IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1594

ROBERT MORRIS

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT FOR POLK COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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COUNSELS FOR APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of the circuit court=s denial of Mr. Morris= postconviction motion filed under Florida Rule of Criminal Procedure 3.851.

References to the record include volume and page number and are of the form, e.g., (PCR Vol. I - p. 123)

Robert Morris, the Appellant now before this Court, is referred to as such or by his proper name. The attorneys who represented Mr. Morris at trial were Howard Dimmig and Howardene Garrett. They are sometimes referred to by name and sometimes as Atrial counsel.@ The phrase Aevidentiary hearing@ refers to the evidentiary hearing conducted on Mr. Morris= motion for post conviction relief.

Mr. Morris= trial was presided over by the Honorable Robert A. Young. The evidentiary hearing was presided over by the Honorable J. Michael McCarthy.

REQUEST FOR ORAL ARGUMENT

Mr. Morris has been sentenced to death. The resolution of the issues in this

action will determine whether Mr. Morris lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Morris accordingly requests that this Court permit oral argument.

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

Robert Morris was charged by indictment on September 29, 1994 in Polk

County with the first degree murder of Violet Livingston, burglary, armed robbery, and sexual battery. Mr. Morris= motion to sever the sexual battery count was granted. The state unsuccessfully sought certiorari review in the Second District Court of Appeal of the order granting a severance. The State then elected to try the sexual battery count first, and that case went to trial in November, 1998, resulting in a hung jury. The trial court then granted a judgment of acquittal, on the ground that the evidence did not exclude the reasonable hypothesis that the victim died prior to the commencement of the sexual battery. The defense moved in limine to exclude evidence of sexual activity from the upcoming murder trial. The trial court ruled that the state could introduce evidence that biological materials and fluids recovered from Violet Livingston=s body during the autopsy were submitted for DNA testing, and could introduce the results of the DNA tests, but that the state would not be permitted to introduce evidence inferring sexual activity.

The case proceeded to trial on counts one, two, and four from February 15 - March 11, 1999, before Circuit Judge Robert A. Young and a jury. On the Friday before jury selection, the state offered an eleventh hour plea deal of a sentence of life imprisonment in exchange for a guilty plea. Robert Morris did not accept the offer.

The jury found Mr. Morris guilty as charged on each count and after the penalty phase recommended a death sentence by a vote of 8-4. Mr. Morris received concurrent sentences of life imprisonment for the burglary and robbery convictions.

On April 30, 1999, Judge Young imposed the death penalty for the murder conviction, finding four aggravating factors, one statutory mitigating factor, and numerous nonstatutory mitigating factors. Notice of appeal was filed on April 30, 1999.

On February 21, 2002, Mr. Morris= conviction was affirmed by the Court in Morris v. State, 811 So.2d 661 (Fla. 2002). The Court issued a mandate on March 14, 2002. Mr. Morris filed his Motion for Post Conviction Relief on March 3, 2003. Mr. Morris filed an Amended Motion for Post Conviction Relief on May 30, 2003. A status conference was held on October 15, 2003 where Mr. Morris was granted an evidentiary hearing. Mr. Morris filed a Second Amended Motion for Post Conviction Relief on December 22, 2003.

An evidentiary hearing was held on May 19 and 20, 2004. The trial court denied the Motion for Post Conviction Relief on July 12, 2004. Mr. Morris filed his Notice of Appeal on August 9, 2004.

II. STATEMENT OF THE FACTS

An evidentiary hearing was held on May 19 and 20, 2004 on claims IA, IB, III, IV, VI, VII, IX, and XI (based on cumulative errors derived from matters the court has permitted a hearing on). (PCR Vol. V - p.769.) The court denied a hearing as to claims II, V, VIII, and X as the claims required only legal argument and no presentation of evidence. (PCR Vol. V - p.769.)

Claim IA alleged that trial counsel was ineffective in failing to object or move

for a mistrial and recusal of the trial court in the guilt phase of the trial. The gravamen of the claim alleged that the trial court allowed jurors to submit questions which could be answered by the court or the state during the trial. Claim IB alleged that trial counsel was ineffective in failing to properly investigate and prepare for the guilt phase of the trial. Trial counsel failed to investigate an alternate suspect. Claim III alleged that the mental health expert who evaluated Mr. Morris failed to conduct a professionally competent and appropriate evaluation. Claim IV alleged that trial counsel failed to provide Mr. Morris= mental health expert with adequate background information to permit a meaningful evaluation for the presence of mitigation. Claim VI alleged that trial counsel was ineffective in holding discussions with the court outside the presence of Mr. Morris and without a waiver by Mr. Morris. Claim VII alleged that trial counsel was ineffective for failing to call Mr. Morris to testify at the penalty phase of the trial. Claim IX alleged that trial counsel failed to request the court instruct the jury on statutory mitigators where evidence was presented on statutory mitigation. Claim XI alleged that Mr. Morris= trial was fraught with procedural and substantive errors.

EVIDENTIARY HEARING FACTS

A. TESTIMONY OF DOCTOR BILL MOSMAN

Dr. Bill Mosman is a psychologist licensed in Florida who testified at the evidentiary hearing. (PCR. Vol. II - p.282) Dr. Mosman was tendered as an expert in

the area of psychology and the State had no objection. (PCR. Vol. II - p.283)

As a part of his evaluation, Dr. Mosman requested all records resulting from the trial including educational records and raw data obtained from Dr. Dee - the clinical psychologist and clinical neuropsychologist appointed as a confidential expert to Mr. Morris during the trial. (PCR. Vol. II - p.285) Dr. Mosman reviewed the test procedures used by Dr. Dee in his evaluation of Mr. Morris. (PCR. Vol. II - p.286) Dr. Mosman also conducted an evaluation and testing of Mr. Morris. (PCR. Vol. II - p.323)

Regarding the level of retardation of Mr. Morris, Dr. Mosman testified that Mr. Morris consistently scored in the lower percentiles and that some of his scores were in the retarded range. (PCR. Vol. II - p.287-8) Mr. Morris= level of reasoning, analysis, judgment, and comprehension is in the mentally retarded range. (PCR. Vol. II - p.318) Dr. Mosman testified that the issue of mental retardation in the clinical psychologist perspective was not addressed in a minimally acceptable level during the preparation of the trial. (PCR. Vol. II - p.297) Dr. Mosman testified that although Mr. Morris was labeled Aeducable mentally retarded@ in elementary school, that is not a diagnosis recognized in the clinical field and that it is a category no longer used. (PCR. Vol. II - p.287)

Dr. Mosman testified that Mr. Morris was administered a series of Wechsler tests for which he consistently scored in the lower percentile. (PCR. Vol. II - p.287-8)

On March 9, 1996, Dr. Dee administered the Wisconsin exam to Mr. Morris which is designed to evaluate frontal lobe and brain damage. (PCR. Vol. II - p.292-3) Mr. Morris scored on the Wisconsin exam in the 10th percentile which equates to 90 out of 100 individuals scoring more accurate. (PCR. Vol. II - p.293)

Regarding the administration of the Wechsler exam, Dr. Mosman expressed concern that the test was not properly administered. (PCR. Vol. II - p.294) First, an assistant and not Dr. Dee administered the tests, and only parts of the subtest were given. Second, a full scale I.Q. could not be obtained because a performance I.Q. was not obtained. Finally, approximately two months after Dr. Dee=s assistant administered the test, the WAIS III, a new version, came out. This test was never used. (PCR. Vol. II - p.294-7)

Dr. Mosman testified that three mental mitigators could have been presented, but were not. (PCR. Vol. II - p.302) Dr. Mosman believed that the statutory mitigators that could have been given were: age at the time of the offense, extreme mental or emotional disturbance, and capacity to conform. (PCR. Vol. II - p.300, 302, 307-8) Dr. Mosman testified that the testing errors were such that they could not be translated accurately. (PCR. Vol. II - p.299, 300)

Dr. Mosman testified that the statutory mitigation of extreme mental disturbance should have been presented. (PCR. Vol. II - p.307) Mr. Morris had brain damage directly related to frontal lobe problems, which equates to a substantial

impairment with capacity to conform. (PCR. Vol. II - p.314-5)

