IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1200

JOHNNY SHANE KORMONDY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, STATE OF FLORIDA

Lower Tribunal Case No. 1993 CF 003302A

INITIAL BRIEF OF APPELLANT

Michael P. Reiter
4543 Hedgewood Drive
Tallahassee, Florida 32309
Attorney for Appellant
(850) 893-4668

PRELIMINARY STATEMENT

This appeal arises from the denial of Appellant's motion for postconviction relief by Circuit Court Judge Tarbuck, First Judicial Circuit, Escambia County, Florida, following an evidentiary hearing. This proceeding challenges both Appellant's convictions and his death sentence. The issues raised in Appellant's Initial Brief will be presented in numerical order to follow the trial court's order for ease of review. However, it should be recognized that the order of the issues is not reflective of the importance of the issues presented.

The following abbreviations will be used to cite the record in this cause, with appropriate page number(s) following the abbreviation:

"R1." -- record on direct appeal to this Court;

"TT1." -– trial transcript on direct appeal to this Court;

"R2." –- record on 2nd direct appeal to this Court;

"TT2." –- trial transcript on 2nd direct appeal to this Court;

"PC-R." -- postconviction record on appeal in this proceeding;

"PC-T." -- postconviction transcript of evidentiary proceedings.

REQUEST FOR ORAL ARGUMENT

Appellant has been sentenced to death and is, therefore, in peril of execution by the state of Florida. If this Court grants relief, it may save his life; denial of relief may hasten his death. This Court generally grants oral arguments in capital cases in the current procedural posture. Appellant, therefore, moves this Court, pursuant to Florida Rule of Appellate Procedure 9.320 (and case law interpreting the rule) to grant him oral argument in this case and to set aside adequate time for the substantial issues presented to be fully aired, discussed, and for undersigned counsel to answer any questions this Court may have regarding the instant appeal.

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT ii

REQUEST FOR ORAL ARGUMENT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES viii

STATEMENT OF CASE 1

STATEMENT OF FACTS 2

SUMMARY OF ARGUMENT 13

ISSUE I

WHETHER THE TRIAL COURT ERRED IN FINDING APPELLANT'S GUILT PHASE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUIRE APPELLANT'S PRESENCE AT PRETRIAL CONFERENCES IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS?..... 15

ISSUE II

WHETHER THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR ALLOWING APPELLANT'S STATEMENTS TO LAW ENFORCEMENT TO BE INTRODUCED INTO EVIDENCE?..... 20

Acquiescence to Motion to Suppress..... 20

Trial Court's finding Motion to Suppress Not Meritorious..... 25

ISSUE III

WHETHER THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR CONCEDING TO THE JURY THAT APPELLANT WAS GUILTY OF BURGLARY AND ROBBERY?..... 27

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO IMPEACH THE STATE'S WITNESSES? 31

ISSUE V

WHETHER THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO MOVE FOR DISQUALIFICATION OF JUDGE KUDER AND TO WITHDRAW FROM REPRESENTATION BEFORE THE FIRST TRIAL?..... 45

Disqualification of Judge..... 45

Ms. Stitt's Conflict of Interest..... 47

Public Defender's simultaneous Representation of William Long..... 54

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE DURING REPRESENTATION OF APPELLANT FOR THE SECOND PENALTY PHASE PROCEEDING? 60

Appellant's waiver of presentation of Mitigation to the jury at the recommendation of his attorney was invalid because Defense Counsel failed to investigate. 61

Defense Counsel was ineffective for failing to present record mitigation to the Court in his memorandum and at the Spencer hearing. 67

Defense Counsel was ineffective for failure to have the Appellant present at critical stages of the proceedings in violation of Fla.R.Crim.P. 3.180(a)(3). 69

Defense Counsel was ineffective for failing to object to impact evidence and to object to lack of corresponding instructions 70

Defense Counsel was ineffective for failing to proffer testimony of Ms. McAdams after the Trial Court sustained the State's objection. 72

ISSUE VII

WHETHER THE TRIAL COURT ERRED BY FINDING THAT THE NEWLY DISCOVERED EVIDENCE OF RECANTED TESTIMONY WAS NOT CREDIBILE AND WOULD NOT HAVE CHANGED THE OUTCOME. 74

James Hazen's Testimony and Recent Statement 76

Buffkin's Affidavit 85

William Long's Recent Statement 93

ISSUE VIII

WHETHER MR. KORMONDY WAS DENIED HIS RIGHTS UNDER THE FIRST, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES BECAUSE OF THE RULES PROHIBITING MR. KORMONDY'S LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT? 96

ISSUE IX

WHETHER MR. KORMONDY WAS DENIED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE EXECUTION BY ELECTROCUTION AND LETHAL INJECTION ARE CRUEL AND/OR UNUSUAL

PUNISHMENTS 97

ISSUE X

APPELLANT'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS APPELLANT MAY BE INCOMPETENT AT THE TIME OF EXECUTION. 98

ISSUE XI

APPELLANT'S TRIAL PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. 98

CONCLUSION AND CERTIFICATE OF SERVICE 99

CERTIFICATE OF COMPLIANCE 100

TABLE OF AUTHORITIES

Cases

Armstrong v. State,
642 So.2d 730 (Fla. 1994) 75

Cuyler v. Sullivan,
446 U.S. 335, 349, 64 L. Ed.2d 333,
100 S.Ct. 1708 (1980) 49, 58, 59, 60

Derden v. McNeel,
938 F.2d 605 (5th Cir. 1991). 99

Duckett v. State,
30 Fla. L. Weekly S667 (Oct. 6, 2005). 75

Farr v. State,
621 So.2d 1368 (Fla. 1993) 68

Florida v. Nixon,
125 S.Ct. 551; 73 U.S.L.W. 4047 (2004), ... 26, 29

Ford v. Wainwright,
477 U.S. 399 (1986) 99

Guzman v. State,
644 So.2d 996 (Fla. 1994) 54

Hall v. State,
738 So.2d 374 (Fla. 1st DCA 1999) 16

Hazen v. State,
700 So.2d 1207 (Fla. 1997) 79

Heath v. Jones,
941 F.2d 1126 (11th Cir. 1991) 99

Henderson v. State,
135 Fla. 548, 185 So. 625 (Fla. 1938) 75

Hunter v. State,
817 So.2d 786 (Fla. 2002). 48, 58, 59

Jones v. State,
591 So.2d 911 (Fla. 1991). 84, 86, 94

Kearse v. State,
770 So.2d 1119 (Fla. 2000) 16, 19, 71,72

Kegler v. State,
712 So.2d 1167 (Fla. 2nd DCA 1998). 41

Koon v. State,
619 So.2d 246 (Fla. 1993), ... 65, 66

Kormondy v. State,
703 So.2d 454, 458 (Fla. 1997): 2, 79

Kormondy v. State,
845 So. 2d at 52 (Fla. 2003). 73

LaRussa v. Vetro,
254 So.2d 537 (Fla. 1971). 71

Lee v. State,
690 So.2d 664 (Fla. 1st DCA 1997) 54, 56, 57, 59

Marquard v. State,
850 So.2d 417 (Fla. 2002); 75

Nixon v. Singletary,
758 So.2d 618, 623 (Fla. 2000): 29

Nixon v. State,
857 So.2d 172 (Fla. 2003), ... 30, 31

Pomeranz v. State,
703 So.2d 465 (Fla. 1997), ... 74

Provenzano v. Moore,

744 So.2d 413 (Fla. 2000) 98

Robinson v. State,
865 So.2d 1259, 1262 (Fla. 2004), ... 73

Schwab v. State,
814 So.2d 402 (Fla. 2002). 24

Smith v. Wainwright,
741 F.2d 1248 (11th Cir. 1984), ... 44

Spaziano v. State,
692 So.2d 174 (Fla. 1997) 75

Spencer v. State,
615 So.2d 688 (Fla. 1993). 12, 13, 67

State v. Gibson,
557 So.2d 929 (Fla. 5th DCA 1990). 36

State v. Gunsby,
670 So.2d 920 (Fla. 1996). 100

Strickland v. Washington,
466 U.S. 668, 104 S.Ct. 2056, 80 L.Ed.2d 674
(1984) 13, 15, 20, 24, 27, 31, 45, 60, 65, 71

Traylor v. State,
596 So.2d 957 (Fla. 1002), ... 20

Wiggins v. Smith
539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). 65

RULES

Fla. R. Crim. P. 3.180(a)(3) 15, 16, 69

Fla. R. Crim. P. 3.851 . ..... 1, 2, 36, 54, 56, 57, 61, 75, 76

STATEMENT OF CASE

On July 27, 1993, Appellant was indicted for one count of first-degree felony murder, three counts of armed sexual battery, one count of burglary of a dwelling with an assault and an intent to commit a theft, and one count of armed robbery. Appellant's trial began on July 5, 1994. Appellant was found guilty on all charges, and a penalty phase trial began on July 8, 1994. The jury recommended death by a majority vote of 8 to 4. The trial court followed the jury recommendation and sentenced Appellant to death on October 7, 1994.

On Appellant's first direct appeal to this Court, Appellant's guilt was affirmed. However, this Court remanded the case to a new penalty phase trial on December 23, 1997. The new penalty phase trial began on May 3, 1999. The jury again recommended death by a majority vote of 8 to 4. The trial court followed the jury's recommendation and sentenced Appelant to death on July 7, 1999.

On Appellant's second direct appeal, this Court affirmed Appellant's death on February 13, 2003. Appellant filed a Petition for Writ of Certiorari to the United States Supreme Court, which was denied on October 23, 2003.

Appellant filed his postconviction 3.851 Motion on August

30, 2004. The trial court conducted a Huff hearing on January 18, 2005. Appellant filed an Amendment to his Motion on April 5, 2005. An evidentiary hearing was conducted on April 18 and 19, 2005. The trial court entered its order denying Appellant relief upon his 3.851 Motion on June 20, 2005. Appellant filed his Notice of Appeal on July 7, 2005.

STATEMENT OF FACTS

The facts adopted by this Court set out in State of Florida v. Kormondy, 703 So.2d 454 (Fla. 1997) are as follows:

> The record reflects the following. The victim Gary McAdams was murdered, with a single gunshot wound to the back of his head, in the early morning of July 11, 1993. He and his wife, Cecilia McAdams, had returned home from Mrs. McAdams' twenty-year high-school reunion. They heard a knock at the door. When Mr. McAdams opened the door, Curtis Buffkin was there holding a gun. He forced himself into the house. He ordered the couple to get on the kitchen floor and keep their heads down. James Hazen and Johnny Kormondy then entered the house. They both had socks on their hands. The three intruders took personal valuables from the couple. The blinds were closed and phone cords disconnected.
>
> At this point, one of the intruders took Mrs. McAdams to a bedroom in the back. He forced her to remove her dress. He then forced her to perform oral sex on him. She was being held at gun point.
>
> Another of the intruders then entered the room. He was described as having sandy-colored hair that hung down to the collarbone. This intruder proceeded to rape Mrs. McAdams while the first intruder again forced her to perform oral sex on him.
>
> She was taken back to the kitchen, naked, and placed with her husband. Subsequently, one of the

> intruders took Mrs. McAdams to the bedroom and raped her. While he was raping her, a gunshot was fired in the front of the house. Mrs. McAdams heard someone yell for "Bubba" or "Buff" and the man stopped raping her and ran from the bedroom. Mrs. McAdams then left the bedroom and was going towards the front of the house when she heard a gunshot come from the bedroom. When she arrived at the kitchen, she found her husband on the floor with blood coming from the back of his head. The medical examiner testified that Mr. McAdams' death was caused by a contact gunshot wound. This means that the barrel of the gun was held to Mr. McAdams' head.
>
> Kormondy was married to Valerie Kormondy. They have one child. After the murder, Mrs. Kormondy asked Kormondy to leave the family home. He left and stayed with Willie Long. Kormondy told Long about the murder and admitted that he had shot Mr. McAdams. He explained, though, that the gun had gone off accidentally. Long went to the police because of the $50,000 reward for information.

While the above represents facts adopted by this Court as being established at the trial of Appellant, the following is a rendition of facts from the Appellant’s point of view presented at the evidentiary hearing, the records on direct appeals, and the record of this appeal.

OFFENSE

On July 11, 1993, Appellant, Curtis Buffkin (co-defendant), and James Hazen (co-defendant) were riding through a neighborhood because Buffkin wanted to burglarize a residence (TT1. Vol. VII, p1263; PC-T. Vol. I, p78). Buffkin had in his possession a .44 caliber handgun, which he and Appellant had stolen from a previous burglary (PC-R. Vol. V,

p768). Appellant was driving his Camaro, and then he parked near a subdivision sign in the McAdams' neighborhood (TT1. Vol. VII, p1264). Buffkin noticed the McAdams' car drive by, and then said to Appellant and Hazen, "that's us right there" (PC-T. Vol. I, p78). Unknown to Appellant, Buffkin intended to burglarize an occupied dwelling in order to get more money (PC-T. Vol. I, p78).

Buffkin exited the vehicle and urged Appellant and Hazen to "come on, come on, come on" (TT1. Vol. VII, p1265). As Buffkin approached the McAdams', Appellant and Hazen held back and refrained from entering the garage. Appellant then observed someone enter the residence through the garage door (TT1. Vol. VII, p1266). Buffkin entered the garage and proceeded to knock on the inside garage door. Appellant and Hazen remained outside, near the front of the garage (TT1. Vol. VII, p1268). Someone opened the inside garage door. Buffkin pointed his weapon and began hollering. Buffkin then urged Appellant and Hazen to enter the residence (TT1. Vol. VII, p1268-1269). After entering the residence, Buffkin held Mr. and Mrs. McAdams at gunpoint in the kitchen and instructed the couple not to move they wouldn't get hurt (TT1. Vol. VII, p1271). Buffkin then instructed Appellant and Hazen to pull the phone lines, close the blinds, and search the residence

(PC-T. Vol. I, p87).

