IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC04-1283

SEBURT NELSON CONNOR,

Appellant,

v.

STATE OF FLORIDA,

Appellee,

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This reply brief covers issues I, II, III, VI, VIII and IX of Mr. Connor's initial brief. As to the remaining issues Mr. Connor relies upon the argument and law presented in his initial brief.

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(ARGUMENT-I)

COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO PROSECUTOR'S COMMENT DURING VOIR DIRE.

Mr. Connor submits that his trial counsel was ineffective because he failed to object to comments made by the prosecutor during the course of trial that told jurors that Mr. Connor had a criminal record and that the jury would not be told about Mr. Connor's criminal record. In its brief, the State attempts to muddy the record in an effort to obscure the prejudice that Mr. Connor suffered as a result of the prosecutor's improper comments. The State's arguments, however, lack merit.

First, there is no legal basis for the State's contention that Mr. Connor's claim is "…procedurally barred, because it should have been raised on direct appeal." (Answer Brief at page 22) It is beyond dispute that Mr. Connor's trial counsel failed to preserve this issue for direct appeal by failing to make a contemporaneous objection to said statements. It is also undisputed that Mr. Connor's counsel did not move to strike said statements. Based on the failures of his trial counsel, Mr. Connor raises here an ineffective assistance claim that, as this Court has expressly held, "can be raised in a rule 3.850 motion but not on direct appeal." *Bruno v. State*, 807 So.2d 55,

63 (Fla. 2002); *Stewart v. State,* 420 So.2d 862, 864 n. 4 (Fla. 1982).[1] It should be noted that Florida courts have consistently ruled that "[t]he general rule is that the adequacy of a lawyer's representation may not be raised for the first time on a direct appeal. *Bruno v. State,* 807 So.2d 55, (Fla. 2002), *Smith v. State,* 901 So.2d 1000, at 1001(Fla. 4th DCA, 2005).

Most importantly, Florida Courts have consistently held that:

> Ineffective assistance of counsel claims, **including those alleging that counsel failed to properly preserve an issue for appellate review are cognizable in rule 3.850 motion, as they generally cannot be raised on appeal.** [Emphasis added] *Johnson v. State*, 888 So.2d 122, at 125 (Fla. 4th DCA 2004), *Chambers v. State,* 530 So.2d 452, at 453 (Fla. 1st DCA 1988), *Terry v. State,* 894 So.2d 1086 (Fla. 1st DCA 2005).

Accordingly, this claim is not procedurally barred and thus can be properly raised in Mr. Connor's post conviction motion and should be reviewed on the merits. Likewise, Mr. Connor's claim of ineffective assistance of appellate counsel is also not procedurally barred. For obvious reasons, a defendant cannot file an ineffective assistance of

[1] In *Rutherford v. Moore*, 774 So.2d 637 (Fla. 2000), this Court indicated that, in "rare exceptions," ineffective assistance may be heard on direct appeal –but even then, raising such a claim on direct appeal was not required. *Id.* at 648.

counsel claim against his appellate attorney on direct appeal. Thus the only time that a defendant can file an ineffective assistance of appellate counsel claim is after the direct appeal is over. For the most part, appellate counsel will not be deemed ineffective for failing to raise issues not preserved for appeal. *Medina v. Dugger*, 586 So.2d 317, at 318 (Fla. 1991). However, there are situations where appellate counsel can raise a claim not preserved for direct appeal. Typically an attorney can present, on appeal, issues involving fundamental errors that where not preserved during trial. *Robert v. State,* 568 So.2d 1255, at 1261 (Fla. 1990), *Robinson v. Moore*, 773 So.2d 1, at 4 (Fla. 2000). A "fundamental error" has been defined as "as an error that reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without assistance of the alleged error." *Kilgore v. State,* 688 So.2d 895, at 898 (Fla. 1997). Since Mr. Connor's appellate attorney failed to present this issue as a "fundamental error" he was ineffective pursuant to the test announced in *Strickland*.

In its answer brief, the State also contends that this claim should also be denied because it is facially insufficient. The State based its conclusion as to this issue on the case of *Strickland v. Washington*, 466 U.S. 668 (1984). It

should be noted that in his initial brief, Mr. Connor also relied on *Strickland.* Accordingly, in order not to be repetitious, Mr. Connor will rely on the arguments that he made in his initial brief as to this issue.

