denying defendant the right to a fair and impartial trial.

*Id.* at 476. *See also Adams*, 23 Cal. Rptr. 2d at 529 ("In light of the fact that the dynamics of a trial are inextricably intermingled, we conclude that the procedure of allowing a witness to testify accompanied by another person at the witness stand has an effect on jury observation of demeanor.").

In Florida, section 92.55, Florida Statutes, entitled "Judicial or other proceedings involving victim or witness under the age of 16 or person with mental retardation; special protections," states:

> [u]pon motion of any party . . . the court may enter any order necessary

> to protect a child under the age of 16 . . . who is a victim or witness in any judicial proceeding . . . from severe emotional or mental harm due to the presence of the defendant if the child . . . is required to testify in open court.

Section 92.55 lists several factors that the court can consider in entering any necessary orders. The statute concludes by stating "[t]he court shall enter any order necessary to protect the rights of all parties, including the defendant in any criminal action." § 92.55, Fla. Stat. (2003).

In Petitioner Vathis' case, the trial court did not make any finding that it was necessary for the alleged victim's parents to escort her to or from the witness stand or otherwise accompany her at the stand. No order pursuant to section 92.55 was entered by the trial court.

Accordingly, as set forth above, Petitioner Vathis stated a facially sufficient claim that trial counsel was ineffective for failing to object to an emotional outburst at the witness stand in the presence of the jury. The claim is not refuted by the record. Had counsel in Petitioner Vathis' case brought the improper emotional display to the trial court's attention, the trial court would have been required to impose appropriate safeguards to reduce the effect of the prejudice caused by the display, including either granting a mistrial or instructing the jury to disregard the improper conduct. Hence, the trial court erred by summarily denying his postconviction claim and the district court erred by affirming the denial. The district court below not only held that counsel

was *not* ineffective for failing to object to the emotional outburst, but that a motion alleging ineffective assistance of counsel could *never* sustain a claim on these grounds. Petitioner Vathis requests the Court to quash the decision in *Vathis* to the extent that the reasoning in that decision is in conflict with *Beasley*. Petitioner Vathis is simply asking for an evidentiary hearing on his claim whereby he is afforded the opportunity, through the testimony of witnesses, to establish the prejudice caused by the emotional outburst in front of the jury.

Finally, the decision below is in conflict with *Seminole Shell Co. v. Clearwater Flying Co.*, 156 So. 2d 543 (Fla. App. 1963), concerning whether a trial court should immediately instruct a jury in order to cure potential prejudice caused by improper conduct, testimony, or evidence. At the end of the opinion below, the First District stated the following:

> [T]he jurors were instructed that "the case must not be decided for or against anyone because they feel sorry for anyone or are angry at anyone." This instruction was given for a purpose, and we must assume that the jurors followed it in deciding their verdict.

*Vathis,* 859 So. 2d at 519. The First District therefore held that a belated instruction given at the conclusion of all the evidence can cure the prejudice caused by an emotional outburst that occurred in the middle of the trial. As pointed out by Judge Ervin in his dissenting opinion below, "[t]he majority's reliance on the standard instruction to the jury. . . is misplaced, because that instruction, given at the conclusion

of trial, was too remote to counter the prejudicial effects of the improper emotional display occurring during the states's case-in-chief." *Vathis*, 859 So. 2d at 520 (Ervin, J., dissenting).

In contrast to the holding in *Vathis*, the court in *Seminole Shell Co.* recognized that when the jury witnesses a prejudicial comment or display, the trial court should *immediately* instruct the jury to disregard the improper comment or display:

> The evidence having been admitted for consideration by the jury, the belated attempt by the Court in its general instruction at the close of the case to correct this error was insufficient. The effect upon the minds of the jury can't under such circumstance be so easily and completely neutralized. *It has been uniformly held that the Court should act immediately to appropriately instruct the jury*.

156 So. 2d at 545 (citations omitted) (emphasis added).

Simply reading Florida Standard Jury Instruction (Criminal) 3.10[14] was not

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[14] Florida Standard Jury Instruction (Criminal) 3.10 states:

> These are some general rules that apply to your discussion. You must follow these rules in order to return a lawful verdict:
>
> 1. You must follow the law as it is set out in these instructions. If you fail to follow the law, your verdict will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in this matter.
>
> 2. This case must be decided only upon the evidence that you have heard from the answers of the witnesses [and have seen in the form of the exhibits in evidence] and these instructions.

enough to cure the harm caused by the parents of the victim in Petitioner Vathis' case. The record is clear that defense counsel failed to object to the misconduct and failed to move for a mistrial.[15] At the very least, counsel should have requested a curative instruction *specific to the misconduct that occurred regarding the alleged victim.* Florida Standard Jury Instruction (Criminal) 3.10 is a general instruction given in every

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> 3. This case must not be decided for or against anyone because you feel sorry for anyone, or are angry at anyone.
>
> 4. Remember, the lawyers are not on trial. Your feelings about them should not influence your decision in this case.
>
> . . .
>
> 8. Your verdict should not be influenced by feelings of prejudice, bias or sympathy. Your verdict must be based on your views of the evidence, and on the law contained in these instructions.