Hazen found McAdams' .38 caliber handgun in a dresser in the master bedroom (TT1. Vol. VII, p1272). Upon Appellant's and Hazen's return to the kitchen, Buffkin handed Appellant the .44 caliber handgun and took the .38 caliber handgun from Hazen and asked Mr. McAdams, "what are you going to do with this?" (PC-T. Vol. I, p87). Hazen took the .44 caliber from Appellant (PC-T. Vol. I, p89) and took Mrs. McAdams into the master bedroom. Appellant went to the back room and observed Mrs. McAdams performing oral sex on Hazen and then returned to the kitchen (TT1. Vol. VII, p1274-1275). According to Appellant's statement, Buffkin handed Appellant a handgun to watch Mr. McAdams, while he (Buffkin) went into the back bedroom (TT1. Vol. VII, 1276-1278). Buffkin then raped Mrs. McAdams (PC-T. Vol. I, p88).

Buffkin and Hazen returned Mrs. McAdams back to the kitchen area, naked. Buffkin took a beer from the refrigerator, opened it, and told Mr. McAdams to drink it (PC-T. Vol. I, p95; TT1. Vol. VII, p1279). Hazen then stated, "I ain't through with her yet" (TT1. Vol. VII, p1280; PC-T. Vol. I, p95). Buffkin took the handgun from Appellant and again pointed it at Mr. McAdams' head (TT1. Vol. VII, p1281). While proceeding to take Mrs. McAdams back to the bedroom again

(TT1. Vol. VII, p1282), Hazen observed Buffkin holding the .38 caliber handgun against Mr. McAdams' head (PC-T. Vol. I, p109).

Buffkin bumped Mr. McAdams in the head with the .38 caliber handgun and it accidentally went off, shooting and killing Mr. McAdams (PC-T. Vol. I, p97; TT1. Vol. VII, p1283). Buffkin told Appellant to call "Bubba" to get out of there (PC-T. Vol. I, p98). While attempting to flee, Hazen discharged the .44 caliber handgun into the bedroom floor (PC-T. Vol. I, p114).

Buffkin, Appellant, and Hazen exited the residence and left in Appellant's vehicle (TT1. Vol. VII, p1285-1286). Buffkin commented to Hazen that the shooting was an accident, but that he would have had to shoot them anyway (PC-T. Vol. I, p110).

Appellant was having marital difficulties and moved in with William Long, the cousin of Appellant's wife. Long and Appellant were at a gas station and noticed a poster that offered a $50,0000 reward for the arrest and conviction of the individuals involved in the McAdams' case (TT1. Vol. VII, p1186). Long had been drinking alcohol and smoking crack at this time (TT1. Vol. VII, p1192). According to Appellant, he

remarked to Long that “if he wanted to catch the ones who was involved in that he would be walking right behind us” (PC-T. Vol. II, p340). Long remembers Appellant’s comment differently (TT1. Vol VII, P.1186).

Long relayed his version of Appellant’s comment to his friend, Chris Roberts. Because Long had an outstanding warrant for violation of probation and he didn’t want to go to jail, he told Roberts to report Appellant to law enforcement so they could split the reward (TT1. Vol. VII, p1188). However, law enforcement eventually spoke to Long and convinced him to wear a wire in order to get a confession from Appellant (PC-T. Vol. I, p56). In order to avoid jail, Long reluctantly wore a wire and spoke to Appellant at Appellant’s place of employment (PC-T. Vol. I, p58). Long was arrested anyway, and was released on a $5,000 bond, which he didn’t pay. Long was originally represented by the Public Defender’s Office. Due to a conflict, Long was provided with a new court appointed-counsel. Law enforcement appeared on behalf of Long at his hearing for revocation of probation (PC-T. Vol. I, p61). However, Long lied at trial by stating that law enforcement did not speak on his behalf (TT1. Vol. VII, p1197-1198).

Appellant fled the area and was chased by law enforcement. In their attempt to capture Appellant, law

enforcement shot at Appellant, and pursued Appellant with vehicles and on foot with K-9. The Appellant hid in a shed and was discovered by K-9. He was bitten on the legs and foot several times (PC-T. Vol. VII, p311-313). The Appellant was taken to the Sheriff's Office and interrogated by detectives. He was told that if he cooperated, he could go home and that he would receive a lesser sentence than the co-defendants. Appellant gave a statement. (PC-T, Vol. II, p315-317).

Appellant's mother and sister testified that Detective Cotton told them that if Appellant cooperated, it would go easier on him. (PC-T. Vol. III, p439; p441).

REPRESENTATION FACTS

Ms. Antoinette Stitt and Mr. Ron Davis (assistant public defenders) were appointed to represent the Appellant. This was Stitt's first death case (PC-T. Vol. I, p1280). Stitt went to high school with the victim, and also attended some of the same social functions as the victim (PC-T. Vol. I, p153-157). Stitt informed Judge Kuder and Mr. Edgar (assistant state attorney) in chambers of her relationship with the victim (PC-T. Vol. I, p155-156). Neither Stitt nor Edgar nor Judge Kuder voiced this information on the record until the case was remanded for a new penalty phase in 1998. However, Judge Kuder informed all defendants on the record of his

relationship with the victim and that his wife worked for the State Attorney's Office in 1994 (R1. Vol. I, p16-20). Stitt recommended to the Appellant not to disqualify the judge (PC-T. Vol. I, p160). Although Stitt contends she informed Appellant of the conflicts (PC-T. Vol. I, p157-158), Appellant contends she didn't (PC-T. Vol II, p348-350).

At the evidentiary hearing, Stitt testified to her personal feelings about representing Appellant, "I would have been off that case like a shot because I didn't want to be on it in the first place" (PC-T. Vol. I, p161), "I wanted off Mr. Kormondy's case. I really – it was unpopular with not only Mr. McAdams' group that I went to high school with, I was getting calls from my group that I went to high school with, you know, how can you defend him…" (PC-T. Vol. I, p191). She further testified that she had no sympathy for Appellant (PC-T. Vol. I, p183).

Mr. Joseph Kirkland previously represented William Long (key State witness) for a drug violation that was also prior to the Public Defender's Office representing the Appellant. Kirkland also represented Long on the violation of probation charge during the same time Stitt represented the Appellant (PC-R. Vol. V, p842). When Kirkland became aware of the dual

representations, he withdrew from Long's case (PC-R. Vol. V, p591).

The Appellant sent letters to Stitt and Judge Kuder requesting the Public Defender be removed from his case because of a conflict (PC-R. Vol. IV, p588; p592). However, the letters do not specifically state the nature of the conflict. The clerk's docket indicates a hearing was conducted and the Appellant's request was denied, although it appears the hearing was not transcribed.

Stitt filed a Motion to Suppress Appellant's statement given to law enforcement (PC-R. Vol. I, p10). Edgar told Stitt that the State would acquiesce to the Motion (PC-R. Vol. IV, p589; PC-T. Vol. I, p18). However, Stitt withdrew the Motion to Suppress at a hearing where she had Appellant waive his presence (TT1. Vol. I, p136-137), and then failed to inform the Appellant of her intention to withdraw the motion (PC-T. Vol. II, p322).

During her opening and closing statements at trial, Stitt conceded the Appellant's guilt of robbery and burglary to the jury (TT1. Vol. I, p965-974; Vol. VIII, p1393, 1395, 1399). Stitt did not consult with nor obtain approval by the Appellant for this alleged strategy (PC-T. Vol. II, p306-307).

Stitt failed to impeach Mrs. Cecelia McAdams (key State

witness) or Long. Deputy Tim Scherer gave a deposition, wherein he said that he took Mrs. McAdams' statement on the night of the offense (PC-R. Vol. V, p856). According to Deputy Scherer's deposition, Mrs. McAdams made statements that were inconsistent with her trial testimony.

Further, Mrs. McAdams gave a deposition prior to trial, wherein she expressed uncertainty as to the identify of the last person who took her to the bedroom and raped her (Mrs. McAdams' deposition p25). However, at trial Mrs. McAdams was certain Buffkin was the last person who took her to the bedroom.

Stitt obtained Long's criminal record and failed to impeach Long with his conviction at trial (TT1. Vol. VII, p1179-1180). Further, Stitt also did not impeach Long's trial testimony with his deposition statement. In Long's deposition he was asked what the Appellant had told him. Long's account of Appellant's statement did not include Appellant stating that he shot Mr. McAdams (Long deposition, p8). However, his trial testimony included the Appellant telling him that Appellant shot Mr. McAdams (TT1. Vol. VII, p1186).

This Court remanded the case for a new penalty phase. Stitt was again assigned to represent the Appellant. Appellant again requested that the Public Defender be removed

from his representation. A hearing was conducted wherein the Appellant was asked specifically to announce why he believed there was a conflict. Appellant was unable to articulate anything specific (R2. Supp. Vol. I, p22). At the hearing, Stitt failed to inform the Court of her relationship with the victim or the simultaneous representation of Long. The Court did not ask Stitt if she knew about any conflict.

Subsequently, Stitt filed a Motions to Disqualify the Judge and for Substitution of Counsel. A hearing was conducted wherein Stitt stated to the Court she didn't believe that these conflicts were "waivable" (R2. Vol. I, p70). Stitt further acknowledged her failure to previously announce on the record about her relationship with the victim or the Public Defender's simultaneous representation of Long (R2. Vol. I, p31-34). The Court granted both motions.

Mr. Glenn Arnold was then appointed to represent the Appellant. Arnold filed a Notice of No Intention to Present Mitigation Evidence. Arnold did not hire any experts (PC-T. Vol. II, p259), obtain any records other than those in the possession of the Public Defender's Office (PC-T. Vol. II, p259), and only spoke to Appellant's mother (PC-T. Vol. II, P258). At a hearing on March 3, 1999 (second penalty phase began on May 3, 1999), Arnold informed the Court he was not

prepared for trial (R2. Vol. I, p123-124; 131). Edgar informed Arnold and the Court that
record mitigation existed and the Court was required to consider that mitigation (R2. Vol. I, p140-141).

At the close of the State's case, Arnold informed the Court the Appellant would not be presenting mitigation. The Court allowed Arnold to question the Appellant about waiving mitigation. The Court did not question Arnold whether he performed an investigation or what mitigation was available. The jury returned a recommendation for death by a vote of 8 to 4.

At the evidentiary hearing, Arnold testified that the Appellant did not want to present any mitigation to the jury (PC-T. Vol. II, p257, 261-262). However, Appellant did not prohibit Arnold from presenting mitigation at the Spencer hearing (PC-T. Vol. II, p265). Arnold testified at the evidentiary hearing that he encouraged the Appellant to present mitigation to the jury (PC-T. Vol. II, p270). However, the colloquy between Arnold and the Appellant, waiving mitigation, suggests that the strategy was mutually agreed upon (TT2. Vol. III, p483). The Appellant testified at the evidentiary hearing that the waiver of mitigation was Arnold's idea. The Appellant agreed to the waiver because Arnold told

him that the State was focusing on premeditation, which would cause the case to be reversed (PC-T. Vol. II, p308).

However, Mr. Davis (Appellant's previous attorney) testified at the evidentiary hearing that the Appellant wanted mitigation presented and that he (Mr. Davis) was preparing to present mitigation (PC-T. vol. II, p279). In fact, Davis testified that he was preparing to retain a new psychologist when the PD's Office was substituted by court-appointed counsel (PC-T. Vol. II, p288-289).

Arnold filed a sentencing memorandum on May 7, 1999 (R2. Vol. II, p233-239). No mention of prior mitigation was mentioned. The Spencer hearing was conducted on June 30, 1999 (R2. Supp. Vol. II, p216). At that hearing Arnold indicated to the Court that he had nothing further to present. The Court sentenced the Appellant to death without consideration of record mitigation.

SUMMARY OF ARGUMENT

In Strickland v. Washington, 466 U.S. 681, 104 S.Ct. 2056, 80 L.Ed.2d 674 (1984), the Court stated that investigation of the case and consultation with the client is essential before any decisions are made.

> Representation of a criminal defendant entails certain basic duties. Counsel's function is to

> assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. Id. at 688.
>
> As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. Id. at 691.

The following is an attempt to examine Stitt's performance in light of the above requirements. A summary of the arguments to be set out below is condensed here for clarity: (1) this was Stitt's first death case as lead chair, (2) she had a conflict of interest, which doesn't appear on the record until resentencing, (3) she was being harassed by her friends, as well as Mr. McAdams' friends, for representing Appellant, (4) she didn't want to represent Appellant, (5) she withdrew the Motion to Suppress without consulting with or obtaining permission from Appellant, (6) she conducted hearings in the absence of the Appellant without a written waiver, (7) she conceded Appellant's guilt of felony murder without consulting with or obtaining Appellant's permission,

(8) she advised the Appellant not to disqualify the judge due to a conflict of interest, while at the same time she had a conflict of interest, (9) she failed to obtain available records to impeach Long, and (10) she failed to impeach key State's witnesses with prior inconsistent statements.

Mr. Arnold (penalty-phase counsel) failed to: (1) conduct proper investigation, (2) fully inform Appellant about the law and facts necessary for reasonable decisions, and (3) failed to inform the Court of record mitigation.

Moreover, the unavailable trial testimony of Mr. Buffkin and Mr. Hazen conclusively establishes that Appellant did not shoot Mr. McAdams. Notwithstanding the trial court's finding, their testimony was not credible; a jury should be permitted to evaluate this evidence. A jury, not a judge, should determine whether prior testimony, motivated by personal bias and gain, is more or less reliable than their recanted testimony. To permit a judge alone to make that determination, in the interest of finality, circumvents the entire jury process.

ISSUE I

WHETHER THE TRIAL COURT ERRED IN FINDING APPELLANT'S GUILT PHASE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUIRE APPELLANT'S PRESENCE AT PRETRIAL CONFERENCES IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The standard of review for claims of ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668 (1984). The Strickland Court requires an Appellant to plead and demonstrate: (1) unreasonable attorney performance, and (2) prejudice.

Fla. R. Crim. P. 3.180(a)(3) provides: "In all prosecutions for crime the Defendant shall be present at any pretrial conference, unless waived by the Defendant in writing." It is undisputed that Appellant did not file a written waiver of his presence. In its order the trial court correctly stated the Appellant had orally "waive[d] his appearance at not just one hearing, but at the hearings, plural" (PC-R. Vol. VI, p952). However, there were more than two hearings where Appellant didn't appear and counsel waived his presence.