In page 26 of its reply brief, the State argues that Mr. Connor has not cited a single case supporting his argument of deficiency or prejudice. However, this argument overlooks the fact that in his initial brief Appellant cited the case of Knight *v. State*, 316 So.2d 576 (1st DCA, 1975). In *Knight*, (*Supra*) the prosecutor initially asked the defendant if he had ever been convicted of a crime, to which the defendant responded in the negative. The jury was then excused and a sidebar conference was held, after which the jury returned and the prosecutor asked the appellant if he had ever been convicted of assault with a deadly weapon, found guilty, and placed on five years probation. Again, appellant answered in the negative to compound the error, the prosecutor asked the question, in varying forms, six more times, each time receiving a negative reply. In reversing the defendant's conviction the court held that:

> What is the average juror to think when the representative of the State is allowed to repeatedly ask an accused whether he had been convicted of a particular crime? **The unfortunate tendency of the human mind to conclude that 'where there is smoke, there is fire' operates to prejudice the right of an accused to a fair trial**. Moreover, this Court cannot allow such a flagrant

> violation of the statute to go unnoticed. Therefore reversal for a new trial on this point alone would be required. [Emphasis added]

In the case at bar the situation is even more egregious than in ***Knight***, (*Supra*) because the prosecutor did not just merely suggest to the jury that the Mr. Connor had a criminal record. In the case at bar, the prosecutor told the jurors that Mr. Connor had a criminal conviction that they would not be told about. In addition, unlike the situation in ***Knight***, Mr. Connor was not afforded an opportunity to deny such allegations.

The fact that there are not too many cases where the prosecution comments on a defendant's criminal history, can simply be attributed to the courts granting mistrials or impaneling new jury panels. Even the rules of evidence do not allow the State to mention a defendant's criminal history during its case-in-chief. The rules of evidence allow the prosecution to comment on a defendant's criminal history only when a defendant who has a criminal history of felonies or crimes involving moral turpitude testifies during trial. In the case at bar, the prosecutors comments about Mr. Connor having a criminal history were inaccurate because Mr. Connor did not have a criminal history. Given the magnitude of this error, there is a reasonable probability that but for the prosecutors comments about Mr. Connor having a criminal history, Mr. Connor would not have been found guilty. With

regards to the jury recommendation of death, the Court should note that it was an 8 to 4 decision for the death penalty. Given the prejudicial nature of said evidence it is reasonably probable that one or more jurors relied on these statements in voting for the death penalty. After all the prosecutor told them that Mr. Connor had a criminal record that they would not be told about.

In its answer brief the State tries to downplay the prejudicial effect of the Prosecutor's comments by arguing that this was a selective quotation taken out of context. This was not a selective quotation. In fact, the State does not deny that the prosecutor made said statements. The prosecutor did not have to make any comments about Mr. Connor having a criminal history. Rather than staying away from this issue, however, the prosecutor chose to venture into the prejudicial world of a defendant's criminal history and commented to the jury that "… if I was Mr. Zenobi, my concern would be if she doesn't hear about the prior record of the defendant in this case because you won't …" [T-2628] By telling the jurors that Mr. Connor had a "prior record" and that they would not be told about it, the prosecutor poisoned the minds of the jurors from the get go.

Given the prejudicial nature of the improper comments made by the prosecutor about Mr. Connor having a "prior record", it is clear that both his

trial and appellate lawyers were ineffective for failing to preserve and present this issue during trial and on appeal. Accordingly, the Court should reverse the conviction and grant Mr. Connor a new trial or at least a new penalty phase.

(ARGUMENT-II)

MR. CONNOR'S *CRAWFORD* CLAIM.

Mr. Connor concedes that the Florida Supreme Court has recently held that *Crawford v. Washington*, 541 U.S. 36 (2004) is not to be applied retroactively. *Breedlove v. Crosby,* No. SC04-686 and *Chandler v. Crosby*, No. SC04-518. However, Mr. Connor preserves this issue because the United States Supreme Court has not yet ruled on this issue.

ARGUMENT-III

COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE TO STRIKE THE ENTIRE JURY PANEL FOLLOWING DEFEDANT'S COMMENT REGARDING CUBAN DICTATOR FIDEL CASTRO.

In its answer brief, the State first argues that Mr. Connor's ineffective assistance claim arising from his trial counsel's failure to move to strike the jury panel given that the jury panel overheard Mr. Connor make positive remarks about Cuban dictator Fidel Castro is "procedurally barred" because his trial attorney failed to file a proper objection and move to strike the panel. Since in its brief the State presented an identical response to

Argument–I, the Appellant will rely herein in his reply to Argument-I above, on the issue of whether or not Mr. Connor was "procedurally barred" from presenting this issue on his post conviction relief motion. Mr. Connor further asserts that his appellate counsel was ineffective for failing to present this issue on appeal given that Appellant's remarks were highly prejudicial and thus amount to fundamental error of a nature reaching down into the validity of the trial itself because a verdict of guilty and the imposition of the death penalty, could not have been obtained without assistance of the alleged error." *Kilgore v. State,* 688 So.2d 895, at 898 (Fla. 1997).

In its answer brief, the State also argues that "the defendant seems to be asserting that his trial counsel was ineffective for failing to strike the entire panel" and thus claimed that this issue was insufficiently pled in the heading and not elaborated on in the body. First and foremost, in page 30 of his initial brief Mr. Connor developed this argument step by step. Appellant also asserted that "[t]he trial attorney did not object or move to strike the entire panel after he was made aware of the highly prejudicial comments made by Mr. Connor." Appellant also made similar arguments in the body of the brief as to this issue.