B. TESTIMONY OF HOWARD DIMMIG

At the evidentiary hearing Howard Dimmig testified that he is an assistant public defender and has been with his current office since 1988. (PCR. Vol. III - p. 346) Dimmig represented Mr. Morris on the charge of first degree murder as well as other charges. (PCR. Vol. III - p.347) Howardene Garrett was co-counsel. (PCR. Vol. III - p.347) The responsibility for the guilt and penalty phases were divided with Dimmig handling the guilt phase and Garrett handling the penalty phase. (PCR. Vol. III - p.348)

Since one of the other charges against Mr. Morris included a sexual battery, Attorney Dimmig moved to sever the sexual battery charge because of the prejudicial effect it may have upon the jury. (PCR. Vol. III - p.348) Attorney Dimmig tried the sexual battery charge and a mistrial was declared because there was a hung jury. (PCR. Vol. III - p.349) He then filed a renewed motion for a directed judgment of acquittal, which was granted. (PCR. Vol. III - p.349)

Attorney Dimmig was aware of a proposed Rule of Civil Procedure that would allow jurors to submit questions to the court during a trial. (PCR. Vol. III - p.350) Dimmig recalled that during Mr. Morris' trial, the trial court anticipated the rule change allowing jurors to ask questions during the trial. (PCR. Vol. III - p.350) However, at the time of Mr. Morris' trial, Attorney Dimmig was unaware that the proposed rule

change applied only to civil cases. (PCR. Vol. III - p.350)

As an experienced public defender, Dimmig was well aware of the standard jury instruction regarding reasonable doubt. (PCR. Vol. III - p.350) He acknowledged that allowing jurors to ask questions during the trial could benefit the state as the procedure could help resolve reasonable doubt in the jurors minds. (PCR. Vol. III - p.350) He further acknowledged that allowing the state the opportunity to clarify any confusion, misunderstanding, or resolve conflicts in the evidence would not benefit Mr. Morris. (PCR. Vol.- p.352) Even though he knew that allowing jurors to ask questions during the trial inured to the state, Dimmig failed to object to the unusual procedure. (PCR. Vol. III - p.351) He did not know why he failed to object. (PCR. Vol.- p.352) Furthermore, he realized that in failing to object, the error was compounded because the issue was not preserved for appellate review. (PCR. Vol. III - p.351-2)

Attorney Dimmig attempted to develop an alternate suspect and believed it would be critical to the defense. (PCR. Vol. III - p.354, 379) There were four unidentified and untested fingerprints at the scene; two on the light bulb cover, one on the kitchen counter, and one on the closet doorknob in the second bedroom. (PCR. Vol. III - p.354) There was an effort to match the fingerprints through the AFA system, but they were unidentified fingerprints. (PCR. Vol. III - p.354) During cross examination of state witnesses counsel was further able to establish that hair samples recovered from the scene were microscopically different than those of Robert Morris

and that DNA recovered could have been tainted with a third person=s DNA. (PCR. Vol. III - p.364-5)

Attorney Dimmig did attempt to make an issue of the unidentified fingerprints to raise reasonable doubt through the existence of an alternative suspect. (PCR. Vol. III - p.355) In opening statement, Dimmig told the jury that a witness observed an individual who was definitely not a black man closely observing the apartment where Mrs. Livingston was killed. (PCR. Vol. III - p.355) The witness that Attorney Dimmig referred to in the opening statement was Sherry Laventure who lived in the first one of the houses behind the Martin=s Landing apartment complex were Violet Livingston lived. Sherry Laventure was interviewed by police and investigators from the Public Defender=s Office in their canvass of the neighborhood. (PCR. Vol. III - p.355)

Sherry Laventure testified at trial that the person she saw at the Martin=s Landing apartment complex was not white. (PCR. Vol. III - p.357) Attorney Dimmig testified that he had attempted to previously refresh Ms. Laventure=s recollection during a conversation he had with her in October of 1997. (PCR. Vol. III - p.357) However, Attorney Dimmig did not have any recorded statements of Ms. Laventure with which he could impeach her during trial. (PCR. Vol. III - p.358) Attorney Dimmig knew before trial that Laventure was not a willing witness, yet he had not deposed her. (PCR. Vol. - p.361)

Laventure also testified at trial that Toni Maloney, an investigator with the

Public Defender=s Office, attempted to encourage Laventure to say that the person around the apartment was not black. (PCR. Vol. III- p.361) Defense counsel then entered into a stipulation with the state that no representative of the Public Defender=s Office had encouraged anyone to present false testimony. (PCR. Vol. III- p.361) Dimmig testified at the evidentiary hearing that he went into what he refers to as the Amother-hen-mode.@ Dimmig wanted to bolster the image of the Public Defenders=s office and present the image that [they] had not in any way attempted to influence the testimony of a witness. (PCR. Vol. II- p. 465) Laventure also testified that she spoke with another investigator with the Public Defender=s Office named Brad Barfield. (PCR. Vol. III- p.361) She claimed that she told the investigator that the man she saw was not white. (PCR. Vol. III- p.362-3) Attorney Dimmig never did call Barfield to rebut the testimony of Laventure. (PCR. Vol. III- p.364)

Attorney Dimmig acknowledged that the state was able to exploit the failure of the defense to impeach Ms. Laventure. (PCR. Vol. III - p.359) The state was able to exploit the fact that Dimmig had said one thing in an opening statement, and could not have the witness confirm what he said in opening statement. (PCR. Vol. III - p.359)

C. TESTIMONY OF HOWARDENE G. GARRETT

Howardene Garrett is an assistant public defender who represented Robert Morris in the penalty phase of his trial. (PCR. Vol. III - p. 391) Attorney Garrett testified that it was strategy to have the two phases of the trial completely distinct.

(PCR. Vol. III - p. 392)

Attorney Garrett was aware of Mr. Morris' right to testify in both the guilt and penalty phases of the trial. (PCR. Vol. III - p. 392) Mr. Morris did testify in the guilt phase of his trial. (PCR. Vol. III - p. 392) Attorney Garrett was present when Attorney Dimmig discussed with Mr. Morris his right to testify in the guilt phase. (PCR. Vol. III - p. 392) Garrett could not recall whether or not she had any discussions with Mr. Morris about him testifying in the penalty phase. (PCR. Vol. III - p. 394) She acknowledged that Mr. Morris' right to testify was his personal right which could be waived only by him. (PCR. Vol. III - p. 393) She further acknowledged that it can be very effective in penalty phase to have the client speak in their own words to the jury about abuse suffered as a child. (PCR. Vol. III - p. 393)

During the penalty phase, Attorney Garrett presented several points regarding nonstatutory mitigation. (PCR. Vol. III - p. 396) She also presented evidence in support of statutory mitigation. (PCR. Vol. III - p.398) Garrett filed a motion requesting a special jury instruction in an effort to get the court to instruct on all of the mitigators, even if they were not mentioned in the statute. (PCR. Vol. III - p. 396) However, the court denied the motion for a special jury instruction on nonstatutory mitigation. (PCR. Vol. III - p. 396)

No statutory mitigation instruction was requested by counsel nor given by the court to the jury. (PCR. Vol. III - p. 398) Even though the jury did not have the

benefit of hearing a statutory mitigation instruction, the court did find one statutory mitigator in his sentencing order. (PCR. Vol. III - p. 398) Attorney Garrett could not rule out that it might have been beneficial to Mr. Morris had she requested the jury be given the statutory mitigation instruction. (PCR. Vol. III - p. 398) She believed that it might have been something that would have made a difference. (PCR. Vol. III - p. 398)

Attorney Garrett acknowledged that a client has a right to be present at all proceedings with respect to his or her case. (PCR. Vol. III - p. 398) Garrett testified that she had no independent recollection of matters that were discussed during a bench conference outside the presence of Mr. Morris. (PCR. Vol. III - p. 399) She stated that she did read the transcript in preparing for her testimony at the evidentiary hearing. (PCR. Vol. III - p. 399) She could not rule out that the matter discussed was regarding a legal matter that involved Mr. Morris. (PCR. Vol. III - p. 399)

Attorney Garrett was not aware that the WAIS administered by Dr. Henry Dee to Robert Morris was not the most recent version of the test. (PCR. Vol. III - p. 400) She said she would certainly always want to use the most recent test. (PCR. Vol. III - p. 401) She was not aware that there was a WAIS III. (PCR. Vol. III - p. 401) She could only defer to her expert. (PCR. Vol. III - p. 401)