A defendant has the constitutional right to be present at any stage of his trial where fundamental fairness might be thwarted by his absence Hall v. State, 738 So.2d 374 (Fla. 1st DCA 1999)(The right to attend "any pretrial conference," Fla. R.Crim. P. 3.180(a)(3), is personal to the defendant and can only be waived "by the defendant in writing"). Kearse v. State, 770 So.2d 1119 (Fla. 2000).

The trial court ignored the evidentiary hearing testimony

of Stitt, which disclosed that she urged Appellant to waive his presence. Stitt's advice to Appellant that he wasn't needed was tainted, especially since Stitt knew she was about to withdraw the Motion to Suppress.

The order concluded no prejudice, but fails to explain why. "Additionally, the Court finds that Appellant was not prejudiced by his choice of not being present for the pretrial conferences" (PC-R. Vol. VI, p953). What choice? Counsel stipulated on a number of occasions to Appellant's waiving his presence.

The Appellant testified at the evidentiary hearing he **orally** waived his presence, at some hearings, because his attorneys assured him that his presence was not needed.

On May 26, 1994, (R1. Vol. I, p50) a hearing was held wherein the Appellant was not present. Davis waived Appellant's presence (R1. Vol. I, p56).

On June 20, 1994, Defense Counsel again waived the Appellant's presence at a pretrial conference.

> MR. DAVIS: Of course, Mr. Kormondy is not present right now.
>
> THE COURT: I was going to ask counsel if you were in a position to waive presence of your respective clients, whether you consider this to be an essential aspect of the trial, and if you do, we'll adjourn to the courtroom and bring the Appellants in. And I assume that we do not wish

them to be present for purpose of what we're doing today. And I will ask each of you to waive their presence. And let's start with Ms. Stitt. If you are uncomfortable --

MS. STITT: Yes, sir. What are we going to be doing this morning?

THE COURT: The only thing I anticipate doing is simply ruling on those motions that relate directly to the method of jury selection. For example, motion to prohibit any reference to advisory role of the jury at sentencing.

MS. STITT: We'll waive his presence for that. (TT1. Vol. I, p12-13).

On June 21, 1994, Stitt had Appellant waive his presence for pretrial motions, wherein she withdrew the Motion to Suppress.

MS. STITT: Judge, Mr. Kormondy will waive his appearance to be at the motion hearings, and we would like to put that on the record.

THE COURT: Mr. Kormondy, do you understand that you have an absolute right to be present during a hearing on a motion that pertains to your case?

APPELLANT KORMONDY: Yes, sir.

THE COURT: And your attorney has advised me that you are waiving your right to appear. Do you understand these motions and the Court's ruling on these motions may affect and certainly will affect the manner and quality in which evidence is presented and certain other items that affect your case?

APPELLANT KORMONDY: Yes.

THE COURT: Let me ask counsel, do you believe his presence is necessary or whether he can be of any assistance to you in the motions that are going

to be argued in his absence?

MS. STITT: No, Your Honor, most of the motions have to do with the constitutionality of the death penalty.

(TT1. Vol. I, p136-137).

Again, on June 23, 1994, a pretrial conference was conducted wherein Appellant orally waived his presence at Defense Counsel's request.

THE COURT: Do you waive the presence of your Appellant while that explanation is being given?

MR. DAVIS: Yes, sir. I will however, I'll be present on his behalf.

THE COURT: Mr. Kormondy, do you understand you have the right to be present when the Court instructs the jury about the nature of this process? If you wish to be present, you may. Your attorneys tell me that they are waiving that, and by that I take it they mean that your presence would not be of assistance to them during that process. You've heard what I intend to say to them and I will not go beyond what I have told you that I would say in here. Do you wish to waive your presence in the courtroom while the Court makes those remarks?

THE APPELLANT: If my attorney wants me to, I will.

THE COURT: Is that a yes.

THE APPELLANT: Yes.

(T1. Vol. II, p285).

On July 1, 1994, a hearing was conducted on Appellant's motion for continuance without the presence of the Appellant.

(R1. Vol. II, p296).

Stitt testified at the evidentiary hearing she had no

recollection regarding the Motion to Suppress or her conversations with Appellant about the Motion (PC-T. Vol. I, p131-133), except it was her practice to discuss those sort of matters with her client (PC-T. Vol. I, p136). In contrast, Appellant testified at the evidentiary hearing he became aware, for the first time, his Motion to Suppress was withdrawn when he reviewed his 3.850 Motion (PC-T. Vol. II, p322). Appellant further testified he wanted his motion heard [PC-T. Vol. II, p322). This testimony went undisputed at the evidentiary hearing.

Although subject to a harmless error analysis, the Court in Kearse, Supra, held that absence of an Appellant from a pretrial conference without an express written waiver is error. The trial court's order found no prejudice because Appellant's absence was voluntary and therefore, no prejudice or deficient performance occurred (PC-R. Vol. VI, p953). Appellant was unaware that his counsel intended to withdraw his Motion to Suppress and, therefore, his absence was not voluntary, especially since he didn't trust his attorneys (PC-T. Vol. II, p302-304).

ISSUE II

WHETHER THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR ALLOWING APPELLANT'S STATEMENTS TO LAW ENFORCEMENT TO BE INTRODUCED INTO EVIDENCE?

The standard of review for claims of ineffective assistance of counsel is set out in Strickland, which requires an Appellant to plead and demonstrate: (1) unreasonable attorney performance, and (2) prejudice.

The trial court correctly states the legal premise set out in Traylor v. State, 596 So.2d 957 (Fla. 1002), regarding the totality of circumstances in reviewing the voluntariness of a confession (PC-R. Vol. VI, p954). The trial court provided a lengthy explanation of the facts he relied upon, and held that the Motion to Suppress, if argued, would not have been meritorious and, therefore, counsel could not be ineffective.

While the Appellant disagrees with the court's finding, and will argue further below, the trial court missed the entire point. The State acquiesced to the suppression of Appellant's statement and Stitt withdrew the motion without approval or knowledge of the Appellant.

Acquiescence to Motion to Suppress

Stitt wrote a memorandum to her file (PC-R. Vol. IV, p589), which explained the State would acquiesce to the suppression of Appellant's statement. Mr. Edgar (assistant state attorney) testified at the evidentiary hearing he didn't recollect acquiescing to the suppression, but stated, "I would

trust that Ms. Stitt accurately reflected our conversation in the memorandum. If that's what she said in the memorandum, then I'm sure that's what happened" (PC-T. Vol. I, p18). The trial court's order makes no reference to these facts.

Stitt filed the Motion to Suppress on June 17, 1994, with a hearing scheduled for June 20, 1994 (PC-R. Vol. I, p10). At a hearing held on June 21, 1994, Stitt withdrew the Motion to Suppress Appellant's statements (R1. Vol. II, p257).

In her memorandum, Stitt explained her reasoning for withdrawing the Motion to Suppress, "The Motion to Suppress was withdrawn because we were fearful because of comments made by the prosecution that they were going to acquiesce to the motion…In light of almost certain penalty phase, we felt it better to have before the jury his statement that he was not the trigger man" (PC-R. Vol. IV, p590).

At the evidentiary hearing Stitt speculated that she had informed Appellant of the withdrawal of the Motion (PC-T. Vol. I, p131-133). However, the Appellant testified that Stitt did not tell him she was going to withdraw the motion or that the State acquiesced (PC-T. Vol. II, p322).

On cross-examination, Stitt testified she was frightened about what the State might introduce, which affected the decision no to suppress the Appellant's statement. This

strategy was suggested by the State's questions. For example, Edgar asked Stitt if she even knew that the State might bring in DNA evidence, call Buffkin, or obtain a continuance. Stitt answered, "I was frightened to death that you were going to continue it and bring the DNA in" (PC-T. Vol I. 194-195).

However, the record specifically refutes Stitt's responses to Edgar's questions. On June 21, 1994, Stitt withdrew the Appellant's Motion to Suppress his statement. Nine days later, June 30, 1994, Stitt filed a Motion for Continuance, not Edgar (R1. Vol. II, p293). In that motion Stitt specifically stated at paragraph 7, "That on Tuesday, June 27, 1994, Stitt was informed by the State Attorney's Office that they intended to introduce DNA evidence against Johnny Shane Kormondy." Stitt's own motion states that she only became aware of possible DNA after she withdrew the Motion to Suppress.

Further, in Stitt's Motion for Continuance she states in paragraph 10, "That on June 30, 1994, the defense for Johnny Shane Kormondy was notified that the co-Appellant, Curtis Darryl Buffkin, would be offering testimony at trial purported to be against Johnny Shane Kormondy." Stitt's own motion states she became aware that Buffkin might testify only after she withdrew the Motion to Suppress. On June 21, 1994, the

date the Motion to Suppress was withdrawn, Stitt was aware that Buffkin was unavailable for interview because Buffkin had invoked his right to remain silent.

The record refutes Stitt's evidentiary hearing testimony that she was "frightened" that the State would continue the case for DNA. At the hearing held on Stitt's motion to continue on July 1, 1994, four days before the beginning of Appellant's trial, Edgar stipulated that he would not use DNA, nor call Buffkin as a witness in Appellant's case (R1. Vol. II, p296), and argued against a continuance.

> MR. EDGAR: Because of that and I understand that I think anybody can understand that, Judge, after what we've been through. I understand where counsel is going about this DNA evidence. I don't think that evidence is that important to tell these people that they've got to wait another month or week or two or three, and I'll just not use it if that's what it takes (R1. Vol. II, p300).

* * * * *

> MR. EDGAR: ...All I'm seeing in this case from the beginning to the end is the desire by the Defense to avoid trial, **not prepared for trial**. I have bent over backwards to not even consider evidence before the jury that would implicate their client so as to allow these good people to proceed to trial and not be agonizing over this anymore. And I think that's what we should do. We should keep this thing right on track (R1. Vol. II, p312)(emphasis added).

Stitt testified that she didn't discuss the DNA, fibers, or Buffkin's testimony with Appellant before withdrawing the Motion to Suppress because "I don't think I knew about them at

the time" (PC-T. Vol. I, p199-200). The Appellant testified that Stitt told him nothing about the procedure of the suppression hearing or prepared him in any way (PC-T. Vol. II, p323).

The only direct evidence of Appellant's involvement in the offense introduced at trial was his statement and Long's statement. Stitt had to appreciate that the Appellant's admissions would be substantially more damaging than that of Long, who was on crack, received a reward, avoided jail time for violation of probation (unknown to Appellant at time of trial), and was a convicted felon.

In assessing counsel's performance for purposes of an ineffective assistance of counsel claim, the standard is an objective one and not a subjective one. See Strickland, 466 U.S. at 688; Schwab v. State, 814 So.2d 402 (Fla. 2002). Prematurely withdrawing the Motion to Suppress is not what a reasonably competent lawyer would do, especially without consulting with the client[1].

[1]When Appellant's counsel suggested at the evidentiary hearing that Stitt prematurely withdrew the Motion to Suppress and could have waited to introduce the Appellant's custodial statement in her case-in-chief through Detective Cotton, if the strategy was still sound and approved by Appellant, the State objected and argued, "A defense attorney cannot get a witness to come on to give the defendant's statement. That's against the rules. That's not a party opponent. The client is

Trial Court's Finding Motion to Suppress Not Meritorious

Assuming the State had not acquiesced to the suppression of Appellant's statement, the court's order fails to consider much of the record in its conclusion that the motion would not have been meritorious.

The Appellant testified: he was shot at by law enforcement, he was bitten numerous times by the police dog, he was in pain, he was bleeding, he was not provided medical assistance, he was not offered food or drink, and he was given a "guarantee" that if he cooperated he would get a lesser sentence than the co-defendants (PC-T. Vol. II, p312-321). The Appellant also testified that the detectives knew about his injuries because they had him remove his clothes and took pictures of his body (PC-T. Vol. II, p315).

---

not a party opponent. That's well-established Florida Law" (PC-T. Vol. I, p198). The trial court stated in its order in footnote 52, at page 11 that the defendant would have to testify in order to introduce his statement in his case-in-chief. Both the State and the Court are incorrect. While Section 90.803(18) only permits a statement against interest by a party opponent, Section 90.804(2)(C) does not prohibit the defendant from introducing his own statement, if: he is unavailable (privilege constitutes unavailable), and the statement is so against his criminal interest at the time it was made so that a reasonable person in the shoes of the declarant would not have made it unless it were true. While a defendant introducing his own statement may be unorthodox and no case on point exists in Florida, Florida's evidence code permits it. Appellant's statement was not exculpatory, because a defendant is presumed to know the law and whether or not he was the shooter, he was still subject to felony murder.

Lane Barnett (Appellant's mother) and Laura Hopkins (Appellant's sister) both testified that Detective Allen Cotton told them that if the Appellant cooperated, he (Cotton) would "guarantee" it would go easier for the Appellant (PC-T. Vol. III, p439 and p441). Barnett and Hopkins testified they observed the Appellant had dog bites, was bleeding, was crying, and was upset (PC-T. Vol. II, p207 and p234-235).

The trial court's order found Detective Cotton's testimony credible (PC-T. Vol. VI, p957), and concluded the Appellant's statement incredible that Det. Cotton promised if he cooperated he would be allowed to go home (PC-T. Vol. VI, p957, n44). However, it is unclear how the trial court could find in footnote 44 at page 9 of its order that Det. Cotton's statement does not contradict that of Hopkins. Det. Cotton denied telling Hopkins and Barnett about any guarantees (PC-T. Vol. III, p413), yet doesn't recollect ever speaking with them (PC-T. Vol. III, p407).

The trial court pointed out that Det. Cotton testified he could only make the cooperation known to the judge (PC-T. Vol. III, p422-423). Contrarily, Hopkins and Barnett[2] stated otherwise. Hopkins also testified Appellant told her that he

[2] The trial court's order at footnote 44, page 9, is incorrect. Appellant's mother testified to the same statement as Appellant's sister at Vol. III, p441.

was promised that things would go easier on him if he cooperated (PC-T. Vol. II, p215). Contrary to the Court's finding in footnote 44, Det. Cotton's statement is a total contradiction to the testimony given by Hopkins and Barnett. However, the trial court's order makes no determination as to their credibility.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR CONCEDING TO THE JURY THAT APPELLANT WAS GUILTY OF BURGLARY AND ROBBERY?