In its answer brief, the state does not deny that the topic of Fidel

Castro is highly emotional in Miami-Dade County. The State correctly points out that the decision of *United States v. Campa*, 2005 U.S. App. Lexis 23517 (11th Cir. 2005) was vacated and a rehearing en banc has been granted. On this topic the State argues that the *Campa* case bears no resemblance to this case. This is true, the facts of *Campa* are totally different than the facts of this case. However, Mr. Connor cited *Campa* not for its facts but for the polls taken by F.I.U. professors with regards to sentiments about the defendants charged in that case, who are alleged to be spies for Fidel Castro. These polls are a good indication as to how people feel about Fidel Castro and people who sympathize with the Cuban dictator. Certainly, this topic was of importance in the minds of many jurors in this case because they brought this matter to the attention of the Court. Equally as disturbing is fact that members of the panel were discussing this topic during a recess.

In page 37 of its answer brief, the State argues "…that all the veniremembers who heard the comment were individually questioned and those effected were excused…" This statement is inaccurate because according to juror Benidel, "half a dozen people heard it behind me…" and only five were questioned. Even Ms. Rodriguez who overheard two

people discussing this topic during a recess told the court:

> MS RODRIGUEZ: One was Robyn, the attractive brunette.
>
> THE COURT: Bandinel, who has been excused.
>
> MS. RODRIGUEZ: Right. And the other one, I can't recall who, but it was a two-way conversation and I was standing by them. [T-2772-Lines 9-16].

The undisputed truth is that one person that overheard the statement was not accounted for. Mr. Connor's trial attorney was informed of this and did not request that the panel be stricken.

The State also argues that this claim is barred because in his brief Mr. Connor adopted the argument of ineffective assistance of counsel as stated in Argument-I of his initial brief. However, restating the *Strickland* test over and over again would not have added anything to this argument. The bottom line is that Mr. Connor's trial attorney was ineffective for failing to move to strike the entire panel after he learned that several jurors were offended by Mr. Connor's positive comments about Fidel Castro.

The State also argues that Mr. Connor should not receive the benefit of his ill comments. However, the problem here is not his comments, but rather the way the comments were viewed and disseminated between the prospective jurors. Apparently Mr. Connor made these remarks quietly

enough that they were not overheard by the court reporter, the Judge or his trial attorney. It does not appear that Mr. Connor was being disruptive. Without a doubt Mr. Connor is a man of very low I.Q. He could have very well been talking to himself. The problem with the statement is that it had a highly prejudicial impact on the minds of prospective jurors. Once his trial attorney was placed on notice that the prospective jurors overheard the statements and that the statements had a prejudicial impact on the minds of some of the jurors, Mr. Connor's trial lawyer had no choice but to make sure that no one that was picked as a juror was influenced by the statements. The undisputed testimony from the jurors that came forward was that there was one juror who heard the comment that was not accounted for. This is a chance that no defense lawyer should have taken, especially in the death penalty phase. Certainly, a person that was offended by such comments could, in all likelihood, be more apt to vote to impose the death penalty than a person who was not exposed to such comments. After all, Fidel Castro is not just a name in Miami-Dade County, he has caused much hurt and pain to most Cuban-Americans who reside in Miami-Dade County.

ARGUMENT-VI

DEFENDANT'S CONSTITUTIONAL RIGHT TO REMAIN SILENT WAS VIOLATED.

In page 50 of its answer brief, the State argues that Mr. Connor's claim as to this issue should be barred because this claim was waived, procedurally barred, facially insufficient and without merit.

In asserting waiver, the State argues that Mr. Connor waived this claim for failure to properly brief it. In support of this argument the State cites the case of *Anderson v. State*, 822 So.2d 1261 (Fla. 2002). However, *Anderson* differs from the case at bar in that the defendant, in his 3.850 motion and on appeal, failed to brief and explain what the cumulative errors where. In the case at bar, Mr. Connor has briefed and explained the errors both in his post conviction relief motion and in his brief. Although, not specifically mentioned in the heading, this claim was consistently presented as one of ineffective assistance of counsel and the Appellant has referred to the record and cited case law in support of this claim. Should the Court deem it necessary, the Appellant is willing to further brief this issue. However, it should be noted that in its answer brief the State has eloquently briefed this issue.

In its answer brief, the State also argues that Mr. Connor is

procedurally barred from presenting this issue on appeal because it should have been presented on direct appeal. Since in its answer brief the State presented an identical response to Argument–I, the Appellant will rely herein in his reply to Argument-I above, on the issue of whether or not Mr. Connor is "procedurally barred" from presenting this issue.

In its answer brief, the States argues that Mr. Connor should have presented any Fifth Amendment violations on direct appeal and thus is now procedurally barred from presenting this issue. In support of this argument the State cites several cases. The first case cited by the State is that of *Cook v. State,* 792 So.2d 1197, at 1200-01 (Fla. 2001). However, it should be noted that in *Cook,* the Court denied relief because it found that the defendant's claim was procedurally barred because he "…could have raised on direct appeal…" the issue of his right to remain silent. Presumably, this issue was properly preserved by *Cook's* trial attorney and was not presented on direct appeal. In the case at bar, this issue was not objected to by Mr. Connor's trial attorney and thus it could not be presented on direct appeal.