Attorney Garrett testified that if she had the evidence to support the mental age mitigator, she would have preferred to use it. (PCR. Vol. III - p.403) She did not

recall speaking with her expert about the mental age mitigator. (PCR. Vol. III - p.414)

D. TESTIMONY OF ROBERT MORRIS

Robert Morris testified at the evidentiary hearing that he recalled testifying at the guilt phase of the trial. (PCR. Vol.III - p.423) Attorney Garrett did not tell him that he had to testify nor did she force him to testify. (PCR. Vol.III - p.423) Mr. Morris does recall Attorney Garrett asking him if he wished to testify in the guilt phase but she did not ask him about testifying in the penalty phase. (PCR. Vol.III - p.424) Mr. Morris testified that Judge Young did not ask him if he wished to testify in the penalty phase. (PCR. Vol.III - p.425) The attorneys did not tell Mr. Morris that he had the right to testify in the penalty phase as well as the guilt phase. (PCR. Vol.III - p.425) Had he known he could testify, Mr. Morris would have testified in the penalty phase of his trial and would have answered any questions asked of him. (PCR. Vol.III - p.425-6)

Mr. Morris would have testified about his upbringing and how it felt when his mother made him steal. (PCR. Vol.III - p.426) He also would have explained how he came to be diagnosed with ulcers. (PCR. Vol.III - p.426) He would have testified as to his side of the story regarding mitigation. (PCR. Vol.III - p.426)

E. TESTIMONY OF DR. HENRY DEE

Dr. Henry Dee, a clinical psychologist and clinical neuropsychologist, testified at the evidentiary hearing. (PCR. Vol.III - p.433) Dr. Dee testified that he did not

personally give Mr. Morris the battery of tests including the Denman, the Wechsler, the Wisconsin Card Sorting Test, and the Halstead-Reitan Battery - one of his assistants administered the tests. (PCR. Vol.III - p.437) Dr. Dee administered the WAIS-R, which was state of the art, however, the WAIS III came out just after administering Mr. Morris the test. (PCR. Vol.III - p.439)

In Dr. Dee=s opinion, Mr. Morris was not retarded. (PCR. Vol.III - p.440) Mr. Morris had been tested with various tests and scored between 76 and 80 in the past. (PCR. Vol.III - p.442) Based on his prior scores, Dr. Dee did not see that there was any point in going back and administering more tests or a different form of tests. (PCR. Vol.III - p.442) Dr. Dee did agree and conclude that Mr. Morris suffered from brain damage. (PCR. Vol.III - p.455)

Regarding the age at the time of the offense mitigator, Dr. Dee testified that he didn=t specifically remember discussing it with Attorney Garrett, but he believed mental age is useful when the individual is much younger. (PCR. Vol.III - p.460)

Dr. Dee did not recall discussing with Mr. Morris the statutory mitigator of extreme mental or emotional disturbance. (PCR. Vol.III - p.446) However, he believed that Mr. Morris did meet that mitigator because Morris had frontal lobe damage. (PCR. Vol.III - p.446) At the Spencer hearing Dr. Dee testified about the frontal lobe damage and all the complications that go along with it. (PCR. Vol.III - p.447) He also testified at the Spencer hearing that Morris had cognitive deficits, but it

was not couched in statutory or non-statutory terms; it was just the facts that he believed to be mitigating circumstances. (PCR. Vol.III - p.447)

Dr. Dee testified that in retrospect he should have given all the subtests to Mr. Morris. He also wished that he would have been more eloquent in describing the truly horrendous background suffered by Mr. Morris. Otherwise, he would not have done things differently. (PCR. Vol.III - p.447)

SUMMARY OF THE ARGUMENT

In Argument I, Mr. Morris argues that counsel was ineffective for failing to object, move for a mistrial, and move for recusal of the trial court. The trial court erroneously allowed jurors to ask questions during the trial. The procedure employed by the trial court was contrary to the law as existed during Mr. Morris' trial. Trial counsel was also ineffective for failing to investigate and prepare. Trial counsel told the jury in opening statement that a witness saw a white man observing Ms. Livingston's apartment shortly before the killing. Mr. Morris is a black man. During

trial, the witness said the man was not a white man. Trial counsel was unprepared to impeach the witness because he failed to prepare.

In Argument II, Mr. Morris argues that trial counsel was ineffective for allowing discussions to proceed while outside of Mr. Morris= presence. Trial counsel waived Mr. Morris= right to be present during all trial proceedings and did not obtain a waiver from Mr. Morris thus depriving him of his constitutional rights.

In Argument III, Mr. Morris argues that trial counsel was ineffective in failing to inquire of Mr. Morris as to whether he wished to testify in his own behalf in penalty phase thus depriving him of his constitutional rights. The trial court also did not inquire of Mr. Morris as to whether he wished to testify and whether he knowingly and intelligently was waiving his rights.

In Argument IV, Mr. Morris argues that trial counsel was ineffective for failure to request that the jury be read the standard instruction on statutory mitigation where sufficient mitigation was presented to support a reading of the instruction. Had the jury been read the instruction, they would have recommended life and not death in this case where the recommendation for death was 8-4.

ARGUMENT I

MR. MORRIS WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF HIS 5TH, 6TH, 8TH, AND 14TH

AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION

The Standard of Review

Under the principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

A. Trial counsel was ineffective in failing to object, move for a mistrial and subsequent recusal of the trial court during the guilt phase of the trial.

Counsel fails to object to the court allowing jurors to ask questions.

During the course of the trial, the jurors told the court, through the bailiff, that they were confused and they wanted to know if they could ask questions. (R. Vol. XXII - 2090) The State suggested that questions regarding a particular witness= testimony should be answered while the witness was on the stand. The trial court anticipated the passage of a Anew statute@ which allegedly had a provision for juror questions**.** The trial court approved that the procedure be implemented in Mr. Morris= trial. Trial counsel did not object to the procedure. (R. Vol. XXII - 2091)

At the evidentiary hearing, Attorney Dimmig testified that he was aware of a proposed rule change that would allow jurors to submit questions to the court during a trial, however he was unaware that the proposed rule change applied only to civil cases. (PCR. Vol. III - p.350) Attorney Dimmig acknowledged that allowing jurors to

ask questions during the trial could benefit the State as the procedure could help resolve reasonable doubt in the juror=s minds. (PCR. Vol. III - p.350) Allowing the State to clarify confusion, misunderstanding, or resolve conflicts in the evidence would not benefit Mr. Morris. (PCR. Vol. III - p.352) Attorney Dimmig did not know why he failed to object. (PCR. Vol. III - p.352)

Permitting the State to clarify, explain, or bolster any weak points in a witnesses testimony after the testimony was presented would deprive Mr. Morris of a fair adversarial testing of the evidence. Attorney Dimmig=s acknowledgment that the procedure could assist the State by helping jurors resolve reasonable doubt was never lost on the prosecutor. During trial, the prosecutor stated: AMy concern is, Judge, again, with all due respect, jurors tend to equate vagueness with reasonable doubt, confusion with reasonable doubt, lack of understanding or comprehension of a given subject with reasonable doubt. This is where I=m at right now.@ (R. Vol. XV - p.2137)

Legal Argument

The trial court transcended its role as impartial trier of fact and assumed the role of prosecutor by advising the State to keep their witnesses on the stand so the jury questions could be addressed. The task of a prosecutor is to remove vagueness and confusion in his presentation of the evidence. The trial court, by aiding the prosecution in the presentation of their case, deprived Mr. Morris of a fair adversarial testing of the evidence. Trial counsel should have moved for a mistrial and for recusal

of the trial court.

The trial court was not only assisting the State in trying their case, but was advising the jurors to engage in procedures that were prohibited by law. Florida Statute ' 918.06 clearly states that: AThe court shall admonish the jury that it is their duty not to converse among themselves or with anyone else on a subject connected with the trial or to form or express an opinion on a subject connected with the trial until the cause is submitted to them.@ The Florida Rules of Criminal Procedure make no provision for jury questions during trial Fla.R.Crim.P. 3.410. Rule 3.410 specifically states:

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them the additional instructions or may order the testimony read to them.

The trial court disregarded the statute and rule that precluded discussion and deliberation before the jury retires to consider their verdict. Instead, the trial court advised the jurors that they could ask questions during trial which requires an element of deliberation and possibly communication between the jurors.