The standard of review for claims of ineffective assistance of counsel is set out in Strickland. An Appellant is required to plead and demonstrate: (1) unreasonable attorney performance, and (2) prejudice. Concession of guilt by counsel is more specifically set out in Florida v. Nixon, 125 S.Ct. 551; 73 U.S.L.W. 4047 (2004), as it relates to ineffective assistance of counsel.

> **Defense counsel undoubtedly has a duty to discuss potential strategies with the Appellant.** See *Strickland v. Washington, 466 U.S. 668, 688, 80 L. Ed.2d 674, 104 S.Ct. 2052 (1984)*. But when a Appellant, **informed by counsel,** neither consents nor objects to the course counsel describes as the most

> promising means to avert a sentence of death, counsel is not automatically barred from pursuing that course…
>
> **A presumption of prejudice is not in order based solely on a Appellant's failure to provide express consent to a tenable strategy counsel has adequately disclosed to and discussed with the Appellant**.

Id. (emphasis added).

The trial court found no prejudice to Appellant for two reasons. The first is Stitt "testified at the evidentiary hearing that she did, indeed, recall telling Defendant about her strategy of admitting the offenses of burglary and robbery to the jury" (PC-R. Vol. VI, p959). The trial court's order cites Volume I, page 173, of the evidentiary hearing transcript.

Actually, Stitt testified she believed she did inform Appellant (PC-T. Vol. I, p172). When pressed to state what words she used in the conversation with Appellant, Stitt stated that she was trying to save his life (PC-T. Vol. I, p173).

> Q. (By Mr. Reiter) Do you have a specific recollection of the conversation which you say you believe you spoke to Mr. Kormondy about?
>
> A. Yes. I told him we were trying to save his damn life.
>
> Q. Okay. That's it?
>
> A. Yes.

(PC-T. Vol. I, p172-173). If Stitt's above testimony at the evidentiary hearing is credible, as found by the trial court (PC-R. Vol. IV, p960), then Stitt did not tell Appellant she was going to concede guilt to the jury, only that she told Appellant she was "trying to save his damn life." Stitt couldn't remember whether Appellant approved of this strategy or not (PC-T. Vol. I, p171). The Appellant testified at the evidentiary hearing that Stitt didn't tell him she was going to concede his guilt (PC-T. Vol. II, p306-307).

The trial court's second stated reason why Appellant was not prejudiced by Stitt's concessions was because the evidentiary hearing testimony, the trial record, and the Appellant's custodial statement explained his participation in the burglary and robbery (PC-R. Vol. VI, p960). However, the trial court inappropriately relied upon Appellant's apparent guilt to justify Stitt's failure to consult with Appellant about the concessions (trial court's order footnote 58, at page 13). Only Long testified at trial to any admissions made by Appellant.

Additionally, the trial court's reliance upon Appellant's custodial statement ignores the fact that it was Stitt who permitted the statement to be introduced at trial in the first place.

Regardless of what evidence is introduced at trial, it is counsel's obligation to test the State's case. Counsel must utilize every legal option in order to require the State to prove each and every element of each offense charged and not concede Appellant's guilt without his knowledge or consultation. Perhaps counsel should have said nothing instead of throwing in the towel.

As pointed out by this Court in Nixon v. Singletary, 758 So.2d 618, 623 (Fla. 2000):

> It has also been suggested that absent this strategy, Nixon's counsel had no other options. We disagree. In every criminal case, a defense attorney can, at the very least, hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt. Without Nixon's consent to do otherwise, this should have been the strategy utilized by defense counsel.
>
> Justice Wells in his dissent speculated:
>
> A less experienced attorney, probably seeking to avoid criticism - either public, private or professional - would have tried the case differently, and probably would have left no hope at all for Mr. Nixon.

Id. at 629.

Stitt was more than just "less experienced" than Nixon's counsel, since this was her first death case.

She also testified that her friends and the victim's

friends vilified her for representing the Appellant. Yet, notwithstanding Justice Wells' insight, Stitt still conceded guilt to the jury in the same fashion as Nixon's attorney, except she didn't consult with Appellant about her intention Florida v. Nixon, 125 S.Ct. 551; 73 U.S.L.W. 4047 (2004). Moreover, there was no substantial competent evidence for the trial court to find Stitt, in fact, informed or consulted with the Appellant about conceding guilt Nixon v. State, 857 So.2d 172, 175 n7 (Fla. 2003)(Overruled on other grounds).

During opening statement, Stitt told the jury the Appellant was guilty of burglary and robbery, and, in effect, felony murder (T1. Vol V. p965-974). Stitt stated to the jury, "Namely he is guilty of burglary and participating in the robbery."

During her closing argument, Stitt again conceded guilt.

> And I told you in opening statement at the beginning of this trial that Johnny Shane Kormondy is not totally innocent. He did intend to go there and to burglarize the house (T1. Vol. VIII, p1395).

Stitt's explanation to the jury helped support the State's case of felony murder.

> What your verdict must do is to reflect the truthful and honest evaluation of the evidence and to determine what Johnny Shane Kormondy did or did not do. It's your job to determine what he intended to happen and what he did not intend to happen (T1. Vol. VIII, p1393).

* * * * *

> Now your decision is to decide on the question of felony murder. I ask you to review all of the evidence, to review all of the testimony, to rely on your own recollections as jurors. Evaluate what Shane Kormondy intended to happen when they entered that house and if you do that, it's my belief that you will return an honest, a true and fair verdict (T1. Vol. VIII, p1399).

The facts in the instant case are substantially more egregious than that in Nixon v. State, 857 So.2d 172 (Fla. 2003), because Nixon's counsel informed him of his intentions and was an experienced capital attorney.

In the instant case, Stitt did not mention anything about sparing Appellant's life in her opening or closing statement, nor did she testify at the evidentiary hearing that that was her strategy for conceding Appellant's guilt.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO IMPEACH THE STATE'S WITNESSES?

The standard of review for claims of ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668 (1984). The Strickland Court requires an Appellant to plead and demonstrate: (1) unreasonable attorney performance, and (2) prejudice.

William Long –

The trial court's order sets out some of the facts established at trial about how Stitt impeached Long, and found

that “Defendant has failed to show how he was prejudiced by trial counsel failing to ask this one specific question (Long’s felony conviction), and is therefore not entitled to postconviction relief on this basis” (PC-R. Vol. VI, p962). Outside the presence of the jury it was established that Long was, in fact, convicted of a felony (TT. Vol. VII, p1179-1180).

At trial the Court instructed the jury that they should consider whether it was proved that the witness had been convicted of a crime when considering reliability of a witness (TT. Vol. VIII, p1458). Inasmuch as the jury was specifically instructed on this issue, one has to assume that the jury would follow the law and would have given weight to the fact that Long was a convicted felon, which was not presented.

Further, and perhaps more important, Long lied at trial and the evidence to prove Long’s lie was available to Stitt, but she did not obtain a copy of Long’s probation file.

At trial neither the State nor the Defense asked Long if he had been convicted of a felony (TT1. Vol VII, p1184-1199). When asked at the evidentiary hearing why she did not impeach Long with his criminal record, especially since she had just received it, Stitt had no specific response (PC-T. Vol. I, p175).

In addition Stitt failed to impeach Long with his deposition testimony. On two occasions during trial, Long stated, “The only way they would catch the guy that shot Mr. McAdams was if they were walking right behind us” (R1. Vol. VII, p1186) and “The only way they would catch the man that shot Mr. McAdams was if they were right behind us. Word for word, that’s what he said” (R1. Vol. VII, p1201). However, Long’s deposition testimony was different. He stated, “Yeah, the only way they can catch the guy that they did this is if they were walking behind us right now” (Long deposition, page 8, on Dec. 7, 1993). According to Long’s deposition testimony, Appellant did not say, “**shot** Mr. McAdams,” he stated Mr. Kormondy said, “the guy that they **did this**.”

Further, Appellant testified at the evidentiary hearing that Long’s recollection was incorrect. He testified he told Long “if he want to catch the ones who was involved in that he would be walking behind us right now” (PC-T. Vol. II, p340).

Because Sitt did not obtain Long’s court file for his violation of probation, she was unaware of Long’s lies at trial.

At the evidentiary hearing Long testified he was told that initially his bond was set at $20,000 (PC-T. Vol. I, p54), which the Warrant confirms, and was reduced to $5,000

(PC-R. Vol. V, p848-850). However, Long did not pay any of the bond (PC-R. Vol. IV, p580-581), but was still released (PC-T. Vol. I, p59-60). At the Evidentiary hearing Long testified, "If I'm not mistaken, I got out on pretrial release. I went straight from the jailhouse across the street and signed up for it, I know" (PC-T. Vol. I, p59). At trial Stitt did not ask and Long did not mention he had a $5,000 bond that he did not have to pay to get out of jail. Edgar asked Long if he went to jail, and Long stated he did, but signed his own bond to get out (TT. Vol. VII, p1197). There was no mention of the unpaid $5,000 bond at the trial.

At the trial, Long stated he did not want to go to jail, that's why he asked Chris Roberts to repeat to law enforcement what Long told Roberts (TT1. Vol. VII, p1196). At trial, Stitt asked Long if law enforcement made him a deal so he wouldn't have to go to jail. Long stated that the only promise made to him was he wouldn't be locked up with Kormondy (TT1. Vol. VII, p1196). However, at the evidentiary hearing Long testified:

> Q. They were saying they weren't going to arrest you. What else?
>
> A. Yes, sir, they were just going to talk to me and find out what I knew. When I got down there, the prosecuting attorney or something said that everything more or less that I had said wasn't good enough, he needed me to wear a wire. I said, well,

I really don't care to wear a wire. He said, well, either you're going to wear a wire or you're going to go across the street.

Q. I'm sorry?

A. He said I was going to do what had to be done or more or less I was going to go to jail.

(PC-T. Vol. I, p55-56). Long's evidentiary hearing testimony contradicts his trial testimony about not being promised that he wouldn't go to jail. Whether Long was arrested or not, he believed that if he wore a wire he wouldn't be arrested. Neither Stitt nor Edgar questioned Long with any detail about his arrest or wearing a wire.

Another lie Long told at trial was a response to Mr. Edgar's question:

Q. And no one spoke up on your behalf on any violation of probation.

A. No.

(TT. Vol. VII, p1197-1198).

However, at the evidentiary hearing, Long stated:

Q. Did you have conversation with Mr. Hall or Mr. Cotton regarding your prosecution or anything that it would do for you?

A. When it came up when they gave me the Public Defender's Office, I called and they figured out it was going to be a conflict of interest. They gave me Peter W. Mitchell as a court-appointed attorney. I went and met with him. He told me to pack my toothbrush I was going to jail for violation of probation.

I called Allen Cotton and he told me if I—

Q. I'm sorry?

A. I contacted **Allen Cotton**. He said if I ran or did not show up for court, that he would find me, which is understandable. He told me to go to court. I went to court. **He stood up beside me, he talked to the judge, and the judge put me on six months' community control.** And I completed it with flying colors. Never had any problems whatsoever.

(PC-T. Vol. I, p60-61).

Stitt's inadequate investigation and failure to impeach a key state witness with a prior felony conviction, as well as not revealing benefits the witness received from the State, fell below expected standards. This undermined the confidence in the outcome of the trial State v. Gibson, 557 So.2d 929 (Fla. 5th DCA 1990).

Pursuant to Appellant's newly discovered evidence claim, the trial court considered some of the above facts in its order at page 43 (PC-R. Vol. VI, p990-994). While Appellant's 3.851 Motion did not technically express the above facts as ineffective assistance of counsel, the facts were expressed in Appellant's Amended 3.851 Motion as newly discovered evidence. The State was aware of the facts Appellant intended to visit and did not object during the evidentiary hearing. Therefore, the trial court should have viewed the facts as they related to counsel's ineffective performance, as should this Court.

Cecilia McAdams –

The trial court's order restates Stitt's testimony that she was never told by the court to take it "easy" on Mrs. McAdams (PC-R. Vol. VI, p963).

The trial court's order, at page 16, explains that Stitt "testified that she did not call Deputy Scherer as an impeachment witness to Mrs. McAdams' testimony because she did not know of any material differences between Mrs. McAdams' trial testimony and her previous statement given to the deputy" (PC-R. Vol. VI, p963).

However, Mr. Davis (co-counsel of Stitt) was aware of potential inconsistencies.

> Q. (By Mr. Reiter) You were present at Mr. Buffkin's trial during the testimony of Mrs. McAdams?
>
> A. I don't have a specific recollection of that. I know I had planned on being there because there was some confusion as to whether or not which participant was in what room and what role each one played. There were inconsistent versions floating around and I know I had intended on being there…

(PC-T. Vol. II, p291). The trial court's order makes no mention of what Davis knew about inconsistent statements. Further, Davis was aware of the strategy he and Stitt would use in examining Mrs. McAdams. Although Davis didn't use the term "easy," he did use the term "delicate."

> Q. (By Mr. Edgar) Mr. Davis, you never told

anyone in this case that you were told by Judge Kuder that you were to back off or to not go hard on Cecilia McAdams?

A. No, sir.

Q. That didn't happen did it?

A. Not that I'm aware of.

Q. Judge Kuder didn't tell you anything like that?

A. No, sir.

Q. If the defendant's mother and sister said that you and Ms. Stitt visited them and told them that, that would be untrue wouldn't it?

A. That is correct. And Mr. Edgar, may I just to shed more light on this, you know, this may have come up in the context of in terms of cross-examining Ms. McAdams in terms of tactics used in the courtroom and the manner of cross-examining her, we may have discussed in the presence of Mr. Kormondy or either his family that it was a **delicate** matter, that this lady had been through a severe traumatic experience and that it was going to be difficult to cross-examine her considering what she had been through. So that may be where that comes from. I'm not sure.

* * *

Q. And it was your strategy as probably pretty much elementary strategy not to alienate the jury by attacking this witness, Ms. McAdams, this victim?

A. That is correct. There was no doubt that she had been the victim of a heinous crime that was uncontroverted and both – I recall Ms. Stitt and I discussing that, you know, we will have to proceed **very carefully** with this woman given all that she had been through.

(PC-T. Vol. II, p282-283). While Stitt and Davis were concerning themselves with being “delicate” and not alienating the jury, they forgot about their obligation to the Appellant; test the State’s case. It was their duty to expose any flaws in Mrs. McAdams’ recollections. They could have done that “delicately.”