(R-93) (recited to the jury in Petitioner Vathis' case in substantially the same form as set forth above).

[15] Petitioner Vathis suggests that had the request been made, the trial court would have been required to grant a mistrial. "When any curative instruction would be insufficient, the trial court should grant a mistrial." *Henderson v. State*, 789 So. 2d 1016, 1018 (Fla. 2d DCA 2000). "A motion for mistrial should be granted when it is necessary to ensure that the defendant receives a fair trial." *Cornatezer v. State*, 736 So. 2d 1217, 1218 (Fla. 5th DCA 1999). "A mistrial is appropriate where the error complained of is so prejudicial that it vitiates the entire trial." *Id.* The improper conduct in Petitioner Vathis' case vitiated the entire trial, making it impossible for him to receive a fair trial. "[O]ne cannot unring a bell; after the thrust of the saber it is difficult to say forget the wound; and finally, if you throw a skunk into the jury box, you can't instruct the jury not to smell it." *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1952).

criminal case. The nonspecific language of the instruction was not sufficient to cure the error in Petitioner Vathis' case. Accordingly, Petitioner Vathis requests the Court to quash the decision in *Vathis* to the extent that the reasoning in that decision is in conflict with *Seminole Shell Co*. concerning whether a trial court should immediately instruct a jury in order to cure potential prejudice caused by improper conduct, testimony, or evidence.

For all of the reasons set forth above, the district court's affirmance of the trial court's summary denial of Petitioner Vathis' postconviction claim was erroneous. While postconviction practice is becoming a subspecialty of criminal law, pleadings cannot become a trap for the unweary. Originally intended to provide access to courts for a *pro se* inmate, the purpose and spirit of postconviction practice will not be furthered by exacting pleading requirements which experienced lawyers cannot satisfy.

Petitioner Vathis satisfied the pleading requirements of rule 3.850. Therefore, Petitioner Vathis respectfully requests the Court to remand this case to the district court with directions that the district court instruct the trial court to hold an evidentiary hearing on this claim.

**2. The district court erred by affirming the summary denial of Petitioner Vathis' claim that trial counsel was ineffective for advising Petitioner Vathis to take a polygraph examination and entering a stipulation that the results of the examination would be admissible at trial.[16]**

**a. Standard of Review.**

The Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. *See* Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). The instant case concerns a trial court's summary denial of a criminal defendant's postconviction motion pursuant to Florida Rule of Criminal Procedure 3.850. In *McLin v. State*, the Court reiterated that appellate courts must adhere to the following standard of review when considering a

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[16] This issue was not addressed in the district court's opinion below and therefore is not the basis for conflict jurisdiction in this Court. However, "[o]nce th[e] Court accepts jurisdiction over a cause in order to resolve a legal issue in conflict, [the Court] ha[s] jurisdiction over all issues." *Murray v. Regier*, 27 Fla. L. Weekly S1008, S1009 n.5 (Fla. Dec. 5, 2002). The Court's "authority to consider issues other than those upon which jurisdiction is based is discretionary and is exercised only when these other issues have been properly briefed and argued and are dispositive of the case." *Id.*

summary denial of a postconviction motion:

> To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record.

827 So. 2d 948, 954 (Fla. 2002).

**b. Argument on the Merits.**

In his postconviction motion, Petitioner Vathis alleged that trial counsel rendered ineffective assistance by advising him to submit to a polygraph examination and by entering a stipulated agreement with the State that the results of the examination would be admissible at trial. (R-05). Counsel rendered this advice despite the fact that Petitioner Vathis was prescribed Xanax, a psychotropic medication that impairs the ability of the brain to function and process information and despite the fact that Petitioner Vathis suffered from a previously diagnosed heart condition: Mitral Valve Prolapse and Atrial Fibrillation. (R-06). Finally, Petitioner Vathis asserted that counsel rendered ineffective assistance by failing to object to the qualifications of FDLE polygraph examiner Tim Robinson. (R-06).