Apparently, the trial court, when agreeing to allow jurors to ask questions, was relying on a proposed rule for only civil cases. On February 4, 2002, **In Re: Final Report of Jury Innovations Committee Docket Number: 01-1226,** was set on this

Court=s calendar. The stated purpose of the Jury Innovations Committee was to review the existing jury system and to evaluate the need to improve, to enhance and to reform the system. Judge Shevin noted that any changes to the established practices regarding juror discussions and most other recommendations of the panel applied to civil cases. Judge Shevin expressed concern that if applied to criminal cases, constitutional restraints may arise. Unfortunately for Mr. Morris, the trial court allowed jurors to ask questions based on the mistaken belief that a statute allowing for juror questions would soon become law, not based upon the law as it existed at the time of Mr. Morris= trial.

Trial counsel should have objected to the procedure allowed by the trial court. In Strickland v. Washington, 466 U.S. 668, 688 (1984), the United States Supreme Court held that counsel has Aa duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.@ To establish that counsel was ineffective, Strickland requires a defendant to demonstrate (1) unreasonable attorney performance, and (2) prejudice. Id. Reasonable attorney performance obliges counsel Ato bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.@ Strickland at 685. Trial counsel was ineffective for failing to object, failing to move for a mistrial, and failing to move that the court be recused. Counsel=s performance fell below that standard set in Strickland.

In Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979) the court explained:

> Appellee argues that under our totality of the circumstances test, the failure of Nero=s counsel to request a mistrial cannot alone render his assistance ineffective. We disagree. Sometimes a single error is so substantial that it alone causes the attorney=s assistance to fall below the sixth amendment standard. This case presents such an error. Id. at 994.

The Nero court went on to hold:

> Nero=s attorney allowed the State to introduce inadmissible evidence of Nero=s past conviction. The attorney failed to move for a mistrial when the court would have automatically granted one. This error by Nero=s attorney is crucial since the evidence of past convictions is so prejudicial that it can render the entire trial fundamentally unfair. For these reasons we hold that Nero was denied the effective assistance of counsel in violation of the sixth amendment. Id. at 994.

In Mr. Morris= case, the trial court applied a proposed statute not in effect at the time of trial. Furthermore, the proposed statute, if even passed into law, would apply only to civil cases. Trial counsel=s failure to object to a proposed civil court procedure, not in effect at the time of trial, a trial where his client=s life was at stake, clearly demonstrates that trial counsel=s assistance fell far below the Sixth Amendment standard for effective counsel.

Moreover, there is a reasonable probability that the outcome would have been different had counsel made an objection and motion for mistrial. Failure to contemporaneously object to challenged testimony waived appellate review in Brooks

v. State, 762 So.2d 879, 890 (Fla. 2000). See also Pomeranz v. State, 703 So.2d 465, 470 (Fla. 1997)(Failure to object to collateral crime evidence at the time it is introduced violates the contemporaneous objection rule and waives the issue for appellate review.@); Correll v. State, 523 So.2d 562, 566 (Fla.1988)(AEven when a prior motion in limine has been denied, the failure to object at the time collateral crime evidence is introduced waives the issue for appellate review.@)Had Attorney Dimmig objected and been denied by the trial court, the error would have been preserved for appellate review. Trial counsel was ineffective for not objecting to this procedure. The verdict of guilt is the prejudice.

Prejudice is further demonstrated through the holding of Vining v. State, 827 So.2d 201 (Fla. 2002). In Vining, this Court held, A[t]his Court concluded that the issue was waived for purposes of appellate review because defense counsel never objected to the court=s consideration of this material even though the trial judge clearly informed counsel that he had reviewed these materials.@ Id. at 209. In Mr. Morris= case, the trial court clearly announced its intention to allow the jurors to ask questions and in effect advised the State on how to try the case. Effective counsel would have objected in order to properly preserve the issue for appellate review.

In Eure v. State, 764 So.2d 798 (Fla. 2nd DCA 2000), the court held:

> If we could determine that in any way the defense counsel=s failure to object was a strategic move, we would not find ineffectiveness; however, in light of the egregious

> arguments made by the prosecutor, we conclude that counsel=s failure to object fell below any standard of reasonable professional assistance. Moreover, there is a reasonable probability that the outcome would have been different because, had an objection and motion for mistrial been made and denied by the trial court, the error would have been preserved. In such a scenario, we undoubtedly would have reversed Eure=s conviction in this appeal. Id. at 801.

The holding cited above is directly on point with the facts of Mr. Morris= case. When the court ruled that juror questions would be permitted in anticipation of an inapplicable statute, an objection and motion for mistrial should have been made. When the trial court assumed the role of the prosecutor, trial counsel was ineffective for not filing a proper written motion to recuse. Reversal of Morris= conviction is proper.

In United States v. Cronic, 466 U.S. 648, 656 104 S.Ct. 2039,2045 (1984), The Supreme Court of the United States set the following standard which should be applied to Mr. Morris= case:

> The right to the effective assistance of counsel is thus the right of the accused to require the prosecution=s case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted -- even if defense counsel may have made demonstrable errors B the kind of testing envisioned by the Sixth Amendment has occurred. Id. at *656, **2045.

Furthermore, the Court held that AOnly when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without

inquiry into counsel=s actual performance at trial.@ When Mr. Morris= trial counsel failed to object to the trial court=s reliance upon a proposed statute which had not been passed into law, and when passed, would exclude criminal cases in its application, the crucible of meaningful adversarial testing had been transformed into an inquisitorial process. A complete breakdown in the adversarial process occurred. Under Cronic, subsequent prejudice need not be demonstrated. Relief is proper.

B. Trial counsel was ineffective in failing to properly investigate and prepare in the guilt phase of the trial.

Counsel fails to investigate and prepare.

Trial counsel attempted to develop an alternate suspect in his opening statement. Trial counsel told the jury that a witness observed an individual who was definitely not black observing the apartments where Ms. Livingston lived. (R. Vol. XX p. 1705-06) Mr. Morris is a black male.

During trial, the witness that trial counsel alluded to in his opening statement testified that the individual observing the apartments was not white. The witness, Sherry Laventure, testified:

> Q. You=ve indicated that it was a man?
>
> A. Uh-huh.
>
> Q. How would you describe the person?
>
> A. I didn=t really see his face. I didn=t, you knowB I really couldn=t identify him.

> Q. So you can=t identify the person. What was it that you did notice about the person?
>
> A. That he wasn=t white. (R. Vol. XXVII-3040).

Trial counsel was unable to impeach Sherry Laventure because counsel possessed no prior recorded statements that the person she saw was not a black man. No depositions or sworn statements were taken. Trial counsel was also unable to successfully refresh Laventure=s recollection regarding a conversation he had with her before trial in October of 1997. (R. Vol. XXVII- p.3044)

Ms. Laventure testified that she spoke with another investigator with the Public Defender=s Office named Brad Barfield. (PCR. Vol. III - p.361) Attorney Dimmig never called Investigator Brad Barfiel to rebut the testimony of Laventure. (PCR. Vol. III - p.364) During the cross examination, Laventure testified about her contact with an investigator saying:

> Q. Do you remember speaking to an investigator that had a beard?
>
> A. Yes, yes.
>
> Q. Do you remember his name?
>
> A. No.
>
> Q. Do you remember who he worked for?
>
> A. It was**B**I think it was the public defender.