As to Deputy Scherer’s deposition, the trial court referred to the credibility of his deposition testimony rather than its content regarding inconsistencies by Mrs. McAdams. The trial court stated, “Defendant has not demonstrated that Scherer, who was not an investigator, was trained to conduct a proper interview or to take proper notes, nor has he shown that Scherer himself had confidence in his recollection of Mrs. McAdams’ statement” (PC-R. Vol. VI, p9640-964). Edgar was present at Deputy Scherer’s deposition, and, in fact, cross-examined Deputy Scherer (PC-R. Vol. V, p854-867). If Edgar had been concerned about Deputy Scherer’s abilities, Edgar could have asked those questions during the deposition. He didn’t.

Deputy Scherer was the first law enforcement officer at the scene on July 11, 1993 (PC-R. Vol. V, p855). Deputy Scherer questioned Mrs. McAdams at that time (PC-R. Vol. V, p856), and some of her answers reflect inconsistencies with

her trial testimony. Stitt did not call Deputy Scherer at trial, nor did she question Mrs. McAdams about her statement to Deputy Scherer. Stitt's explained at the evidentiary hearing she was unaware of any material differences (PC-T. Vol. I, p182).

The following excerpts represent Mrs. McAdams' statements to Deputy Scherer, as well as her testimony at trial regarding the same subject matter.

TRIAL TESTIMONY - Mrs. McAdams testified that she was sexually assaulted on the toilet in the master bedroom bath and on the floor in the vanity area of her home (TT1. Vol. VI, p1074).

TIM SCHERER'S DEPOSITION - Deputy Scherer testified that Ms. McAdams told him that the sexual assault occurred on the bed (PC-R. Vol. V, p859).

TRIAL TESTIMONY - Mrs. McAdams testified the first shot she heard came from the kitchen and the second shot she heard came from the bedroom (TT1. Vol. VI, p1080-1083).

TIM SCHERER'S DEPOSITION - Deputy Scherer testified that Mrs. McAdams told him that the first gunshot she heard was in the bedroom and the second gunshot came from the kitchen (PC-R. Vol. V, p860).

TRIAL TESTIMONY - Mrs. McAdams testified only one individual was in the bedroom with her when she heard the gunshot that came from the front of the house (TT1. Vol. VI, P1080-1083).

TIM SCHERER'S DEPOSITION - Mrs. McAdams told him there were two assailants in the bedroom when the gunshot was fired in the bedroom (PC-R. Vol. V, p860).

TRIAL TESTIMONY - Mrs. McAdams testified that one of the assailants, while in the bedroom, had a cloth wrapped around his head and that the cloth did not cover his face. She further testified that he had mousy brown, stringy hair to his collarbone (TT1. Vol. VI, p1076).

TIM SCHERER'S DEPOSITION - Mrs. McAdams told him that the other two assailants, not Buffkin, had on a hood or masks (PC-

R. Vol. V, p858). She also could not identify their clothing other than they were dark and wore a ski mask or hood (PC-R. Vol. V, p861).

TRIAL TESTIMONY – Mrs. McAdams testified at trial that three individuals raped her (TT1. Vol. VI, p1088).

TIM SCHERER'S DEPOSITION – Deputy Scherer testified that Mrs. McAdams told him that two individuals raped her (PC-R. Vol. V, p860).

The trial court's order was fixated upon the fact that Deputy Scherer didn't testify at the evidentiary hearing or that Mrs. McAdams wasn't called at the evidentiary hearing. Neither one's testimony at the evidentiary hearing would have ameliorated Stitt's failure to impeach Mrs. McAdams at trial. Deputy Scherer's deposition and report were available at the time of trial, which is when Mrs. McAdams should have been impeached. The trial court erroneously found that Stitt's failure to impeach Mrs. McAdams was not ineffective. The court's conclusion is wrong. See Kegler v. State, 712 So.2d 1167 (Fla. 2nd DCA 1998).

> Trial counsel's failure to impeach Caraballo with the statements he made on the night of the murder was not reasonable under the circumstances of this case. Caraballo did not mention Kegler or the version of events he testified to at trial until Sandra Thomas came forward five months after the murder. Up until that time, he asserted that two men

> who he could not identify had shot the victim. This is a significant contradiction in Caraballo's position. There is a **reasonable probability** that the result of Kegler's trial would have been different but for counsel's failure to bring this information to the jury's attention. (emphasis added).

The trial court also concluded (speculated) that even if Stitt attempted to impeach Mrs. McAdams the verdict would not have been different at either the trial or penalty phase (PC-R. Vol. VI, p964). The trial court cites the wrong standard; The standard is reasonable probability the result would be different Id.

The trial court found no prejudice on two grounds. Mrs. McAdams' testimony was clear, affirmative, and very credible at trial (PC-R. Vol. P964). The trial court's opinion as to the quality of Mrs. McAdams' trial testimony and its speculation that the jury would not dismiss her testimony over Deputy Scherer's is beside the point (PC-R. Vol. V, p965). The trial court should have focused on the reasonable probability of a different result if the jury believed Deputy Scherer's testimony, which questioned the accuracy of Mrs. McAdams' recollection.

The trial court's order asserts that Appellant would still have been found guilty and sentenced to death, even if he wasn't the shooter (PC-R. Vol. V, p965). This assertion

was based upon the fact that a jury found Hazen (co-defendant) guilty and also sentenced him to death. The trial court's order states Hazen's sentence was overturned because he was merely a "follower," while Appellant was an instigator (PC-R. Vol. V, p965).

In its assessment, the trial court correctly states that the trial evidence infers Appellant was an instigator prior to entering the McAdams' residence, since his vehicle was used, and he received proceeds from the crime. However, the trial records also establish Mr. Hazen received proceeds of the crime, raped Mrs. McAdams, threatened to blow her head off, and lied about his participation in the crimes during his trial.

While Appellant may have been the driver of the vehicle, Appellant was not previously aware of Buffkin's intent to burglarize an occupied dwelling. According to Buffkin's evidentiary hearing testimony, and Appellant's statement, robbing an occupied dwelling was solely Buffkin's idea (PC-T. Vol. I, p78-79). To demonstrate Appellant's lack of intent to burglarize an occupied residence, consider the following: When Buffkin exited the vehicle to enter the McAdams' residence, he had to urge Appellant and Hazen to follow: "come on, come on, come on" (PC-R. Vol. IV, p602-603); when Buffkin

entered the garage, Appellant and Hazen remained outside by the front of the garage (PC-R. Vol. IV, p604). The Appellant and Hazen did not go into the garage until after Mr. McAdams answered the door, and Buffkin called out urging them forward (PC-T. Vol. p605). This clear hesitation confirms that Appellant and Hazen were wary about entering the residence.

Other than Mrs. McAdams' questionable recollection at trial, no evidence was presented at any of the two trials or evidentiary hearing that Appellant raped Mrs. McAdams. Appellant offered his DNA again (PC-T. Vol. II, p338) to establish he didn't rape Mrs. McAdams. Although, Edgar asserted that he possessed DNA, he failed to introduce it at trial or at the evidentiary hearing. His statements to the contrary are unsupported by his failure to produce any DNA evidence that the Appellant raped Mrs. McAdams. However, Hazen admitted to raping Mrs. McAdams (PC-T. Vol. I, p114), as did Mr. Buffkin (PC-T. Vol. I, p88). While Appellant may be more culpable than Hazen before entering the McAdams' residence, the evidence establishes that Appellant was less culpable than either Buffkin or Hazen after entering the residence, which is when Mr. McAdams was killed and Mrs. McAdams was raped.

Notwithstanding the trial court's finding, Appellant was

prejudiced twice by counsel's failure to impeach. First, the State acquiesced to the suppression of Appellant's statement to law enforcement. Based upon what was introduced at trial, and without Appellant's statement, the only direct evidence placing Appellant at the scene was Long's testimony. The lack of credibility of Long's testimony has already been explained above.

Second, Mrs. McAdams' prior inconsistent statements would have established that her memory was distorted and rendered unreliable due to the trauma she endured. The impeachment of the State's key witnesses and the lack of Appellant's statement would have reasonably resulted in a different outcome.

Further, Stitt's failure to impeach the State's key witnesses could have had a profound effect on the penalty phase, as well as the guilt phase. In Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984), the Court stated:

> The failure of counsel to use the statements to impeach the Johnsons may not only have affected the outcome of the guilt/innocence phase, it may have changed the outcome of the penalty trial. As we have previously noted, jurors may well vote against the imposition of the death penalty due to the existence of "whimsical doubt." In rejecting the contention that the Constitution requires different juries at the penalty and guilt phases of capital trial, we stated:

> The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained *any* doubt whatsoever. There may be no *reasonable* doubt -- doubt based upon reason -- and yet some *genuine* doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt -- this absence of absolute certainty -- can be real.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO MOVE FOR DISQUALIFICATION OF JUDGE KUDER AND TO WITHDRAW FROM REPRESENTATION BEFORE THE FIRST TRIAL?

The standard of review for claims of ineffective assistance of counsel is set out in Strickland. An Appellant is required to plead and demonstrate: (1) unreasonable attorney performance, and (2) prejudice.

Disqualification of Judge –

Judge Kuder informed all three defendants of his relationship with Mr. McAdams and that Judge Kuder's wife worked for the State Attorney's Office (R1. Vol. I, p16-20). In its order, the trial court acknowledged at the evidentiary hearing that Stitt admitted she advised Appellant not to seek disqualification of Judge Kuder (PC-R. Vol. VI, p966). The trial court found Appellant failed to demonstrate any bias on the record while Judge Kuder presided over the trial and therefore Appellant failed to show how counsel was deficient

(PC-R. Vol. VI, p966). Appellant concedes that he has not shown any specific instance where Judge Kuder expressed bias on the record.

However, Kevin Beck (Mr. Buffkin's trial attorney) testified that he had informed Stitt that Judge Kuder sought "good press" from a journalist (PC-T. Vol. I, p35) off the record. The attorneys in Buffkin's case approached Judge Kuder off the record about the journalist (PC-T. Vol. I, p37). Beck informed Stitt of this event (PC-T. Vol. I, p38).

It is Appellant's contention that Stitt had unclean hands (conflict of interest discussed below) and was in no position to request or advise Appellant to waive Judge Kuder's conflict, especially since she didn't believe Judge Kuder could waive the conflict.

At a hearing held on October 28, 1998, (R2. Vol. I, p22), Stitt argued to the Court on two occasions that she believed Judge Kudger's conflict was not waiveable.

> MS. STITT: Right. I think in this situation, that the conflict is so clear and so **not waiveable** that the Court may have ruled differently if this were the conflict… (R2. Vol. I, p56-57).
>
> * * * *
>
> MS. STITT: Judge you know, Ronnie and I are ready to try the case. We have our expert. We're scheduled to have Russ depose him. We're ready to go. You know, we, too, have compassion for the

> victim and the victim's family. How could you not?
>
> My concern is like Mr. Edgar's. If it gets to another counsel, it's going to mean a delay. This is not your ordinary case. This is not an ordinary – even an ordinary death case. My concern, as is Mr. Edgar's, is to have an error-proof/free proceeding, and **I just don't think these things are waiveable.** (R2. Vol. I, p70).

Based upon Stitt's argument that Judge Kuder's conflict, as well as her own, was not waivable, she either made a misrepresentation to the court or she incorrectly advised Appellant to waive the conflicts she believed were unwaiveable.

Ms. Stitt's Conflict of Interest - Like judges, our justice system does not demand that lawyers discard their feelings, beliefs, and prejudices, only that they put them aside for the benefit of their clients. At times, however, human nature overrules even our most sincere attempts at accomplishing what our minds dictate. But in order to uphold our requirement of zealous advocacy and loyalty to the client, an attorney should not be permitted to deny the effects of those conflicts merely by going through the motions and then asserting that the conflict had no effect. The results of those conflicts are inherent in this case, regardless of Stitt's proclaimed denials. While it is understandable how Stitt may have been affected by this case, given her personal feelings, as shown

below, she should have demanded her employer remove her from this case, or, at the very least, inform the trial court about her conflict of interest on the record.

The trial court's order reiterates Appellant's claim that Stitt's conflict of interest included, among other issues, that "her lack of action was inspired by her own personal prejudice against the Defendant" (PC-R. Vol. VI, p965). However, the order fails to discuss the specific events shown by Appellant contained in the record and established at the evidentiary hearing. Contrary to Stitt's own admission at the evidentiary hearing that her relationship with Mr. McAdams was a potential conflict (PC-T. Vol. I, p153), the trial court found no conflict of interest existed (PC-R. Vol. VI, p967). The trial court is incorrect.

The actions and omissions of Stitt, explained below, suggest that she had a conflict of interest Hunter v. State, 817 So.2d 786 (Fla. 2002).

At the evidentiary hearing Stitt testified as to her personal feelings about representing Appellant. "I would have been off that case like a shot because I didn't want to be on it in the first place" (PC-T. Vol. I, p161), "I wanted off Mr. Kormondy's case. I really – it was unpopular with not only Mr. McAdams' group that I went to high school with, I was

getting calls from my group that I went to high school with, you know, how can you defend him…" (PC-T. Vol. I, p191). "I got phone calls, and it was also – you know, my name had been in the paper. I ran into people at social functions. It made me feel pretty creepy" (PC-R. Vol I, p199). She further testified that she had no sympathy for Appellant (PC-T. Vol. I, p183).

Stitt's personal feelings about this case, whether she acknowledged it or not, affected her performance, and ultimately prejudiced Appellant:(1) this was Stitt's first death case as lead chair (PC-T. Vol. I, p128), (2) she had a conflict of interest, which doesn't appear on the record until resentencing in 1998 (see below), (3) she withdrew the Motion to Suppress without consulting with or obtaining permission from Appellant (PC-T. Vol. I, p131-133, 136), (4) she conducted numerous hearings in the absence of the Appellant without a written waiver, (5) she conceded Appellant's guilt of felony murder without consulting with or obtaining Appellant's permission, (6) she failed to obtain available records to impeach William Long - a key witness for the State, and (7) she failed to impeach Ms. McAdams with available inconsistent statements.