Prior to the filing of the charging information in this case, Petitioner Vathis, pursuant to the advice of defense counsel, stipulated to a polygraph examination, which was conducted by FDLE polygraph examiner Tim Robinson. (R-79-80; 65).

The stipulation provided that Petitioner Vathis would *waive any objections to the admissibility of the results of the examination at trial*. (R-79-80; 28). At trial, the State presented the testimony of Mr. Robinson. (R-84). Defense counsel did not object to the court qualifying Mr. Robinson as an expert. (R-84). Mr. Robinson ultimately testified that the answers given by Petitioner Vathis indicated deception.[17] (R-29). Defense counsel did not object to this testimony.

In its order summarily denying Petitioner Vathis' postconviction claim, the trial court opined:

> Defendant pled not guilty and adamantly reiterated his innocence. Defendant voluntarily and of his own free will went to the Sheriff's Department to talk to them about the case. Defendant, in the presence of his attorney, was asked to take a polygraph examination to verify his truthfulness. After discussion with Defendant, who affirmatively asserted his innocence, *there was no reason for Defendant's attorney to advise his client not to take the stipulated polygraph examination to exonerate himself*. Defendant's counsel did not render ineffective assistance of counsel.

(R-66) (emphasis added) (citations omitted). The trial court added that "there is ample undisputed expert testimony in the record to refute the defendant's allegation that his medical condition affected the outcome of the polygraph exam, and confirms that the defendant's attorney was aware of the defendant's medical condition." (R-65). No evidentiary hearing was held on Petitioner Vathis' postconviction claim.

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[17] During the administration of the polygraph examination, Petitioner Vathis was questioned about the alleged incident and he denied any wrongdoing.

On appeal, the district court affirmed the summary denial of Petitioner Vathis' postconviction claim without discussion. *See Vathis*, 859 So. 2d at 518. As explained below, Petitioner Vathis is entitled to an evidentiary hearing on his postconviction claim.

"It is well established that in Florida, as in most states, polygraph results are inadmissible to prove the guilt or innocence of a defendant." *State v. E.J.J.*, 682 So. 2d 206, 208 (Fla. 5th DCA 1996). In *Delap v. State*, 440 So. 2d 1242, 1247 (Fla. 1983), the Court stated that "[w]here evidence is based solely upon scientific tests and experiments, it is essential that the reliability of the test be recognized and accepted by scientists or that the demonstration pass from the stage of experimentation to that of reasonable demonstrability[; p]olygraph testing has not passed the reliability threshold." (Citations omitted). Nevertheless, the Court in *Delap* acknowledged that although the results of a polygraph examination are inadmissible as evidence, they may be admitted into evidence by stipulation or waiver by the parties. *Id.* at 1247.[18]

Stipulating to the admission of a polygraph examination at trial is not common practice nor reasonable trial strategy, especially in light of the Court's pronouncement

[18] Petitioner Vathis notes that at least one other court has determined that the results of a polygraph examination are inadmissible even if both parties stipulate to its admissibility. *See State v. Porter*, 698 A.2d 739, 774 (Conn. 1997) ("In our view, the limited reliability of polygraph evidence, taken together with its significant potential for prejudicial effect, compel the conclusion that such evidence should remain inadmissible even pursuant to a stipulation.").

that such tests are unreliable. What little reliability the test might have had[19] is called further into question given Petitioner Vathis' medical condition. The fact that counsel was superficially aware of Petitioner Vathis' heart condition does not validate his decision to encourage Petitioner Vathis to submit to an inherently flawed polygraph examination or *waive objections to the examination's admissibility at trial*. The trial court reasoned in its order that since Petitioner Vathis claimed he was innocent, "there was *no* reason for Defendant's attorney to advise his client not to take the stipulated polygraph examination to exonerate himself."[20] (R-66) (emphasis added). This

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[19] In fact, the First District Court of Appeal has previously questioned the amount of weight to be given to a stipulated polygraph examination. In *Majewski v. State*, 487 So. 2d 32 (Fla. 1st DCA 1986), the defendant appealed the summary denial of his postconviction motion. The defendant claimed that counsel was ineffective for failing to investigate and present alibi witnesses. In denying the defendant's claim, the trial court found that the testimony of the State's identification witnesses was not the only evidence linking the defendant to the crime since the results of a polygraph test which the defendant had failed had been placed before the jury pursuant to a stipulation by the parties. On appeal, the district court reversed for an evidentiary hearing, reasoning that "given the questionable reliability of polygraph examinations and the fact that the results of such examinations are not even admissible into evidence in the absence of a stipulation as to admissibility, we must disagree with the trial judge's conclusion that the presentation of the polygraph evidence so strengthened the state's case as to render harmless defense counsel's failure (if any) to present an available defense on behalf of his client." *Id.* at 32.