Q. Did you talk to him in person?

A. Yes.

Q. How many times?

A. That I can recall, a couple times.

Q. Did he tape record your statement?

A. No.

Q. Did you give him a handwritten statement?

A. No. (R. Vol. XXVII - p.3047-48).

Laventure further testified on cross examination:

Q. Were you ever told by anyone that all you have to do is come to this courtroom and say that the person was not black?

A. Yes.

Q. Who made that statement to you, ma=am?

A. The defense side.

Q. Do you remember **B** do you have a name with that person?

A. I think it was Maloney. It was a lady.

Q. A lady, last name Maloney?

A. Uh-huh.

Q. Would the name Toni Maloney ring any bells?
A. Yes. (R. Vol. XXVII- p.3050).

A stipulation was read to the jury that stated no attorney representing the defendant, nor any representative of the public defender=s office, has suggested or encouraged any witness to present false testimony. (R. Vol. XXIV - p. 3091) Attorney Dimmig entered into the stipulation because he went into what he called the Amother hen mode.@ (PCR. Vol. II -p. 465) Dimmig wanted to bolster the image of the Public Defender=s office and present the image that [they] had not in any way attempted to influence the testimony of a witness. (PCR. Vol. II -p. 465)

During trial, counsel proffered his own testimony. The proffer revealed that trial counsel had spoken to Laventure on the telephone but had never met her face to face until the day of trial. (R. Vol. XXIV- p.3222-26)

The State, in closing argument, exploited the defects in the defense case and in Laventure=s testimony. (R. Vol. XXVII- p.3051-52)

Legal Argument

Trial counsel Dimmig was ineffective in failing to properly investigate and prepare before telling the jury in opening statement that a witness would testify that a white man was seen observing Ms. Livingston=s apartment. AOne of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial.@ Magill v. Dugger, 824 F.2d 879, 886 (11th Cir. 1987); Apretrial preparation, principally because it provides a basis upon which most of the defense case must rest,

is, perhaps, the most critical stage of a lawyer=s preparation.@ House v. Balkom, 725 F.2d 608, 618 (11th Cir.), cert. denied, 469 U.S. 870 (1984); Weidner v. Wainwright, 708 F.2d 614, 616 (11th Cir. 1983). As stated in Strickland, an attorney has a duty to undertake reasonable investigation or Ato make a reasonable decision that makes particular investigations unnecessary.@ 466 U.S. at 691. Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial. Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). See also Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981) (counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979) (Asometimes a single error is so substantial that it alone causes the attorney=s assistance to fall below the Sixth Amendment standard@). An effective attorney must present Aan intelligent and knowledgeable defense@ on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970); see also Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990) (en banc) (ineffective assistance in failure to present theory of self-defense); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978). This error also violates defendant=s right to present a meaningful defense. See Crane v. Kentucky, 476 U.S.

683 (1986). Failure to present a defense that could result in a conviction of a lesser charge can be ineffective and prejudicial. Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990).

In Caraway v. Beto, 421 F. 2d 636, 637,638 (5th Cir. 1970), the court held:

> Our adversary system is designed to serve the ends of justice; it cannot do that unless accused=s counsel presents an intelligent and knowledgeable defense. Such a defense requires investigation and preparation. Petitioner=s counsel did not adequately prepare himself for his client=s defense, and therefore petitioner did not receive adequate assistance of counsel. Id. at 637-38.

Mr. Morris= trial counsel knew that Laventure might be a reluctant witness. He did not preserve her testimony by taking a deposition or sworn statement. Although he knew Laventure did not want to testify for the defense, trial counsel did not properly prepare her testimony. The verdict of guilt is the prejudice.

In Ford v. State, 825 So.2d 358 (Fla. 2002), this Court held:

> However, failure to call witnesses can constitute ineffective assistance of counsel if the witnesses may have been able to cast doubt on the defendant=s guilt, and the defendant states in his motion witnesses= names and the substance of their testimony, and explains how the
>
> omission prejudiced the outcome of the trial. Id. at 360-61.

In Mr. Morris= case, the State made mention that Laventure had spoken to Barfield on several occasions. There was no tactical reason why trial counsel could not have called Barfield to testify that originally, Laventure had told him that the man seen

around the Livingston apartment was definitely not a black man. The prejudice was incurable by a mere stipulation because the stipulation did not rebut the content of Laventure=s testimony. Only investigator Barfield could have done that. Without rebuttal, the defense case as it applied to every other witness was tainted with the specter of coached testimony. The verdict of guilt is the prejudice.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING MR. MORRIS= CLAIM THAT COUNSEL WAS INEFFECTIVE FOR HOLDING DISCUSSIONS WITH THE COURT OUTSIDE THE PRESENCE OF MR. MORRIS AND WITHOUT A WAIVER IN VIOLATION OF MR. MORRIS= RIGHTS UNDER THE 5TH, 6TH, 8TH, AND 14TH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION

The Standard of Review

Under the principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

Discussion During Trial and Outside of Mr. Morris= Presence

During the penalty phase of Mr. Morris= trial the following discussion took place, outside the presence of Mr. Morris, between counsel and the court:

THE COURT: Anything else?

MR. DIMMIG: Yes, Your Honor. At this time based on -

MR. HARB: We need your client here.

MR. DIMMIG: Yeah. We would need him in here.

MS. GARRETT: I had one other thing before we go on to that I had one other thing I wanted to bring up that I prefer to bring up outside my client=s presence. It doesn=t even have to be on the record.

(Discussion off the record.)

(The defendant entered the courtroom.)

MR. DIMMIG: Your Honor, at this time the defense would make a Motion for Mistrial based upon the erroneous publication to this jury of what has now been marked as State=s Exhibit A-1. That is a fingerprint card ....

(R Vol. XXXIII - 4168).

The Evidentiary Hearing

At the evidentiary hearing, Attorney Garrett acknowledged that a client has a right to be present for all proceedings with respect to the case. (PCR. Vol. III - p. 398) Ms. Garrett had no independent recollection of the bench conference outside the presence of Mr. Morris. (PCR. Vol. III - p. 399) She also had no independent recollection of the substance of the discussion. (PCR. Vol. III - p. 399) Ms. Garrett testified that she could not rule out that the discussion involved something legal having to do with the course of the trial. (PCR. Vol. III - p. 400) She stated that based on the fact that she didn=t reconstruct the conversation on the record in the presence of Mr. Morris, she hoped that the conversation was not related to a legal matter. (PCR. Vol.

III - p. 408)

The Trial Court Erred in Denying the Claim

The trial court in denying the claim stated that:

> When questioned about matters that were discussed in a bench conference outside the presence of Morris, Ms. Garrett testified that she has no independent recollection of the conversation. She stated that she did read the transcript in preparing for her testimony at the evidentiary hearing. She was unable to say with any certainty that the exchange that took place was regarding a legal matter that involved Morris. However, she stated that based on her background, her training and the fact that she did not reconstruct the conversation on the record; she believes that the conversation was not pertinent to the legal issues of Morris.
>
> The Court finds that Ms. Garrett is a credible witness and the testimony provided by her is reliable. Therefore, the Court finds that Ms. Garrett=s conduct and representation met the standard of performance and there was no deviation from the required standard of performance. Thus, the Defendant is unable to meet either prong of the Strickland test, and ground VI is denied.

Legal Argument

Mr. Morris had a right to be present in the courtroom during trial proceedings when his attorneys conducted a conference at the bench. His absence from the bench conference is a structural error requiring relief. A[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.@ Kentucky v. Stincer, 482 U.S. 730, 745 (1987). When a defendant is denied his constitutional right to be present during a critical stage of criminal proceedings, Supreme Court precedent

requires reversal if the defendant=s absence constitutes a Astructural error,@ that is, an error that permeates A[t]he entire conduct of the trial from beginning to end,@ or Aaffect[s] the framework within which the trial proceeds.@ Arizona v. Fulminante, 499 U.S. 279, 309-10 (1991). Mr. Morris= absence affected the framework within which the trial proceeded.

The defendant=s due process right to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. Mr. Morris was denied this basic right when counsel conferred with the court outside of his presence. In Snyder v. Massachusetts, 291 U. S. 97, 105-06, (1933) 54 S. Ct. 330, 332 (1933), the Supreme Court of the United States held:

> We assume in aid of the petitioner that in a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. Id. at 105-06 *332.

The Court went on to hold:

> No doubt the privilege may be lost by consent or at times even by misconduct. Diaz v. United States, supra. Cf. Sir James Fitzjames Stephen, Digest of the Law of Criminal Procedure, art. 302. Our concern is with its extension when unmodified by waiver, either actual or imputed. Id. at 106 *332.

As stated in Snyder v. Massachusetts, the privilege can be lost by waiver, However, at

no time did Mr. Morris waive his right to be present during proceedings.

In Bustamante v. Eyman, 456 F.2d 269,274 (9th Cir. 1972), the court fully explores the issue of the defendant=s right to be present in the courtroom stating:

> Recently the Court reaffirmed the rule that the accused=s right to be present *in the courtroom* is of constitutional magnitude. In Illinois v. Allen, 397 U.S. 337,338, 90 S.Ct. 1057, 1058, 25 L.Ed.2d 353 (1970), the Court emphasized that A[o]ne of the most basic of rights guaranteed by the Confrontation Clause is the accused right to be *present in the courtroom at every stage of his trial.* Lewis v. United States, 146 U.S. 370 [13 S.Ct. 136, 36 L.Ed. 1011] (1892)@. (Emphasis added.)