The State also cited the case of *Ragsdale v. State,* 720 So.2d 203 (Fla. 1998) as controlling on this issue. However, a close look at this case

reveals that it does not involve a violation of a defendant's right to remain silent but rather a situation where the defendant claimed that his lawyer was ineffective for allowing a co-defendant to invoke his Fifth Amendment rights.

In support of this argument, the State also cited the case of *Johnson v. State*, 593 So.2d 206 (Fla. 1992). However, a close look of this case reveals that it actually supports Mr. Connor's position. It should be noted that on page 208, Claim 8, the Court found that this issue was procedurally barred because it had been "…raised on direct appeal…"

As to this issue, the State also argued in its brief that the comments of the detectives were not a violation on Mr. Connor's right to remain silent. In support of this argument the state cited the case of *Hutchinson v. State*, 882 So.2d 943, at 955 (Fla. 2004). However, in *Hutchinson*, the Court held that the defendant's right to remain silent was not violated because the police officer only testified that he talked to the defendant and did not comment in anyway on the defendant's right to remain silent. In the case at bar it is undisputed that Detectives Tymes and Bayas testified about instances where Mr. Connor exercised his right to remain silent.

The State also cited as controlling the cases of *Engle v. Dugger*, 576

So.2d 696 (Fla. 1991) and *Card v. State*, 407 So.2d 1169 (Fla. 1986). Neither of these cases have anything to do with this particular issue.

ARGUMENT-VIII

MR. CONNOR RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE OF THE PROCEEDINGS.

In its answer brief, the State asserts that Mr. Connor's trial attorneys preparation and performance during trial was not ineffective.

Faisha Thomas Original Statement to Detective Murias

In reply to Appellant's assertion about Faisha Thomas' original statement to Detective Murias, the State argues that "Defendant's claim first assumes that counsel could have used the statement to impeach the witness." [Emphasis added][State's brief Page 67] At no time has the Appellant suggested that Faisha Thomas should have been impeached with her original statement. In his initial brief, Mr. Connor asserted that Faisha Thomas' original statement to Detective Murias should have been presented to the jury. Mr. Connor's trial attorney did not need to impeach Faisha with her prior statement in order to present it. All that defense counsel needed to do was to ask Faisha about having made the particular statement. Thereafter, Mr. Connor's trial attorney could have asked Detective Murias about Faisha's original statement as described in his police report. This piece of

evidence was crucial for several reasons. First, such evidence would have meant that Mr. Goodine was alive and drove away from the scene with his daughter. This was in complete contrast to the State's theory that Mr. Goodine was killed at the house and that Mr. Connor was the man driving the car. Secondly, according to Margaret Goodine's testimony, she always parked her car in the garage. In Faisha's original statement to Detective Murias she told him that the car was parked in the garage, which is also consistent with Margaret Goodine arriving home around that time from work. It should be noted that according to Mrs. Goodine's own statement she left home at about 9:30 a.m., on the day that her husband and daughter disappeared, which means that if she worked a regular 8-hour day she would have been home between 5:30 to 6:00, the same time that Faisha saw Mr. Goodine drive away with his daughter in Mrs. Goodine's car. Ironically, Margaret Goodine was never questioned by the police or by Mr. Connor's attorney during deposition as to her whereabouts on the day in question. Certainly, Faisha's original statement to police was a crucial piece of evidence that could have changed the out come of the trial under S*trickland* because, at the very least, it would have established that Mr. Goodine was not killed at that time and at the place where the State claimed. This evidence also strengthens the argument that Mr. Goodine may not have been

killed at Margaret Goodine's house and that whoever killed Mr. Goodine planted the blood in Margate Goodine's house, Mr. Connor's car and cloth.

Items not discovered at Margaret Goodine's house on the day of the disappearance.

The possibility that someone planted the blood is also supported by other pieces of evidence. For example, on the day that Mr. Goodine and his daughter disappeared, there were numerous officers that came to Margaret Goodine's house. In fact police officers commenced to arrive short after 6:00 p.m. After the police arrived, they went inside Margaret Goodine's house and a search of the house. The search revealed that there were some clothing and personal items missing. Ironically, no one that searched the house reported seeing blood or a broken chair. [T-3952-3982] It was not until the following day, that Broward Sheriff detectives discovered blood and a broken chair inside Mrs. Goodine's house. [T-3664-3666] In its answer brief, the State points to the record where "…Mrs. Goodine was asked about the blood and chair, and indicated that she had not noticed them until Detective Murias asked her about them. (DAT. 3783-85)". However, Mrs. Goodine's statements are not supported by any other evidence. It should be noted that Detective Murias has never claimed to have discovered the blood and the broken chair at Margaret Goodine's house. The un-