[20] Arguably, the opposite of the trial court's conclusion is true–there was no reason for Petitioner Vathis' attorney to advise his client *to take* a stipulated polygraph examination to exonerate himself–mainly because the results of such examinations are unreliable and therefore, if truly innocent, the results may not reflect this.

conclusion is simply not true; there are several reasons to advise a client, even one who maintains innocence, not to agree to take a polygraph examination, the results of which will be admissible at trial. Countless numbers of defendants claim they are innocent every day, yet defense attorneys are not frequently advising these clients to submit to stipulated polygraph tests, thereby waiving any objection to the admissibility of the results at trial. The mere fact that such tests are unreliable is reason by itself to decline to enter into such a stipulation. Moreover, had he been given the opportunity, Petitioner Vathis intended to present expert testimony at an evidentiary hearing that polygraph examinations are never appropriate in sex cases.

No reasonable attorney would have suggested that his client submit to a polygraph examination, especially in light of Petitioner Vathis' medical condition, where the chances for false positive readings are amplified due to a physical ailment directly bearing upon the same physiological responses that a polygraphist interprets to make his findings.[21] Contrary to the trial court's order, the record does not contain

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[21] In its order summarily denying this claim, the trial court reasoned that FDLE polygraph examiner Tim Robinson was aware of Petitioner Vathis' medical condition and that Mr. Robinson opined that such a condition would not effect the results of a polygraph examination. (R-65). Contrary to the trial court's holding, Mr. Robinson lacked the requisite medical and psychiatric qualifications to render an informed opinion as to the effect of Petitioner Vathis' medical condition on the polygraph examination. Additional expert testimony is necessary to clarify the scientific principles surrounding the polygraph and the interaction between the medical and psychiatric condition of Petitioner Vathis and the reliability of the polygraph results.

any justification for agreeing to such a stipulation. Florida Rule of Appellate Procedure 9.141(2)(D) provides that "[o]n appeal from the denial of relief, unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing or other appropriate relief." The record in this case does not conclusively show that Petitioner Vathis is entitled to no relief. Petitioner Vathis relied on the advice of counsel in deciding whether to submit to the stipulated polygraph examination. Encouraging Petitioner Vathis to "exonerate" himself by submitting to a stipulated polygraph examination served only to manufacture incriminating evidence through a false positive reading. Had this evidence not been introduced, the result of the proceeding would have been different. The only remaining evidence against Petitioner Vathis was the testimony of the alleged victim, which was fraught with inconsistencies, and, as explained in Claim 1, was improperly bolstered by the emotional display caused when her parents rushed to the witness stand in full view of the jury. The introduction of the polygraph examination was arguably the State's most important evidence. Without question, this evidence was prejudicial to Petitioner Vathis. Petitioner Vathis has established his entitlement to an evidentiary hearing to determine whether counsel's advice falls outside the realm of effective assistance.

To the extent that the trial court denied this claim on the basis that it amounted

to an acceptable trial strategy, such a finding is insufficient absent an evidentiary hearing. In *Reaves v. State*, 826 So. 2d 932, 938 (Fla. 2002), the Court recognized that "counsel may make a tactical decision [in regards to a particular action or inaction], but a trial court's finding that such a decision was tactical usually is inappropriate without an evidentiary hearing." (Citation omitted).[22]

Accordingly, the district court's affirmance of the trial court's summary denial of Petitioner Vathis' postconviction claim was erroneous. Petitioner Vathis respectfully requests the Court to remand this case to the district court with directions that the district court instruct the trial court to hold an evidentiary hearing on this claim.

[22] *See also McCann v. State*, 854 So. 2d 788, 791 (Fla. 2d DCA 2003); *Gordon v. State*, 608 So. 2d 925, 925-26 (Fla. 3d DCA 1992); *Hall v. State*, 754 So.2d 70, 70 (Fla. 4th DCA 2000); *Lopez v. State*, 773 So. 2d 1267, 1268 (Fla. 5th DCA 2000).

## F. CONCLUSION

Petitioner Vathis' respectfully requests that the First District's decision in *Vathis* be quashed and that this case be remanded to the district court with directions that the district court instruct the trial court to hold an evidentiary hearing on the two claims set forth in this brief. All appropriate relief is respectfully requested.

## G. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Office of the Attorney General
Department of Legal Affairs
PL01, The Capitol
Tallahassee, Florida 32399-1050

by hand/mail delivery this _____ day of April, 2004.

Respectfully submitted,

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## H. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Initial Brief of Petitioner complies with the type-font limitation.

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