Pursuant to Bustamante, Mr. Morris had the guaranteed right to be present in the courtroom at each and every stage of his trial. The Bustamante court further held:

> If the appellant in a capital case could not waive his right to be present at trial except by disruptive conduct, it must certainly follow that whatever attempt counsel made in appellant=s absence and without his knowledge to waive this right was without effect. United States v. Crutcher, 405 F.2d 239 (2nd Cir. 1968), cert denied, 394 U.S. 908, 89 S.Ct. 1018, 22 L.Ed.2d 219 (1969); Evans v. United States, 284 F.2d 393 (6th Cir. 1960).
>
> Having determined that appellant was denied a federal constitutional right, the right to be present in the courtroom at every stage of his trial, the next step is to determine whether that error was harmless. *Chapman v. California, supra* If the error was harmless, there is no reason to disturb the conviction. If, however, appellant=s absence prejudiced his case, weakened his defense, or was otherwise harmful to his interests, a new trial must be held.
>
> It cannot be argued that appellant=s absence was *per se*

> harmless because his counsel was at all times present to guard his interests. In the first place, whether counsel who attempts without the defendant=s knowledge to waive his right to be present can be trusted to protect the defendant=s other rights is a dubious assumption. More importantly, the presence of counsel is no substitute for the presence of the defendant himself. The right to be present at trial stems in part from the fact that by his physical presence the defendant can hear and see the proceedings, can be seen by the jury, and can participate in the presentation of his rights. But the right also rests upon society=s interests in due process. As stated in *Hopt, supra,* A[t]he public has an interest in [the defendant=s] life and liberty. Neither can be lawfully taken except in the mode prescribed by law@. 110 U.S. at 579, 4 S.Ct. at 204. The defendant=s right to be present at all proceedings of the tribunal which may take his life or liberty is designed to safeguard the public=s interest in a fair and orderly judicial system. The presence of counsel alone at trial can never be harmless *per se.* Id. at 274-75.

In Mr. Morris= case, it was obvious from the record that trial counsel was not guarding his interests. Counsel had successfully waived her client=s presence without his knowledge. Trial counsel deliberately waived his presence and stated that she preferred to bring up a matter outside her client=s presence. This is compounded by the fact that counsel addressed the matter off the record. Due to trial counsel=s improper waiver, Mr. Morris was unable to hear and see what was happening to his case. He was also unable to review what was said in regards to his case because counsel, by placing the matter off the record, prevented him from doing so. Clearly, counsel was not protecting Mr. Morris= interests, rather she was concealing matters from him.

The trial court erred in denying the claim. The basis for the trial court=s denial was a finding that Mr. Garrett is a credible witness and that her testimony was reliable. The trial court erred in finding that Ms. Garrett said that the conversation was not pertinent to the legal issues of Mr. Morris. However, if Ms. Garrett is to be believed - and there is no reason not to believe her - she said that she did not recall what was discussed at the bench and that the discussion could have been about legal matters. She simply could not recall what the conversation was about. She did not say that the conversation was not pertinent to the legal issues of the case. The trial court erred in relying on facts not in the record.

Ms. Garrett=s waiver of Mr. Morris= presence for part of the trial proceeding was ineffective assistance of counsel. Her ineffectiveness denied Mr. Morris his constitutional rights to be present at all criminal proceedings against him. The trial court erred in denying the claim based on facts not in the post conviction record. Mr. Morris was prejudiced because he was unable to assist in his own defense and he was not present for a portion of his trial. Relief should be granted to Mr. Morris.

ARGUMENT III

THE LOWER COURT ERRED IN RULING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CALL MR. MORRIS TO TESTIFY AT THE PENALTY PHASE OF THE TRIAL

The Standard of Review

Under the principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

The Lower Court=s Error

Mr. Morris did not testify in the penalty phase of his trial. Closing arguments began in the penalty phase without the trial court inquiring of Mr. Morris as to whether he desired to testify. Trial counsel did not request that the trial court make an inquiry. (R. Vol. XXXV- p.4472) The record does not show that Mr. Morris knowingly, voluntarily, and intelligently waived his right to testify at the penalty phase of the trial.

Ms. Garrett testified at the evidentiary hearing that she was aware of Mr. Morris= right to testify in both phases of the trial. (PCR. Vol. III - p.392-3) Ms. Garrett acknowledged that the right to testify is a personal right which an attorney cannot waive on behalf of the client. (PCR. Vol. III - p.393) Ms. Garrett testified that she had no recollection whether the court conducted a colloquy or whether she discussed with Mr. Morris his right to testify during the penalty phase. (PCR. Vol. III - p.394)

The trial record is replete with instances where Mr. Morris could have aided his defense if he were called to testify. Mr. Morris, in his own words, could have

explained to the jury how the rape of his four year old sister affected him as a helpless young child who could do nothing to save his sister from her attacker. (R.Vol.XXXII - p.4078 - 80) Mr. Morris could have explained to the jury his feelings of frustration at not being able to protect his sister. Mr. Morris could also have described the sadistic abuse suffered by himself and his family at the hands of his mother=s boyfriend, a brutal man named Santee. (R.Vol. XXXII - p.4080) Mr. Morris could have told the jury about being a young child forced, by his mother, to shoplift. (R.Vol. XXXIII - p.4187-88) Had Mr. Morris testified he could have clarified his vocational training, detailed his head injury, and further described with halting eloquence the numerous factors in his background that would mitigate against the imposition of the sentence of death. In this case, where the jury recommendation was 8 to 4 for death, Mr. Morris= description of his background, in his own words, would have been enough to sway the jury to recommend life.

At the evidentiary hearing, Ms. Garrett testified that she could not rule out the possibility that it could have been a more effective presentation to have the [background] information come from Mr. Morris rather than members of his family and the psychologist who testified. (PCR. Vol. III - p.396)

Legal Argument

A waiver by a criminal defendant of his right to testify, to call witnesses, and to present evidence in mitigation must be knowing, voluntary, and intelligent. This Court

addressed the right to testify in Deaton v. Dugger, 635 So.2d 4 (Fla. 1993). In Deaton, the trial court set aside the death sentence and ordered a new sentencing proceeding stating:

> Based on the totality of the circumstances presented at the evidentiary hearing, this court is not convinced by a preponderance of the evidence that the defendant knowingly, freely and voluntarily waived his right to testify or to call witnesses at the penalty phase. While the court does not find that the evidence presented by the defendant at the evidentiary hearing would necessarily have been beneficial to his cause at the sentencing phase, the court finds that the defendant was not given the opportunity to knowingly and intelligently make the decision as to whether or not to testify or to call these witnesses.

In upholding the trial courts ruling this Court stated:

> In this case, the trial judge found that Deaton had waived the right to testify and the right to call witnesses to present evidence in mitigation, but concluded that, because his counsel failed to adequately investigate mitigation, Deaton=s waiver of those rights was not knowingly, voluntarily, and intelligent. The rights to testify and to call witnesses are fundamental rights under our state and federal constitutions. Although we have held that a trial court need not necessarily conduct a *Faretta* type inquiry in determining the validity of any waiver of those rights to present mitigating evidence, clearly, the record must support a finding that such a waiver was knowingly, voluntarily, and intelligently made. [id at 8, emphasis added]

Although this Court does not require that trial courts conduct a Faretta type hearing, the record must show that a waiver of the right to testify must be made knowingly, voluntarily, and intelligently. Nowhere in the record can a waiver of Mr. Morris= right

to testify be found. Trial counsel does not recall an on the record wavier being done. A record waiver was not done in Mr. Morris= case in violation of this Court=s holding in Deaton.

The right to testify in one=s own behalf is a fundamental right and is a right which cannot be waived by counsel. In United States v. Scott, 909 F.2d 488, 490 (11th Cir. 1990), the court held:

> It is clear then that a defendant=s right to testify Ais now a recognized fundamental right.@ *Ortega v. O=Leary*, 843 F.2d at 261. *See Faretta*, 422 U.S. at 819 n. 15, 95 S. Ct. At 2533 n. 15. Accordingly, the right to testify is personal and cannot be waived by counsel. *United States v. Martinez*, 883 F. 2d 750, 756 (9th Cir. 1989), *petition for cert. filed*, No. 89-7539 (May 17, 1990): *United States v. Long*, 857 F.2d 436, 447 n. 9 (8th Cir. 1988) *Ortega*, 843 F.2d at 261; *United States v. Curtis*, 742 F.2d 1070, 1076 (7th Cir. 1984) (per curiam). *Cert. Denied*, 475 U.S. 1064, 106 S.Ct. 1374, 89 L.Ed.2d 600 (1986); *see also Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983) (AIt is ... recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or to take an appeal.@) Id. at 490.