contradicted evidence is that the blood and broken chair were discovered by Broward Sheriffs detectives a day after the disappearance of Mr. Goodine and his daughter. In its answer brief, the State discounts Margaret Goodine's failure to discover this evidence simply because "… Mrs. Goodine was upset upon realizing that her husband and child were missing. (DAT. 3784-85)". However, if Margaret Goodine was so upset after she found out that her husband and youngest daughter were missing, how come it took her three and a half hours to come home from work after finding out that someone had broken into her house and that her husband and daughter were missing? It is undisputed that Margaret Goodine was notified of the break-in and that her husband and daughter were missing at 6:00 p.m.[T-3955] It is also undisputed that she arrived home at 9:30 p.m., three and a half hours later. [T-3954] The State also argues that perhaps Mrs. Goodine was "too upset" to search the house. However, is clear from the record that Mrs. Goodine was not so "upset" to search her house, because she told Detective Murias on November 19, 1992 that a .357 magnum was missing. The Court should also note that Karen Goodine, Margaret's oldest daughter, was also present at the house on November 19, 1992. Karen reported to the police that there were clothing and personal items missing but did not mentioned anything about the broken chair or seeing any blood. The fact that the broken chair

and blood were not discovered at Margaret Goodine's house until over a day after the disappearance of her husband and daughter is strong evidence that the murder did not happen as the State suggested during trial. Most importantly it adds to the possibility that someone planted the evidence in this case to make it seem that Mr. Connor committed the murders.

It is also ironic that not only did the initial search of Margaret Goodine's house not reveal the blood or broken chair, moreover, the initial search of the cottage behind Seburt Connor's house also did not reveal the body of Jessica Goodine. It is important to note that the first time that Miami-Dade Police went to Mr. Connor's home they searched the tiny cottage behind his house and did not find anything. After the initial search of the cottage was conducted, Mr. Connor was taken to the police station where he remained. Thereafter the police conducted a second search of the cottage and discovered the body of Jessica Goodine. These events give strong support to the theory that someone planted the evidence as well as Jessica Goodine's body.

Mysterious Telephone Calls

During trial the State was allowed to present testimony about threatening telephone calls, where the caller was never identified. Even though no one identified who the caller was, the State was allowed to argue that the person

that made the threatening telephone calls was Seburt Connor. A witness presented by the State with regard to this issue was Mrs. McLaughlin, a neighbor of Margaret Goodine who testified that the caller told her to tell Margaret Goodine that he was going to kill her and her daughter Karen. It should be noted that despite the fact that Mrs. McLaughlin knew Mr. Connor and was familiar with his voice, she was not able to identify the voice she heard on the phone as that of Mr. Connor. However the State was able to argue to the jury that the person that was disguising his voice was Mr. Connor because only Mr. Connor referred to Mrs. McLaughlin by a certain name. This testimony was very damaging because it cast Mr. Connor as an obsessed man who was set on killing Margaret Goodine and Karen Goodine. Mr. Connor's trial lawyer could have very easily negated Mrs. McLaughlin testimony by calling Wendell McLaughlin and Miami-Dade Officer Taylor to testify. Had Mr. Connor' s lawyer called Mr. McLaughlin, he would have told the jury that he also received calls from an unknown caller threatening to kill Margaret Goodine, Karen Goodine and Seburt Connor. [Page 18 line 24 of Mr. McLaughlin's deposition] [Appendix-3]. This evidence was of great importance because like Mr. Connor, Mr. McLaughlin is also a native of Honduras who knew Mr. Connor for a number of years and was familiar with Mr. Connor's voice.[Page 5, Line 16 of Mr. McLaughlin deposition].

Also if Mr. Connor's trial lawyer had called Officer Taylor to testify he would have been able to establish that someone was making telephone calls threatening the life of Seburt Connor. This is well documented in Officer Taylor's police report dated May 14, 1992, police case number 239446-M. In this his report Officer Taylor wrote as follows:

> Victim Goodine advised that her neighbor Mrs. McLaughlin has been receiving numerous phone calls in the past week from an **unknown male** advising that he was going to kill the victim's daughter [Karen]. On today's date and time, victim Goodine advised she received a phone call from an **unknown male** who stated that "**Is this Margaret and did you get the message?"** Mrs. Goodine did not answer. The caller then stated. " **if Mr. Seburt is not at the Rolex at 10:00 o'clock, your daughter Karen will be killed."…[emphasis added]**

This testimony was crucial to Mr. Connor's defense in that it not only contradicts the State's allegation that Mr. Connor was making the threatening telephone calls, it is un-contradicted evidence that someone other than Mr. Connor had threatened to kill Margaret Goodine and her daughter Karen Goodine. Arguably, because the caller also threatened to kill Mr. Connor, it could not have been Mr. Connor making the threatening telephone calls. This evidence would have also strengthened Mr. Connor's defense that he was framed for the crimes.