Stitt had an obligation to inform the Court, on the

record, of any potential conflict of interest Cuyler v. Sullivan, 446 U.S. 335 349; 64 L.Ed. 2d 333; 100 S.Ct. 1708 (1980)(Defense Counsel have an ethical obligation to avoid conflicting representations and to advise the Court promptly when a conflict of interest arises during the course of trial).

Stitt testified at the evidentiary hearing she believed she informed Judge Kuder and Edgar early on about her relationship with Mr. McAdams in chambers (PC-T. Vol. I, p155-156).

> Q. Do you have a specific recollection of when it was before it came back the second time, talking about the first trial now –
>
> A. Uh-huh (indicating affirmatively).
>
> Q. – what hearing you appeared at where you told the court of your potential conflict in the case?
>
> A. I know it was early on. I know Mr. Edgar was aware of it because I spoke with him about it.
>
> Q. You spoke with Mr. Edgar?
>
> A. Uh-huh (indicating affirmatively).
>
> Q. It seems to me it was a chambers conference, if I remember correctly, and I'm not sure that I do. I also spoke to Judge Kuder about it, and told him about my tangential relationship with Mr. McAdams. And I also had a discussion with Mr. Kormondy about it.

(PC-T. Vol. I, p155-156).

Excerpts from the record below support the assertion that Stitt failed to report, on the record, the public defender's conflict of interest, or hers, until 1998.

On March 4, 1994, the Appellant wrote a letter to Stitt (PC-R. Vol. IV, p588) asserting a conflict, and a letter to the court on March 10, 1994 (PC-R. Vol. IV, p592) requesting the Public Defender's Office be removed from his case because of a conflict. On March 21, 1994, Judge Kuder and his judicial assistant wrote letters to Appellant (PC-R. Vol. IV, p592-593) informing him of a hearing on the issue to be held on March 30, 1994. Although the clerk's docket makes reference to a hearing on Appellant's request for substitution of counsel being denied, Appellant's counsel could find no transcript of such a hearing. Judge Tarbuck's order makes reference to these letters (PC-R. Vol. VI, p969), but dismisses them for lack of specificity. While the Appellant informed the court of a general conflict in his letters, Judge Kuder never asked Stitt if she had a conflict or if the public defender had a conflict.

Moreover, if Stitt is credible, as found by Judge Tarbuck (PC-R. Vol. VI, p967), then Judge Kuder and Edgar were aware of Stitt's relationship with the victim and failed to confront Stitt or Appellant on the record until 1998.

Even if Judge Tarbuck's finding that the letters lack specificity is correct, Judge Kuder was put on notice of a potential conflict by Stitt in chambers and failed to inquire of counsel on the record.

SECOND PENALTY PHASE PRE-TRIAL RECORD

A hearing was held on May 14, 1998, on Appellant's motion to dismiss the Public Defender's Office. Judge Kuder asked Appellant to specify what conflict he was complaining about. He was unable to articulate any (R2. supp. Vol. I, p93). However, Stitt knew about her relationship with the victim and the simultaneous representation of Long by the Public Defender's Office and she didn't mention it to the Court. If the Court was aware of the conflicts, as stated by Stitt, the Court failed to mention it.

Another hearing was held on July 21, 1998, without the presence of the Appellant (R2. supp. Vol. I, p147). Edgar commented that Stitt had known the victim from high school (R2. supp. Vol. I, p147). This was the first time the record shows Stitt's relationship with the victim. The trial court was present when Edgar mentioned this and the Court made no comment about that fact whatsoever (R2. supp Vol. I, p147). Stitt stated to the court, "You know, I don't remember whether we put it on the record about my going to high school with the

victim or not. I know it was discussed with Mr. Kormondy" (R2. Supp. Vol. I, p151).

Again, the Court made no comment. Either the Court was oblivious to her statement, or he must have already known about Stitt's acquaintance with the victim. The Court did not ask Stitt about her statement, even though a hearing about the issue of Stitt's conflict was held previously on May 14, 1998.

Judge Tarbuck found Stitt's testimony credible that she informed Appellant of her relationship with Mr. McAdams, and that her relationship did not amount to a conflict, and therefore, could not have prejudiced Appellant (PC-R. Vol. VI, p967). First, prejudice is not the standard. Second, Stitt's credibility, especially her selective memory, should be substantially questioned. She could barely remember anything about the case during direct examination (PC-T. Vol. I, p125-185). Common sense dictates if Appellant knew of Stitt's relationship with the victim or that the public defender represented Long at the same time, he would have expressed them in his 1994 letters, in his motion, and testified to those facts at the May 14, 1998 hearing.

The Appellant filed a Motion to Disqualify Judge Kuder (R2. Vol. I, p89-91) and another Motion for Substitution of

Counsel (R2. Vol. I, p92-93) in October 1998. A hearing was conducted on the motions on October 28, 1998 (R2. Vol. I, p22-88).

At that hearing, Stitt was questioned about her potential conflict and whether she informed the Appellant or the Court. The relevant portions of that inquiry are as follows:

> Q. Now, did you convey to Mr. Kormondy your prior relationship and whether or not you knew Mr. Gary McAdams?
>
> A. Yes, I did.
>
> Q. At some point?
>
> A. When I was first appointed to represent Mr. Kormondy, when Mr. Kormondy was moved to the Santa Rosa County Jail, I have notations in my file of the times that I went and spoke with him. And that was one of the first things that we talked about, was that I had known Mr. McAdams, that I considered us to be acquaintances. We talked about that conflict. Mr. Kormondy advised me that at that time he felt comfortable. I assured him, as an officer of the Court, that I would do the job that I've been appointed to do, and at that time he felt comfortable with it.
>
> **Q. Okay. Did you ever raise this issue and have it put on the record?**
>
> **A. No, I never.**
>
> Q. During any proceedings?
>
> A. I didn't think that there was a reason to do that.

(R2. Vol. I, p31-32).

The Appellant was also questioned at that hearing

concerning his Motion to Substitute Counsel. When asked if he remembered Stitt informing him of her relationship with Mr. McAdams, he stated, "I don't remember being aware," "…if she talked to me about it…," "…I don't remember talking about it…" (R2. Vol. I, p22-51).

Appellant wrote a letter to Stitt informing her he was going to ask the court to dismiss the Public Defender's Office due to a conflict of interest on March 4, 1994 (PC-R. Vol. IV, p588).

It is quite clear Stitt, Edgar, and the Court had knowledge early on in the proceedings of the conflicts, but failed to report it on the record. These conflicts suggest at least, that Stitt's performance was affected by her personal feelings, and therefore, prejudiced Appellant.

Public Defender's Simultaneous Representation of William Long – In its order denying Appellant's 3.851 Motion, the Court concluded that the dual representation of Long and Appellant did not constitute a conflict of interest, nor has Appellant shown any prejudice (PC-R. Vol. VI, p968). The trial court's finding is wrong. See Lee v. State, 690 So.2d 664 (Fla. 1st DCA 1997)(discussed further below); Guzman v. State, 644 So.2d 996 (Fla. 1994)(a trial court is not permitted to reweigh the facts considered by the public defender in determining that a

conflict exists. This is true even if the representation of one of the adverse clients has been concluded).

Long's court file reflects that Mr. Joseph Kirkland (assistant public defender) was originally appointed to represent Long on December 4, 1992. Kirkland appeared on Long's behalf on January 19, 1993. Kirkland was again appointed to represent Long for his violation of probation on August 20, 1993(PC-R. Vol. V, p842). On September 9, 1993, Kirkland generated a memorandum informing Mr. Earl Loveless, chief assistant public defender, that he represented Long and sought advice about withdrawing from Long's case (PC-R. Vol. IV, p591). Kirkland withdrew on September 16, 1993 (PC-R. Vol. V, p843).

At the evidentiary hearing Loveless agreed that the Public Defender's Office simultaneously represented Appellant and Long (PC-T. Vol. II, p387). He further testified the office policy is to retain the case with the client who had the longest relationship with the public defender. Loveless agreed that Long had, in fact, had the longer relationship with the Public Defender's Office. However, because Loveless believed that Kirkland had not spoken with Long about his violation of probation, the public defender withdrew from his case (PC-T. Vol. II, p383-384). It must be remembered that

Long assisted law enforcement by wearing a wire just prior being represented by the Public Defender's Office.

The order denying the 3.851 Motion cites Loveless' evidentiary hearing testimony as support, "…the Public Defender's Office was assigned to represent Mr. Long after the Public Defender's Office had already established an attorney-client relationship with Defendant. No real work had begun on Mr. Long's case; Loveless testified that the assistant public defender assigned to Long's case had not even spoke with Mr. Long when the conflict was discovered" (PC-R. Vol. VI, p967-968).

In actuality, the record reflects that Loveless' statement was a result of perusing the public defender's file some time ago and not from a face-to-face conversation with Kirkland (PC-T. Vol. II, p.383). Loveless testified he hadn't reviewed Long's court file. Long testified he called the Public Defender's Office and it was determined that a conflict existed (PC-T. Vol. I, p160-161), therefore, it is obvious Long spoke to someone in the Public Defender's Office about his case.

The trial court's order also fails to discuss Lee v. State, 690 So.2d 664 (Fla. 1st DCA 1997), the facts of which are similar to the case at bar, which coincidentally involved

Loveless.

> When Defense Counsel makes a pretrial disclosure of a possible conflict of interest with the Appellant, the trial court must either conduct an inquiry to determine whether the asserted conflict of interest will impair the Appellant's right to the effective assistance of counsel or appoint separate counsel. *Holloway, 435 U.S. at 484, 98 S.Ct. at 1178-79.* In this case, there can be no doubt that attorney Loveless and the Appellant had an actual conflict of interest. Attorney Loveless had personally represented a primary witness against the Appellant in the past **and his office had also represented that witness about the time he was assisting law enforcement officers in their effort to obtain a confession from the Appellant.**

In Lee Loveless informed the trial court of his potential conflict. In this case, it is undisputed from the record Stitt did not inform the court on the record of her conflict until 1998. While the court's order denying Appellant's 3.851 Motion states that no conflict existed, the Court in Lee found otherwise where factual circumstances existed similar to Appellant's case.

For example, the following common facts existed in both cases: the Public Defender's Office represented Long prior to Appellant, the Public Defender's Office represented Long shortly after he assisted law enforcement officers in their effort to obtain a confession from Appellant by wearing a wire, Stitt withdrew Appellant's Motion to Suppress, Appellant wrote letters to Stitt and the Court complaining about a

conflict of interest, and Stitt felt that her conflict did not affect her performance, yet she testified she wanted off the case.

The Court in Lee also expressed the difference between the standards of proof for a conflict of interest raised pretrial from raising the claim in postconviction.

> The decisions in ***Glasser*** and ***Holloway*** make it clear that an error in accepting a waiver of the right to conflict-free counsel cannot be excused as harmless error on direct appeal. n2 If, as in this case, the Appellant preserves the conflict issue by raising it before trial and does not validly waive the conflict, the trial court's failure to conduct an inquiry or appoint separate counsel in accordance with ***Holloway*** requires that the resulting conviction be reversed. We point out, however, that this rule of automatic reversal is limited to a conflict issue preserved for review on direct appeal. A different rule would apply if the validity of a waiver of the right to conflict-free counsel were first raised in a postconviction proceeding. **When ineffective assistance of counsel is first asserted in a postconviction motion, the Appellant must show that the conflict impaired the performance of the defense lawyer. *Cuyler v. Sullivan 446 U.S. at 348.* Even then, it is not necessary to show that counsel's deficient performance resulting from the conflict affected the outcome of the trial. As the Court held in Sullivan, prejudice is presumed**.

Id. at 669. (emphasis added).

Although Stitt asserted at the evidentiary hearing that her acquaintance with Mr. McAdams did not affect her representation of Appellant, her personal feelings, her desire

to get off the case from the beginning, being harassed by friends, and having no sympathy for Appellant say a great deal about her deficient performance: failure to inform the court of a conflict of interest on the record, withdrawal of Motion to Suppress with consulting Appellant, concession of Appellant's guilt, oral waiver of Appellant's presence at hearings, advising the Appellant not to disqualify the judge (while at the same time she had a conflict), and failure to impeach key State witnesses.

In Hunter v. State, 817 So.2d 786, 791 (Fla. 2002), this Court also cited Cuyler as holding that the issue of conflict of counsel raised in postconviction must identify specific evidence in the record that suggests his or her interests were compromised and such conflict had an adverse effect on counsel's performance. Appellant contends that he has met that burden, notwithstanding the trial court's order.

However, Appellant contends that neither Lee or Hunter explain what result occurs when "special circumstances" exist, like in this case, as mentioned in Cuyler. Although the Court in Cuyler did not specifically explain the meaning of "special circumstances," Appellant contends that the Court must have meant where a conflict of interest is raised for the first time in postconviction, and the trial court knew or should

have known of the conflict of interest, prejudice is presumed, as on direct appeal.

> **Defense Counsel have an ethical obligation to avoid conflicting representations and to advise the Court promptly when a conflict of interest arises during the course of trial. n11 Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist.** n12 Indeed, as the Court noted in *Holloway, supra, at 485-486,* trial courts necessarily rely in large measure upon the good faith and good judgment of Defense Counsel. "An 'attorney representing two Appellants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.'" *435 U.S., at 485,* quoting *State v. Davis, 110 Ariz. 29, 31, 514 P. 2d 1025, 1027 (1973).* Unless the **trial court knows or reasonably should know** that a particular conflict exists, the Court need not initiate an inquiry. n13

Id. at 346. (emphasis added).

The holding of the court in Cuyler specifically utilized the words “absent special circumstances.” The court’s reference to “special circumstances” is written directly after the court denoted an attorney’s ethical obligation to inform the court of a potential conflict and just before stating that the court may assume no conflict exists unless counsel informs the court. The words “absent special circumstances” must have some meaning to the court or the court would not have expressed them.

Appellant contends that Cuyler stands for the proposition that if a trial court knew or should have known of the potential conflict and fails to act, then a claim in postconviction would result in the same relief as if raised in direct appeal.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE DURING REPRESENTATION OF APPELLANT FOR THE SECOND PENALTY PHASE PROCEEDING?