Attorney Garrett, by not explaining to Mr. Morris his right to testify, waived his fundamental right guaranteed him under the Sixth Amendment of the United States Constitution. In Rock v. Arkansas, 483 U.S. 44, 52, 107 S.Ct. 2704, 2709 (1987), the Supreme Court of the United States held:

> Moreover, in Faretta v. California, 422 U.S., at 819, 95

> S.Ct., at 2533, the Court recognized that the Sixth Amendment AGrants to the accused *personally* the right to make his defense. It is the accused, not counsel, who must be ›informed of the nature and cause of the accusation,= who must be ›confronted with the witnesses against him,= and who must be accorded ›compulsory process for obtaining witnesses in his favor.@ (Emphasis added)
>
> Even more fundamental to a personal defense than the right of self-representation, which was found to be Anecessarily implied by the structure of the Amendment,@ *ibid.*, is an accused=s right to present his own version of events in his own words. A defendant=s opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness. Id. at 52, 2709.

The penalty phase jury heard of the abuse and trauma suffered by Mr. Morris, but through family members and an expert witness. The jury did not hear directly from Mr. Morris because Ms. Garrett waived his personal right to testify. As stated in Rock, Mr. Morris did not have the opportunity Ato present his own version of events in his own words.@ Id. at 52. Mr. Morris suffered prejudice because the jury did not hear him describe, in his own words, the abuse and trauma suffered as a child.

Attorney Garrett was ineffective because she did not explain or discuss with Mr. Morris his right to testify. The court in United States v. Teague, 953 F.2d 1525, 1534 (11th Cir. 1992), addressed the right to testify in one=s own behalf in relation to ineffective assistance of counsel saying:

> Where the defendant claims a violation of his right to testify by defense counsel, the essence of the claim is that the action or inaction of the attorney deprived the defendant of

> the ability to choose whether or not to testify in his own behalf. In other words, by not protecting the defendant=s right to testify, defense counsel=s performance fell below the constitutional minimum, thereby violating the first prong of the *Strickland* test. For example, if defense counsel refused to accept the defendant=s decision to testify and would not call him to the stand, counsel would have acted unethically to prevent the defendant from exercising his fundamental constitutional right to testify. Alternatively, if defense counsel never informed the defendant of the right to testify, and that the ultimate decision belongs to the defendant, counsel would have neglected the vital professional responsibility of ensuring that the defendant=s right to testify is protected and that any waiver of that right is knowing and voluntary. Under such circumstances, defense counsel has not acted Awithin the range of competence demanded of attorneys in criminal cases,@ and the defendant clearly has not received reasonably effective assistance of counsel. Id. at 1534.

In Mr. Morris= case, he was never informed of his right to testify in penalty phase. Trial counsel neglected the vital professional responsibility of ensuring that the defendant=s right to testify is protected and that any waiver of that right is knowing and voluntary. Trial counsel has not acted Awithin the range of competence demanded of attorneys in criminal cases.@ Id at 1534 The trial court erred in denying relief to Mr. Morris.

The prejudice suffered by Mr. Morris is that he was denied the fundamental right to testify in his own behalf in the penalty phase of his trial. Had the jury heard him testify, they would have recommended a sentence of life in this close case where the jury recommended death by a margin of 8-4.

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING THE CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILURE TO REQUEST THE COURT INSTRUCT THE JURY ON STATUTORY MITIGATORS WHERE EVIDENCE OF STATUTORY MITIGATION WAS PRESENTED IN THE PENALTY PHASE OF THE TRIAL. THE DENIAL OF THE CLAIM VIOLATED MR. MORRIS= RIGHTS UNDER THE 6TH, 8TH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION

The Standard of Review

Under the principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

Statutory Mitigation Evidence is Presented at the Trial

During the penalty phase of the trial, Dr. Henry Dee, a clinical psychologist and neuropsychologist, who evaluated Mr. Morris testified regarding mitigation. (ROA. Vol. XXX - p. 4290-95) Dr. Dee categorized Mr. Morris=s intelligence level as borderline to dull normal with IQ scores in the vicinity of 76 to 82. (ROA. Vol. XXX - p. 4306-7) School records showed that Mr. Morris was educable mentally retarded and that he had learning disabilities as a child. (ROA. Vol. XXX - p. 4307-9) Dr. Dee opined that Mr. Morris had undiagnosed attention deficit hyperactivity disorder. (ROA. Vol. XXX - p. 4309-10) On the Wechsler intelligence scale administered by

Dr. Dee, Mr. Morris scored on the bottom thirteen percent. (ROA. Vol. XXX - p. 4301-05)

Dr. Dee testified that as a young child, Mr. Morris suffered a great deal of abuse and witnessed abuse of his sisters and his mother. (ROA. Vol. XXX- p. 4314) Mr. Morris= father was never available and his mother was a drug addict and prostitute. (ROA. Vol. XXX- p. 4315) Mr. Morris began stealing food and other items to obtain the approval of his mother. (ROA. Vol. XXX- p. 4315) Mr. Morris was beaten regularly by his mother=s boyfriend, Santee. (ROA. Vol. XXX- p. 4315) Mr. Morris also tried to protect his sister from sexual abuse. (ROA. Vol. XXX- p. 4315-17) During his youth, Mr. Morris spent time in foster care which Dr. Dee explained would be terrifying to a young child. (ROA. Vol. XXX- p. 4220-23)

Dr. Dee opined that, as in Mr. Morris= case, where the mother is so inadequate and impaired by drugs, the child typically develops a sense of shame and embarrassment, which often leads to social isolation. (ROA. Vol. XXX- p. 4318-9)

Medical records documented that Mr. Morris was diagnosed with an ulcer at age thirteen, and in Dr. Dee=s opinion that condition must have been developing for years. (ROA. Vol. XXX- p. 4334-36)

Dr. Dee testified that when a child sees drug abuse by his mother during his formative years, the predictable result is that the child will turn to the same solution when under stress as an adolescent or young adult. (ROA XXX - p. 4323-27) Mr.

Morris could not remember a time when he did not smoke marijuana, even as a young child. (ROA XXXIV- p. 4329) While in high school, Mr. Morris found himself becoming an alcoholic, but the ulcer forced him to give it up. (ROA. Vol. XXX- p. 4326) He turned to a variety of controlled substances including marijuana, powdered cocaine, freebase, and later rock cocaine. (ROA. Vol. XXX- p. 4326-27)

Counsel Requests a Special Jury Instruction

During trial, Attorney Garrett filed with the court a pleading titled ADefendant=s Requested Special Jury Instruction Re: Mitigating Circumstances.@ (Supp. Vol. II - p.106) The purpose of requesting the instruction was to get the court to instruct on all of the mitigators, even if they were not mentioned in the statute. (PCR. Vol. III - p.396) Attorney Garrett, during trial, presented several points regarding both statutory and nonstatutory mitigation. (PCR. Vol. III -p.396, 398) The court denied the motion for a special jury instruction on nonstatutory mitigation. (ROA. Vol. XXXIV - p. 4504-7)

After the motion requesting a special jury instruction was denied, Attorney Garrett did not request a jury instruction on any statutory mitigators. Counsel did ask that her motion be reconsidered saying:

> MS. GARRETT: This would be a good time to renew my previously made objections to the instructions in denial of the specific instructions that I had requested as previously made. And I assume you=re going to - - I already did that once. But your going to read them now, so I=ll do it again.

> THE COURT: Perfect timing. And your motion is denied and the previous rulings would stand.
>
> MS. GARRETT: And, Your honor, I set there on the counter - - you didn=t ask for it, but I thought that the Court might want to have a copy of the slides.

(R. Vol. XXXV - p.4575)

Again, Attorney Garrett did not request that the court read to the jury the standard jury instruction regarding statutory mitigation.