In its answer brief the State argues that this type of evidence was not

admissible because it is "impeachment evidence." This is an incorrect statement of the law. In our legal system impeachment is allowed. However, this type of evidence would have been admissible because it was relevant to rebut the evidence presented by the State in its case-in-chief. Mr. Connor's attorney did not need to impeach any witnesses with this evidence he just had to put the witnesses on and ask them about their prior statements. Perhaps, the State is confusing "impeachment" with "rebuttal." If nothing else a witness' prior statements can also be used to refresh their recollection. In this case, the State presented evidence of the threatening telephone call and asserted that they came from Mr. Connor. Mr. Connor was within his right to present evidence to rebut the State's contentions.

Finger Print

In its answer brief, the State argues that the fact that there was one un-identified fingerprint found in Margaret Goodine's house does not exonerate Mr. Connor. For the most part this assertion is correct. However, this issue should have been presented and argued by M. Connor's attorney because it strengthens the argument that Mr. Connor was framed. Typically, a search of any given area could result in the collection of numerous un-identified fingerprints. However, crime scene technicians are well trained in their craft and lift prints from areas that are relevant to the crime. The

prints collected from Mrs. Goodine's house came from areas near where the broken chair and blood were found. That fact that one un-identified print was located in said areas is highly probative of the fact that someone else could have committed the murders and planted the evidence. This evidence when coupled with the other evidence mentioned above, could have exonerated Mr. Connor. A possibility that someone else committed the murder could not only result in a not guilty verdict, it could also cause jurors to hesitate about voting in favor of the death penalty under *Strickland*.

Jessica Goodine's Guardianship and Probate Estate and Mr. Goodine's Assets.

The State also argues that it would have been foolish for Mr. Connor's attorney to present evidence that a guardianship had been opened for Jessica Goodine just prior to her death and that soon after she died Margaret Goodine opened up a probate estate and got her daughter's money. However, the State's argument presupposes that Mr. Connor's attorney knew about the guardianship and the probate estate of Jessica Goodine. Had the Circuit Court allowed an evidentiary hearing on this matter, the evidence would have shown that Mr. Connor's attorney was un-aware of the guardianship and also that Margaret Goodine had opened up an estate soon after Jessica's death. This is important because, in order to properly prepare

for trial Mr. Connor's attorney needed to know this so that he could have investigated this matter and also confronted Margaret Goodine with this information during her deposition. The fact that Mrs. Goodine opened up an estate for her daughter soon after her death takes on a greater significance when viewed along side the other items overlooked by Mr. Connor's attorney. Why did it take Mrs. Goodine three and a half our to get home after she learned that her daughter and husband were missing and her house was robbed? Why did she not discover the broken chair and blood in her house but notice that a .357 magnum was missing from the house? All these are important issues that should have been fully investigated by Mr. Connor's attorney. Any one of these issues could have resulted in a different verdict or recommendation by the jury in this case under *Strickland*. After all, the State routinely argues that monetary gain is a motive for murder.

.357 magnum

In its brief the State also argues that evidence of the missing .357 magnum would not have been admissible during trial because no gun was used in this case. This argument is incorrect for several reasons. First and foremost, this evidence is probative of the fact that Mrs. Goodine searched the house on the day that her house was broken into and her husband and daughter disappeared. This shows two important things. One, that Mrs.

Goodine was not so upset that she could not search the house as the State has argued in its answer brief. Second, if Mrs. Goodine searched the house, why did she not tell the police about the broken chair and the blood found inside the house? It should also be noted that the following day a Broward Sheriffs detectives found Mrs. Goodine wearing a bloody towel around her head. At the very least, evidence of the missing .357 magnum is relevant to the case because it was not found during the search of Mr. Connor's house, cottage or car. The fact that the gun was not found on Mr. Connor also strengthen the argument that someone else committed the murders.

Testimony of Detective Tymes.

The State argues in its answer brief that Mr. Connor's attorney was not ineffective for failing to impeaching Detective Tymes during trial with inconsistent statements that she made during her deposition. In so arguing the State tries to downplay Detective Tymes' prior statement as "not inconsistent" and as a "selective quotation of statements". [Answer Brief at page 75] The State also argues that Detective Tymes could not be impeached because Mr. Connor's statements did not amount to an admission.

In her deposition of 1994, Detective Tymes made the following statements under oath:

She told Connor about Jessica's body.

> **He [Connor] said that someone playing games with him and was trying to mess him up.**
> **No other question of Connors and Connor made no remarks.**
> **No admission of either murder.** [Emphasis added]
> [52-lines 6-21].

As her statement shows, Detective Tymes unequivocally stated during her deposition that after she told Mr. Connor that Jessica's body was found, Mr. Connor simply stated that "…someone playing games with him and was trying to mess him up." She also stated that she did not ask any other questions and that Mr. Connor made "… made no remarks. No admission of either murder". [Emphasis added]

During trial Detective Tymes changed her story and told the jury that after she told Mr. Connor that Jessica's body was found he asked her "… well, why didn't they take her up to the airport?".