The standard of review for claims of ineffective assistance of counsel is set out in Strickland. An Appellant is required to plead and demonstrate: (1) unreasonable attorney performance, and (2) prejudice.

Appellant's waiver of presentation of mitigation to the jury at the recommendation of his attorney was invalid because Defense Counsel failed to investigate.

At the close of the State's case, Mr. Glenn Arnold (Appellant's penalty phase counsel) informed the Court the Appellant would not be presenting mitigation. Mr. Edgar (assistant state attorney) requested the Court to question the Appellant about his waiver. Arnold was permitted to question the Appellant about his waiving of statutory and nonstatutory mitigation (TT2. Vol. III, p483).

The trial court's order denying Appellant's 3.851 Motion found that Arnold properly investigated possible mitigation

and therefore, Appellant's waiver was valid (PC-R. Vol. VI, p972). The trial court's order relied upon some of Arnold's testimony to reach his conclusion: "speaking with Defendant's mother on a number of occasions, speaking with an expert, and speaking with penalty phase counsel about possible mitigation" (PC-R. Vol. VI, p971). However, even if true, the investigation is still deficient. Further, the facts stated by the court have been somewhat distorted in its order.

Arnold's testimony concerning Appellant's mother:

> Q. Okay. Could you please tell the Court what you did with regard to investigation of this case?
>
> A. Well, I've talked to, of course, Mr. Kormondy. I've talked to his mother a number of times.
>
> Q. How many?
>
> A. Gosh, I don't know.
>
> Q. All in all, how much time did you spend with his mother?
>
> A. All of the times, as I recall, was over the telephone.

(PC-T. Vol. II, p258).

> Q. Did you speak to his sister or brother?
>
> A. I don't remember.

(PC-T. Vol. II, p259)[3]

[3]Laura Hopkins, Appellant's sister, testified that Arnold did not speak with her (PC-T. Vol. II, p208). Willis Halfacre, Appellant's brother, testified that Arnold never contacted him

Mr. Arnold's testimony about speaking with experts:

Q. Well, if your record is void, it wouldn't tell me, so that's why I'm asking you. I don't find anything in the record indicating what you had done.

So, I'm asking you, did you speak to any expert?

A. I don't recall speaking to any expert.

Q. Did you hire an expert?

A. No.

(PC-T. Vol. II, p259)(emphasis added).

Cross-examination of Arnold

Q. It's true, is it not, that Dr. Larson testified in mitigation in the first trial, but I pointed out the fact that the entire results of his examination shows that when given the MMPI, the defendant on the F malingering scale showed he was faking it.

A. I forgot and I didn't tell him correctly. **It seems like I did talk to Jim Larson.**

(PC-T. Vol. II, p266)(emphasis added).

Arnold's testimony about speaking with previous mitigation counsel:

Q. Did you get a copy of his records, school records, medical records?

A. What ever records were in the file that Mr. Davis had, I reviewed.

Q. Did you speak to Mr. Davis?

(PC-T. Vol. II, p223). Lane Barnett, Appellant's mother, testified she spoke to Arnold on two occasions, once in his office and once before court, for a total of 20 to 25 minutes (PC-T. Vol. II, p237).

A. Seems like I did, yes.

Q. Did he offer you help in preparing or presenting mitigation?

A. He did offer that to start with.

Q. Did you utilize what he offered?

A. No.

(PC-T. Vol. II, p259). (emphasis added).

Arnold was not certain of anything he did while preparing for mitigation. Yet, the trial court relied upon Mr. Arnold's "seems like I did" testimony.

There was conflicting testimony between Arnold and Davis as to whether Appellant refused to present mitigation to the jury. Arnold testified that Appellant didn't want his history of drugs and alcohol placed before the jury (PC-T. Vol. II, p257, 261-262). Davis represented Appellant in the penalty phase of Appellant's first trial and began representation of Appellant on remand until Arnold substituted for the Public Defender's Office (PC-T. Vol. II, 279). Davis testified that although Appellant did not want his family dragged through the mud, the Appellant never told Davis not to exclude any evidence from mitigation (PC-T. Vol. II, p281). The trial court's order makes no mention of Davis' testimony in weighing Arnold's testimony for accuracy. This is important because Appellant testified at the evidentiary hearing he never told

Arnold he didn’t want mitigation presented to the jury, only that he didn’t want his mother to testify (PC-T. Vol. II, p307). When asked why Arnold did not present mitigation, Appellant testified that Arnold told him that because the State was pressing the issue of premeditation the case would come back, so there was no need to present mitigation (PC-T. Vol. II, p308). Arnold expressed at the evidentiary hearing that he was concerned about premeditation and argued to the court not to consider it (PC-T. Vol. II, p272). Appellant also testified that Arnold did not tell him what was being done in preparation for the penalty phase (PC-T. Vol. II, p309). Appellant testified that he waived mitigation before the court because he was following Arnold’s advice (PC-T. Vol. II, p309).

The record appears to indicate that Davis and Arnold had two different strategies about the presentation of mitigation, and Appellant followed the advice of the attorney who was representing him at the time. However, Davis at least investigated thoroughly, while Arnold relied upon the State seeking premeditation.

On March 1, 1999, Arnold filed a Notice of Intent Not to Present Evidence of Mitigating Circumstances, which was signed by the Appellant (PC-R. Vol. IV, p595), and filed before

Arnold finished reading the record. However, at a pretrial conference held on March 23, 1999, without the Appellant's presence, Arnold acknowledged to the court that he had not read all of the material and that he wasn't ready to go forward at the penalty phase scheduled for April 5th (R2. Vol. I, p123-124).

Contrary to the trial court's finding, Arnold failed to conduct sufficient investigation prior to recommending a strategy to Appellant Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

> Here, as in ***Strickland,*** counsel claim that their limited investigation into petitioner's background reflected a tactical judgment not to present mitigating evidence and to pursue an alternative strategy instead. In evaluating petitioner's claim, this Court's principal concern is not whether counsel should have presented a mitigation case, but whether the investigation supporting their decision not to introduce mitigating evidence of Wiggins' background was ***itself reasonable.***

Not only did Arnold fail investigate mitigation, he failed to inform the Court what investigation he did perform. The trial court's order correctly states that any error by the court in failing to apply Koon v. State, 619 So.2d 246 (Fla. 1993) is procedurally barred in this proceeding (Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be

presented and what that evidence would be). However, the issue here is Arnold's failure to inform the court.

Arnold's deficient performance was compounded by the fact that Edgar informed Arnold and the Court about the requirement set out in Koon, which was ignored.

> MR. EDGAR: Now, the Defense has indicated that it intends to not offer any mitigating evidence or any mitigating circumstances. Before that's done, Your Honor, it would be incumbent on the Court, in accordance with the Koon decision, to conduct an inquiry of the Appellant to see that he knows the consequences of what he's doing in that matter and the results of it that could result from that.
>
> The Court: Well, were mitigating circumstances presented at the penalty phase at the original trial?
>
> MR. EDGAR: Yes, sir.
>
> MR. ARNOLD: Yes, sir.
>
> THE COURT: Now, see, I don't know what happened there. I don't know what mitigating factors were presented, so I don't know what to ask him.

(R2. Vol. I, p140-141).

Amazingly, the trial court's order found no prejudice occurred based upon the adage of the pessimist's perception of the glass being half empty. The trial court actually held that opinion because the second jury, who heard no mitigation, arrived at the same vote count as the first jury, who heard mitigation; therefore the mitigation would have made no difference. However, Davis recognized that different juries

might come to different results with the same evidence (PC-T. Vol. II, p292-293). One could say Davis is an optimist; the glass is half full. Either way, optimist or pessimist, the trial court's order fails to consider the optimist's possible result, especially if the jury had heard the testimony of Buffkin and Hazen in addition to other mitigation. The likelihood of a different recommendation is great (Buffkin's and Hazen's testimony will be discussed further in Issue VII).

Defense Counsel was ineffective for failing to present record mitigation to the Court in his memorandum and at the Spencer hearing.

The trial court's order found that counsel's failure to present record mitigation at the Spencer v. State, 615 So.2d 688 (Fla. 1993) hearing was not deficient because unfavorable evidence would be presented and it was a joint strategy not to present record mitigation to the judge (PC-R. Vol. VI, p974). The trial court's findings regarding the credibility of Arnold's actions are incongruent. The court's order points out that Arnold investigated the case (he knew about the good and the bad), and encouraged Appellant to present mitigation. Arnold's daughter even helped investigate mitigation (PC-R. Vol. VI, p972). But then the court's order finds that the decision not to put on mitigation was an agreed strategy (PC-R. Vol. VI, p974). Further, Arnold was not precluded from

presenting mitigation to the court.

At the evidentiary hearing Arnold testified as follows:

> Q. Okay. Now, when you said you did not want it in the record, did you get the impression he did not want the jury to hear that information?
>
> A. That's what I'm talking about, yes.

(PC-T. Vol. II, p262).

> Q. Now, did Mr. Kormony ever specifically say to you that he didn't want any mitigation presented to the court?
>
> A. Not that I recall. No.
>
> Q. So then you were free to do so, weren't you?
>
> A. Well, I assume I was.

(PC-T. Vol. II, p265).

At the first penalty phase trial beginning July 8, 1994, mitigation evidence was presented to the jury (TT1. Vols. VIII, IX, X).

On May 7, 1999, Arnold filed a sentencing memorandum (R2. Vol. II, p233-239), but it fails to contain any mention of record mitigation.

On June 30, 1999, a Spencer hearing was conducted (R2. Supp. Vol. II, p216). At that hearing Arnold was given an opportunity to present mitigation, but failed to do so. In addition, Arnold failed to inform the Court of record mitigation that had already been presented at the first

penalty phase trial, even though Edgar advised him of the requirement at the previous hearing (R2. Vol. I, p140-141). Appellant's waiver to present mitigation to the jury does not constitute a waiver to present mitigation to the Court. At the evidentiary hearing, Arnold testified that Appellant did not prevent him from presenting mitigation at the Spencer hearing (PC-T. Vol. II, p265).

The trial court's order takes an untenable position to suggest that Arnold was not ineffective for failing to present record mitigation, when Florida law requires it.

In Farr v. State, 621 So.2d 1368, 1369 (Fla. 1993), the Court set out a requirement that trial courts are to consider mitigation wherever it appears in the record, even if the Appellant does not wish the Court to consider such mitigation.

Defense Counsel was ineffective for failure to have the Appellant present at critical stages of the proceedings in violation of Fla. R. Crim. P. 3.180(a)(3).

The trial court correctly stated in its order that the clerk's docket shows that the Appellant was present during some of the hearings. However, the transcripts are silent about the Appellant's presence. As to the Spencer hearing, the record reflects that the Appellant was in a holding romm and not in the courtroom.

The Appellant was not present at the pretrial conference

held on July 21, 1998 (R2. Supp. Vol. I, p133). At that hearing the following was conducted: (a) trial scheduling (p134), (b) voir dire proceeding (p136), and (c) issue of conflict of the Court and Defense Counsel.

The record fails to establish whether the Appellant was present at the pretrial conference held on March 23, 1999. (R2. Vol. I, p115). At that hearing the following was conducted: (a) proportionality of the death penalty (p116), (b) change of venue (p121), (c) motion to continue (p123), (d) State's intent to use hearsay (p125), and (e) notice of no mitigation (p133).

The record fails to establish if the Appellant was present at the pretrial conference held on April 16, 1999 (R2. Vol. I, p159]. At that hearing the following was conducted: (a) amended Motion in Limine regarding aggravating circumstances (p159), and (b) victim impact evidence (p167).

Further, Judge Tarbuck was present at the Spencer hearing, yet he does not state in his order whether Appellant was present or not.

The trial court's order states that no evidence was presented at the evidentiary hearing regarding Appellant's presence. However, the trial court took judicial notice of the records in this case. The records do not contain any

written waiver signed by Appellant, nor was any oral waiver by Appellant presented on the record during these hearings.

Fla. R. Crim. P. 3.810(a)(3) provides: In all prosecutions for crime the Appellant shall be present at any pretrial conference, unless waived by the Appellant in writing. See Kearse v. State, 770 So.2d 1119 (Fla. 2000), above.

Defense Counsel was ineffective for failing to object to impact evidence and to object to lack of corresponding instructions.

The trial court's order found that counsel "could" request an instruction, but the law doesn't suggest that counsel "had" to request an instruction (PC-R. Vol. VI, p977). The trial court is correct. However, the standard is not "could" or "had," but that counsel's representation fell below an objective standard of reasonableness as stated in Strickland.

The purpose behind jury instructions is to provide the jury with concise, understandable law that is applicable to their case LaRussa v. Vetro, 254 So.2d 537 (Fla. 1971).

The Court in Kearse, Supra approved of the trial court's victim impact evidence instruction:

As this Court has repeatedly explained, our approval

> of standard jury instructions does not relieve a trial judge of his or her responsibility under the law to charge the jury properly and correctly in each case…
>
> Moreover, the instruction given helped to guide the jury's consideration of the victim impact evidence, including that the evidence could not be viewed as an aggravating circumstance.

The trial court's order states that no evidence was presented establishing prejudice (PC-R. Vol. VI, p977). Without proper instructions the jury is unaware of how to utilize the evidence presented. Since Appellant can't to speak with sitting jurors to ascertain how the impact evidence affected their vote, it can only be inferred that it is highly likely that the jury would consider the impact evidence as a nonstatutory aggravator, therefore prejudice can be presumed.

Defense Counsel was ineffective for failing to proffer testimony of Mrs. McAdams after the Trial Court sustained the State's objection.

The issue of the trial court's sustaining the State's objection to the attempted impeachment of Ms. McAdams was addressed on direct appeal. However, this Court found that the trial court did not abuse its discretion because:

> The defense did not indicate what was being sought from the witness by the question nor that there was evidence that would demonstrate that Mrs. McAdams had misidentified her assailants. See Finney v. State, 660 So.2d. 674, 684 (Fla. 1995)(holding that without a proffer it is impossible for the appellate court to determine whether the trial court's ruling was erroneous, and if erroneous, what effect the

> error may have had on the result). Therefore, it cannot be determined from the record that the Appellant was deprived of his opportunity to cross-examine or impeach the witness.

Kormondy v. State, 845 So.2d at 52 (Fla. 2003).