The jury instructions read to the jury by the court did not include instructions on statutory mitigators. Regarding mitigation, the court read the following instructions to the jury:

> Mitigating factors include any aspect of the defendant=s character, record, or background, and any other circumstance of the offense that would mitigate against the imposition of the death penalty.
>
> If one or more aggravating circumstances which is sufficient to justify the imposition of the death penalty is proved beyond a reasonable doubt, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to what sentence should be imposed.
>
> The weighing of aggravating and mitigating circumstances is not just a counting process. You are free to assign whatever weight you feel is appropriate to the aggravating and the mitigating circumstances.
>
> A mitigating circumstance need not be proved beyond a

> reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it established.
>
> The sentence that you recommend to the court must be based upon facts that you find from the evidence and on the law I have given you in these instructions. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations. (ROA. Vol. XXXV- p.4581).

The jury, after the penalty phase, recommended a death sentence by a vote of 8-4. (ROA Vol. IX - p. 1625, Vol. XXXV- p. 4586-87)

The Spencer Hearing

Dr. Dee again testified at the Spencer hearing on April 13, 1999. (ROA. Vol. IX-p.1646). Dr. Dee testified that he had administered a number of psychological tests on Mr. Morris. These tests were extensive and detailed. They also took place over several different sittings. (ROA. Vol.IX- p.1647-52). Dr. Dee testified that on one test alone, the Denman neuropsychology memory scale, Mr. Morris fell outside the normal range and in and of itself, that fact indicated Mr. Morris had cerebral damage. (ROA. Vol. IX- p.1654-59). Dr. Dee found evidence of both diffuse frontal lobe damage (which is associated with increased impulsivity and an inability to control

one=s behavior) and basal injuries impairing memory functioning; his diagnosis was chronic brain syndrome with mixed features. (ROA. Vol. IX- p. 1658-63, 1666-68)

Dr. Dee also testified that based on the performance on the Wisconsin test, Mr. Morris had some kind of brain disease. (ROA. Vol. IX- p.1658). Dr. Dee testified that Mr. Morris= brain injury could have been caused by trauma and detailed two known instances of trauma. (ROA. Vol. IX- p. 1664). Dr. Dee also opined that years of drug abuse could also cause the same kind of frontal lobe damage that Morris had suffered. (ROA. Vol. IX- p.1665). Dr. Dee also testified that both attention deficit and hyperactivity disorder and what are commonly called learning disabilities are syndromes that are identified by behavior, but people that do have brain damage as children frequently have behaviors that are identified by these same syndromes. (ROA.Vol. IX- p.1669-70). Dr. Dee further opined that Morris= brain damage was exacerbated by his drug abuse. (ROA. Vol. X- p.1691).

The results of the MMPI (a grossly elevated score on the scale measuring drug of alcohol addiction), as well as the Missouri pre-sentence investigation and Dr. Dee=s interviews with family members, all confirmed Mr. Morris=s chronic problem with drug abuse. (ROA. Vol. X - p. 1683-85, 1690-91)

Dr. Dee testified that in his opinion, Mr. Morris= capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was, at the time of the offense, substantially impaired. (ROA. Vol. X- p. 1692-92)

The trial court found the statutory mitigating circumstance was presented at the Spencer hearing, but not to the jury: The capacity of the defendant to conform his conduct to the requirements of law was substantially impaired. (R. Supplemental Appeal Vol. I-97).

The Evidentiary Hearing

At the evidentiary hearing Attorney Garrett could not rule out that it might have been beneficial to Mr. Morris had she requested the jury be given the statutory mitigation instruction. (PCR. Vol. III - p. 398) She believed that it might have been something that would have made a difference. (PCR. Vol. III - p. 398) Attorney Garrett noted that Judge Young did find one of the statutory mitigators in his sentencing order, as a result of the testimony presented at the Spencer hearing. (PCR. Vol. III - p. 398) Attorney Garrett said her decision not to ask for the statutory mitigation instructions were strategic. (PCR. Vol. III - p. 415-6)

Legal Argument

In Lockett v. Ohio, 438 U.S. 586 (1978), the Court established the bedrock Eighth Amendment principle that emanates from the Afundamental respect for humanity underlying the Eighth Amendment, [which mandates the]...consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.@ Id. at 304; see also Roberts v. Louisiana, 431 U.S. 633 (1977);

Roberts v. Louisiana, 428 U.S. 325 (1976). In Lockett, the Court defined a mitigating circumstance as Aany aspect of a defendant=s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.@ Id. at 604.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has Aa duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. Strickland requires a defendant to plead and demonstrate (1) unreasonable attorney performance, and (2) prejudice.

Trial counsel may have had a strategic reason for having all 16 non statutory mitigators read to the jury and not be minimized by the different designations of non statutory versus statutory mitigation, however, upon learning that the 16 non statutory mitigating factors were not going to be read to the jury as separate and distinct factors to be considered in mitigation, trial counsel was ineffective for not requesting the statutory mitigation instruction be given. The prejudice was that statutory mitigation was not presented to the jury.

Since the recommendation was 8 to 4 for death, the presentation of designated statutory mitigation would have changed the recommendation to life over death. Attorney Garrett was correct in her assessment that requesting that the jury hear the statutory mitigation instruction was something that might have made a difference. Had the jury been read the statutory mitigation instruction, they would have found that the

statutory mitigator existed, and would have recommended life instead of death. The jury would have realized the significance of mitigation in determining whether to recommend life or death.

In Bryant v. State, 601 So.2d 529 (Fla. 1992), this Court held:

> Bryant=s other claim relates to the trial judge=s refusal to instruct the jury that it could find as mitigation Athat the capital felony was committed while Bryant was under the influence of extreme mental or emotional disturbance..@ It is clear from the record that Bryant presented sufficient evidence that he had emotional problems resulting from his retardation and physical disability Id. at 532.....Regarding mitigating factors dealing with extreme mental or emotional disturbance, we have stated that where a defendant has produced any evidence to support giving instructions of such mitigating factors, the trial judge should read the applicable instructions to the jury *Toole v. State* 479 So.2d 731 (Fla. 1985). Id. at 533.

In Mr. Morris= case, evidence of Mr. Morris= low IQ was presented to the penalty phase jury. Evidence of Mr. Morris= emotional problems such as ADHD was presented by school records and live testimony. Evidence of Mr. Morris= ulcer at age 13 was documented both by live testimony and medical records. Dr. Dee had testified as to Morris= poor impulse control and to his brain damage which resulted in two areas of the brain being damaged. Dr. Dee also testified about Mr. Morris= lack of conscious control. The extensive use of drugs by Mr. Morris was also evidence to support giving instructions on such mitigating factors. Based on Bryant, the trial court would have instructed the penalty phase jury on the statutory mitigators that Mr.

Morris was under the influence of extreme mental or emotional disturbance. Trial counsel was ineffective for not requesting statutory mitigation, had both statutory mitigators been read to the jury, the recommendation would have been life, rather than death.

In Stewart v. State, 558 So.2d 416 (Fla. 1990), this Court held:

> As noted above, an instruction is required on all mitigating circumstances Afor which evidence has been presented@ *and a request is made.* (Emphasis added). Once a reasonable quantum of evidence is presented showing impaired capacity, it is for the jury to decide whether it shows Asubstantial@ impairment. Id. at 420.

In Mr. Morris= case, a great body of evidence was presented to support giving the instruction that Mr. Morris was under an emotional disturbance at the time of the offense, however, no request was made. Trial counsel was ineffective in not requesting the instruction. The resulting 8 to 4 death recommendation is the prejudice.

CONCLUSION AND RELIEF SOUGHT

In light of the facts and arguments presented above, Mr. Morris contends he never received a fair adversarial testing of the evidence. Furthermore, Mr. Morris= representation fell below the standard in Cronic. Confidence in the outcome is undermined and the judgement of guilt and subsequent sentence of death is unreliable. Mr. Morris moves this Honorable Court to:

1. Vacate the convictions, judgments and sentences including the sentence of

death, and order a new trial.

2. Enter any order which this Court deems necessary and proper.

CERTIFICATE OF COMPLIANCE

We hereby certify that the foregoing Initial Brief of the Appellant was generated in Times New Roman, 14-point font pursuant to Fla. R. App. P. 9.210.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Initial Brief of the Appellant has been furnished by United States mail to all counsel of record on this ___ day of February, 2005.

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