Detective Tymes trial testimony clearly contradicts the statements that she gave during deposition. In her deposition she stated that after she told Mr. Connor that Jessica's body was found she didn't ask Mr. Connor any other questions and Mr. Connor "made no other remark." This is in direct conflict with her trial testimony in which she said that "I continued to accuse him of killing Jessica and Lawrence Goodine and **he asked me, well, why didn't they take her up to the**

airport, also? [Emphasis added] [R-4657] Her trial testimony was clearly inconsistent with her prior statements because she claims that she continued to ask Mr. Connor questions after he was told of Jessica's body and also because Mr. Connor gave an answer that only Mr. Goodine's killer would have known. Had Mr. Zenobi simply read Detective Tymes deposition prior to trial he would have been able to confront Detective Tymes with her prior inconstant statement. These statements were very damaging because according to Detective Tymes, Mr. Connor had not been told that Mr. Goodine's body was found by the airport in Fort Lauderdale. Thus in essence the trial testimony of Detective Tymes was that Mr. Connor was guilty because how else would he have known that Mr. Goodine's body was left by the airport. Accordingly, Detective Tymes trial testimony was in essence a confession that was revealed for the first time during trial. It should be noted that these alleged statements were not included in any police report, discovery or deposition. In fact the State had a duty to reveal said statement to Mr. Connor long before trial. This was a also a clear discovery violation that required an immediate *Richardson* hearing. Mr. Connor's attorney should have not only been prepared to impeach Detective Tymes but also should have asserted a

discovery violation. There was a six-year lapse between the day that Mr. Connor was arrested and the time of trial. The State had plenty of time to have discovered and notified Mr. Connor of these incriminating statements.

The Court should also note that Detective Tymes' deposition also shows that Mr. Connor's attorney could have presented the defense that someone other than the police framed Mr. Connor. This is supported by Detective Tymes' deposition where Mr. Connor told her "…that someone playing games with him and was trying to mess him up". Originally, Mr. Connor did not blame the police for having planted the evidence. This coupled with the aforementioned evidence supports the idea that a third person planted the evidence and therefore could have led to a different verdict or recommendation by the jury under *Strickland.*

ARGUMENT-IX

MR. CONNOR RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE.

In its answer brief the State concludes that Mr. Connor's trial counsel was not ineffective in representing him during the penalty phase. In page 78 of its answer brief, the State first argues that Mr. Connor's initial argument

alleges "…that his trial attorney was ineffective in that he should have known that presenting the testimony of Doctors Eisenstein and Moosman would lead to cross examination that revealed certain prior bad acts by the Defendant." It should be noted Mr. Connor's argument on this issue goes beyond whether his trial counsel "should have known." In his initial brief Mr. Connor argued that his trial counsel was totally unprepared to conduct the penalty phase and had not properly reviewed documents and interviewed witnesses. By Mr. Zenobi's own admission, he was not prepared for the penalty phase. This is documented in the trial transcript where Mr. Zenobi objected to the prosecutor asking Dr. Eisenstein about Mr. Connor's prior bad acts. Soon after Mr. Zenobi's objection the following discussion was held:

> THE COURT: Are these matters that were supplied by the Defendant to the doctor?
>
> MR. GILBERT: Yes.
>
> THE COURT: I am not asking you.
>
> MR. ZENOBI: These are matters which have nothing to do with the diagnoses.
>
> THE COURT: Are these matters that were supplied by the Defendant to the doctor? [T-5556]
>
> MR. ZENOBI: **I have no idea. I was not the attorney at the time. [T-5556][Emphasis added]**

This admission by Mr. Zenobi is clear evidence that he failed to properly prepare for the penalty phase. He was caught with his hands down in the middle of the penalty phase. The only conclusion that can be reached from this huge mistake is that Mr. Zenobi did not read Doctor Eisenstein's reports and also did not discuss with Doctor Eisenstein his testimony. It should be noted that during the hearing on Appellant's post conviction motion Doctor Eisenstein testified that he had very little contact with Mr. Zenobi prior to testifying during the penalty phase.

In reply to Mr. Connor's argument that his attorney should have presented the testimony of Doctor Sandford Jacobson, the State seems to concede that his testimony about Mr. Connor suffering from paranoid thinking, trouble adopting his behavior and organic brain damage was important. However, the State simply discounts Doctor Jacobson's testimony as cumulative and having been taken into account by the Court during the sentencing hearing. The fact that Doctor Jacobson's testimony was taken into account by the Court in sentencing Mr. Connor is of no significance. The undisputed fact is that Mr. Zenobi failed to call Doctor Jacobson as a witness during the penalty phase. Doctor Jacobson was a State expert who despite finding Mr. Connor competent believed that Appellant suffered from paranoid thinking, had trouble adapting his behavior and

suffered from organic brain damage. This evidence alone could have very well caused some of the jurors to vote against recommending the death penalty. After all, the vote was 8 to 4 for death. Doctor Jacobson's testimony was mitigating in nature and should have been presented to the jury.

The State next argues in its answer brief that Mr. Connor's attorney was not ineffective for failing to present the testimony of Appellant's cousin regarding Mr. Connor's abusive childhood. The Court should note that the proper standard to determine whether an attorney was ineffective for failing to present mitigating evidence is whether it "…deprived the defendant of a reliable penalty phase proceeding." *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), *Ormen v. State,* 896 So.2d 725 (Fla. 2005).

In *Wiggins,* the United States Supreme Court revisited the issue of ineffective assistance of counsel for failure to investigate. *See Wiggins,* 539 U.S. 510, 123 S.Ct. 2527. The defense counsel in *Wiggins* had the presentence investigation (PSI) report and the Baltimore City Department of Social Services' (DSS) reports which discussed, in a limited manner, the degree of abuse Wiggins suffered as a child. Counsel chose not to further investigate Wiggins' background and relied solely on the PSI and DSS reports. Post conviction counsel later uncovered the extent of abuse Wiggins

suffered, which was far greater than what was discussed in either the PSI or the DSS reports. The Court found that trial counsel had abandoned their investigation of Wiggins' background after only a rudimentary knowledge of his history from a narrow set of sources. The Court also found that the scope of the investigation was unreasonable in light of the information contained in the reports and that "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." *Wiggins,* 539 U.S. at 525, 123 S.Ct. 2527. Thus, the Court concluded, "[i]n assessing the reasonableness of an attorney's investigation ... a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.* at 527, 123 S.Ct. 2527.

Even prior to *Wiggins,* this Court found that failure to investigate mitigation can support a *Strickland* ineffective assistance of counsel claim. *Ragsdale v. State,* 798 So.2d 713 (Fla. 2001), *Rose v. State,* 675 So.2d 567 (Fla. 1996). In *Ragsdale,* this Court found that counsel was ineffective and there was a reasonable probability that the result of the penalty phase would have been different but for counsel's failure to present evidence of the defendant's abusive childhood and history of drug and alcohol abuse.

In the case at bar, there was plenty of evidence known to Mr. Zenobi to

"lead a reasonable attorney to investigate further." Mr. Zenobi knew that Mr. Connor grew-up in Rotan, Honduras. Being that Mr. Zenobi was aware that Mr. Connor was raised in Honduras, he should have sent his investigator to interview witness there as well as to search school and health records there. He should have also inquired as to any individuals that have knowledge of Mr. Connor's childhood. Mr. Zenobi could have easily found Krincenze Connor, a resident of Miami, who knew Mr. Connor from childhood. In fact, Krincenze Connor was present during several hearings. Mr. Zenobi could have asked Mr. Connor or any family member about any childhood friends of Mr. Connor's. Mr. Zenobi was also aware of Doctor Jacobson's testimony and failed to present him during the penalty phase as a mitigating witness. Mr. Zenobi was also placed on notice that Mr. Connor may have been abused during his childhood. He was placed on notice because there were police reports and other documentations in his file of instances where Mr. Connor abused his children. Evidence of a person abusing his/her children is also evidence that the person was abused in his/her childhood.

The State also argues in its answer brief that failure to discover and present said mitigating witnesses was a strategic decision made by Mr. Connor's attorney. The problem with this argument is that it is contrary to the holding in *Wiggins.* In *Wiggins,* the Court also held that:

> "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy."

In the case at bar, Mr. Connor's attorney did not conduct a reasonable investigation. In fact it appears that he conducted no investigation at all of Mr. Connor's childhood. This was clearly ineffective assistance of counsel that resulted in prejudice to Mr. Connor during the penalty phase. For this reason, this Honorable Court should reverse Mr. Connor's death penalty and remand this case to the Circuit Court with instruction to conduct a new penalty phase.

CONCLUSION

The issues presented above individually and collectively establish that Mr. Connor received ineffective assistance of counsel at trial and at the appellate level. Accordingly, based upon the foregoing and on the record, Mr. Connor urges this Honorable Court to reverse his conviction and sentence and grant him a new trial or a new penalty phase hearing. In the alternative, the Appellant requests that this case be remanded to the trial court so that it can conduct an evidentiary hearing as to the issues presented in Appellant's post conviction relief motion.

By: _____
Israel J. Encinosa, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this day 14th of February, 2006 to: Seburt Nelson Connor # 124517, c/o Union Correctional Institute 7819 N.W. 228th Street, Raiford, FL 32026-4440; Assistant Attorney General, Margarita I. Cimadevilla, 444 Brickell Avenue, Suite 650, Miami, FL 33131-2407; The Florida Commission on Capital Cases, c/o Roger Maas, 402 S. Monroe Street, Tallahassee, FL 32399-1300, and the Clerk of Florida Supreme Court, Capital Case Clerk, 500 South Duval Street, Tallahassee, Florida 32399-1927.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is submitted in Times New Roman 14-point font, as required by Florida Rule of Appellant Procedure 9.210 (a)(2).

Respectfully submitted,

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