Had Arnold proffered Mrs. McAdams' prior statements, the evidence would have shown that on the night of the incident Mrs. McAdams reported to police that: (1) she could not identify anyone other than Buffkin because they wore masks or hoods, (2) the gunshot in the bedroom was the shot she heard first, and (3) there were two individuals in the bedroom when she heard the gunshot in the kitchen.

Mrs. McAdams' deposition concerning her identification of the last person who took her back into the bedroom was as follows:

> A. And I reached out and took his hand and they – one of them said, "I didn't tell you you could touch him." So I let go and Gary never looked up at me; he just kept his head down.
>
> And I don't know, they -- you want me to continue? They – they got a beer out of the refrigerator and put it down in between us and told us to drink it, and Gary said, "Which one?" and they said, "You."
>
> And at that time the **third person**, well, the – another person – at that particular point in time **I didn't know which one it was – said, "come with me."** And I got up and he took me back to the back and his comment was, "I don't know what the other two did to you but I think you're going to like what I'm going to do." And –

Q. Now, was it your impression that that was—

A. The first one that came in the door. And –

Q. Were you able to look at that person, to see that person as you got up?

A. No.

(Mrs. McAdams' deposition p25).

A witness may be cross-examined and impeached by either party Pomeranz v. State, 703 So.2d 465 (Fla. 1997). Arnold's failure to proffer impeachment evidence prejudiced the Appellant because Mrs. McAdams was a major State witness who had made prior inconsistent statements.

ISSUE VII

WHETHER THE TRIAL COURT ERRED BY FINDING THAT THE NEWLY DISCOVERED EVIDENCE OF RECANTED TESTIMONY WAS NOT CREDIBLE AND WOULD NOT HAVE CHANGED THE OUTCOME.

The standard of review as to whether the trial court erred in finding recanted testimony unreliable as newly discovered evidence and warrants a new trial is abuse of discretion Perez v. State, 2005 WL 2782589 (Fla. Oct. 27, 2005).

However, the trial court incorrectly utilized the

standard set out in Robinson v. State, 865 So.2d 1259, 1262 (Fla. 2004), to determine the reliability of the recanted testimony. The court's order only considered "evidence which was introduced at trial," rather than to "examine all of the circumstances in the case."

> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. To reach this conclusion the trial court is required to "consider all newly discovered evidence which would be admissible" at trial and then evaluate the "weight of both the newly discovered evidence and the **evidence which was introduced at the trial**." (emphasis added).

The phrase "evidence which was introduced at trial" applies only to whether the newly discovered evidence would probably produce an acquittal or a different sentence.

However, with regard to recanted testimony the court in Robinson went on further to say:

> We addressed this concern in our opinion on Robinson's first 3.851 appeal, wherein we stressed that recantation testimony "may be unreliable and trial judges must '**examine all of the circumstances in the case.**'"(emphasis added).

The court's order considered only the evidence at trial in determining the reliability of the recanted testimony, and not all of the circumstance in the case (PC-R. Vol. VI, p981-990).

First, it should be noted that most of the cases found by

Appellant that apply the rule on recanted testimony refer to witnesses who actually testified at the defendant's trial and subsequently recanted their testimony Henderson v. State, 135 Fla. 548, 185 So. 625 (Fla. 1938); Brown v. State, 381 So.2d 690 (1980); Armstrong v. State, 642 So.2d 730 (Fla. 1994); Spaziano v. State, 692 So.2d 174 (Fla. 1997); Marquard v. State, 850 So.2d 417 (Fla. 2002); Duckett v. State, 30 Fla. L. Weekly S667 (Oct. 6, 2005).

In contrast, Hazen and Buffkin did not testify at Appellant's trial. However, Hazen and Buffkin did testify at the evidentiary hearing about who shot Mr. McAdams.

The trial court's order incorrectly states that Appellant claims his conviction and sentence should be vacated because of newly discovered evidence (PC-R. Vol. VI, p978). Appellant's Amendment to his 3.851 Motion (PC-R. Vol. III, p549) was an alternative argument to vacate Appellant's death sentence if his claims to vacate his conviction were denied. The newly discovered evidence claim was based upon the assertion that Appellant was not, in fact, the person who shot Mr. McAdams, and if proven, would not have received a death sentence because of proportionality assessment.

James Hazen's Testimony and Recent Statement

The trial court's order found that Hazen's evidentiary

hearing statement was, in fact, newly discovered evidence (PC-R. Vol. VI, p979), and would have been admitted into evidence at Appellant's trial (PC-R. Vol. VI, p981). However, the trial court's order concluded that Hazen's testimony would not have led to an acquittal of the Appellant (PC-R. Vol. VI, p981), nor changed the outcome of Appellant's trial when weighed with other evidence adduced at the trial (PC-R. Vol. VII, p985).

Assuming that all other issues are decided against the Appellant, Appellant concedes that Hazen's testimony would not have led to an acquittal because Felony Murder would have been established. However, if the jury found Buffkin actually shot Mr. McAdams, by special verdict, this Court would then be in a position to determine proportionality, regardless of whether the jury voted for death. Hazen testified Buffkin shot Mr. McAdams and that he testified to the same fact at his own trial (PC-R. Vol. I, p118).

Further, the trial court found in its order Hazen's testimony was not credible (PC-R. Vol. VI, p981). Hazen's testimony at the evidentiary hearing identifying who shot Mr. McAdams is not recanted testimony. Therefore, the rule that recanted testimony is not reliable should not apply to Hazen's evidentiary hearing testimony. Edgar asked Hazen if he ever

told the truth to the Court in Escambia County. Hazen stated, "When I sat there and I told you Darryl Buffkin was the man who shot him in my trial, and you called me a liar then" (PC-T. Vol. I, p118).

However, even if the recanted testimony rule applied, the trial court did not apply the proper standard. The rule set out in Robinson, 707 So.2d at 691 stated the court is to examine all circumstances in the case. The trial court's order does not examine all circumstances in the case.

The trial court's order reasonably sets out Hazen's evidentiary hearing testimony. However, in finding Hazen's testimony unreliable, the trial court's order mentioned three points: (1) Hazen's prior lies and relationship with Appellant (PC-R. Vol. VI, p982), (2) Mrs. McAdams' lack of bias and unwavering testimony (PC-R. Vol. VI, p982-983, and (3) William Long's lack of bias (PC-R. Vol. VI, p983-984).

The trial court's order attempts to discredit Hazen's testimony primarily on the basis of his relationship with Appellant. The trial court fails to consider his prior consistent statement at his own trial.

As to bias, the trial court's order states that because Mrs. McAdams did not previously know any of her three attackers, she had no bias to lie about which one was with her

when the fatal shot was fired (PC-R. Vol. VI, p982). Not true. Mrs. McAdams was a victim in many ways. It would be unnatural for a person to sustain the brutality and loss Mrs. McAdams suffered and not possess some bias against her attackers. If Mrs. McAdams was unable to establish that each of the attackers, in fact, raped her or where each one was at any given time, then either one, or perhaps all of the defendants could have been acquitted because of inconsistent evidence. Mrs. McAdams had to know that she would be required to testify at every trial, and her testimony could not vary and had to establish the elements in each of the three cases.

As to unwavering testimony, Mrs. McAdams deposition testimony expressed confusion and gave rise to an inference that Hazen shot Mr. McAdams, and her statement to Deputy Scherer is inconsistent with her trial testimony. The trial court's order fails to examine either. This Court pointed out the inconsistencies between facts at Appellant's trial and Hazen's trial about who was in the bedroom when the gun went off. Kormondy v. State, 703 So.2d 454, 458 (Fla. 1997):

> n1 Kormondy, in this case, and Hazen, in *Hazen v. State, 700 So.2d 1207 (Fla. 1997),* present different factual scenarios. The trial records are inconsistent as to the locations of Hazen and Buffkin at the time of the fatal shot. During Kormondy's trial, Mrs. McAdams testified that Buffkin was with her in the back of the house when

> she heard a shot fired. Officer Hall testified that Kormondy told him in an unrecorded statement that Buffkin fired the fatal shot and Hazen was in the back of the house with Mrs. McAdams. In a tape-recorded confession played for the jury, Kormondy again said that Buffkin shot the victim. During Hazen's trial, Buffkin testified that Kormondy killed the victim and Hazen was in the back room with Mrs. McAdams. Hazen testified that he was not present at the scene when the crimes against the McAdamses were committed.

For the trial court to suggest that Mrs. McAdams had no bias or that her testimony was unwavering suggests the mind set for predisposition. Her husband was killed and she was seriously victimized. How could she not be biased?

Mrs. McAdams' Deposition (Clerk's Docket, item number 333).

Mrs. McAdams attempted to identify Buffkin as number one and Hazen as number two, leaving Mr. Kormondy as number three (Mrs. McAdams' deposition p58-59).

Mrs. McAdam's identification of the person who last took her back into the bedroom was unclear. She was not able to see the person, but was of the impression that it was Buffkin.

> A. And I reached out and took his hand and they – one of them said, "I didn't tell you you could touch him." So I let go and Gary never looked up at me; he just kept his head down.
>
> And I don't know, they -- you want me to continue? They – they got a beer out of the refrigerator and put it down in between us and told us to drink it, and Gary said, "Which one?" and they said, "You."

And at that time the **third person**, well, the – another person – at that particular point in time **I didn't know which one it was – said, "come with me."** And I got up and he took me back to the back and his comment was, "I don't know what the other two did to you but I think you're going to like what I'm going to do." And –

Q. Now, was it your impression that that was—

A. The first one that came in the door. And –

Q. Were you able to look at that person, to see that person as you got up?

A. No.

(Mrs. McAdams' deposition p25).

The trial court's order found Mrs. McAdams' trial testimony credible because she could identify Mr. Buffkin as the one who last took her back into the bedroom because she had seen his face when he first entered the house and was able to identify his voice (PC-R. Vol. VI, p982-983). However, as shown above, Mrs. McAdams was not sure at her deposition who last took her back into the bedroom. And as shown below, Mrs. McAdams testified at her deposition she could only identify Hazen's voice.

MR. EDGAR: This **number two**, the one that, I guess, you had probably the most conversation with; is that right?

THE WITNESS: Uh-huh (Indicating affirmatively).

MR. EDGAR: Do you think you could identify his voice if you saw him – if you heard it again, if he

repeated the same words?

THE WITNESS: Probably, yes.

MR. EDGAR: That you. Take a break.

Q. (BY MS. STITT) Let me just – before we do, **could you identify the voice of the other two?**

A. (BY THE WITNESS) **No.** The one – the one had a very distinct voice.

(Mrs. McAdams' deposition p54).

As for Mr. McAdams' gun, Mrs. McAdams testified continuously in her deposition that it was number two (Mr. Hazen) who had her husband's gun.

Q. Were you and Gary still in the same position?

A. Same position, we hadn't moved. And he rubbed the gun up my hip and he said, "You have a cute ass, I want you to come with me."

Q. That's the person that we're referring to as number two?

A. Uh-huh (Indicating affirmatively).

(Mrs. McAdams' deposition p16-17).

* * * *

Q. If I understand correctly, the guy – the number one guy who came in the door first is not back there with you?

A. That's correct.

Q. Okay. He and Gary are somewhere else, you assume, I suppose, I suppose, still in the kitchen?

A. Uh-huh (Indicating affirmatively).

Q. The number two guy has Gary's gun; is that right?

A. Yes.

Q. After you were sexually assaulted what happened?

A. Then they told me to – he told me to get up and to go back in the kitchen, and he took me back into the kitchen and told me to get back down on the floor, and so I knelt down in front of Gary.

(Mrs. McAdams' deposition p12).

* * * *

Q. Let me back up, and Mike has pointed out something I forgot to ask you. When you were taken back to the kitchen after the first sexual assaults, do you know who had what gun? **Did the number two guy still have Gary's gun**?

A. Yes, I was – there was, you know, there was not – they – I'm sure he did. I mean, **I know he did** because the first person never, you know, entered back into the bedroom – never came back in the bedroom with us the first time.

Q. **So that number two person would have still had Gary's gun to you knowledge?**

A. **To my knowledge.**

Q. Okay. Did you ever hear any of them talk about exchanging the weapons?

A. No.

Q. Did you ever get any indication that that had happened?

A. No.

(Mrs. McAdams' deposition p26).

* * * *

Q. Can you, from seeing them in court, identify any of them?

A. Yes.

Q. Which ones can you identify?

A. Do you want me to call them by number or name?

Q. Both, yeah, if you can.

A. Okay. I – Buffkin.

Q. As –

A. Being the person – as being number one.

Q. Being the person at your door?

A. Uh-huh (Indicating affirmatively). And from what I recall seeing, Kormondy as number two – no wait a minute, I'm getting my numbers confused here. Kormondy as – what was he, which number was he? We have number two as the person that took me to the back first and number three as being the person –

MR. EDGAR: Which one was the first?

MR. ALLEN: I think number two was the one with the gun, with Gary's gun.

THE WITNESS: Okay. Number two was the person with Gary's gun, so number three would have been the one that first vaginally raped me; is that correct? Is that the number we have?

MR. EDGAR: I think I'm a little confused now. Which one – you said the one that you saw holding your purse had light brown, or blondish kind of hair and a thin face.

THE WITNESS: Yes.

MR. ALLEN: Yes.

MR. EDGAR: Have you seen that person in court again?

THE WITNESS: Yes, I have.

MR. EDGAR: Did they call his name in court?

THE WITNESS: Yes.

MR. EDGAR: What was his name?

THE WITNESS: Kormondy.

MR. EDGAR: Okay. That was now what you said was number three?

THE WITNESS: I said number two at first but actually he's number three.

MR. EDGAR: That's not the guy with Gary's gun that rubbed on you?

THE WITNESS: Right.

MR. EDGAR: -- that had oral sex with you?

THE WITNESS: No.

MR. EDGAR: Okay.

Q. (BY MS. STITT) It's not that person?

A. (BY THE WITNESS) It's not the person with Gary's gun, no.

(Mrs. McAdams' deposition p51-52)

The trial court's order failed to examine the above circumstances. The court's order makes no assessment of the change in potential outcome of the penalty phase due to Hazen's newly discovered testimony See Jones v. State, 591

So.2d 911 (Fla. 1991).

As to William Long, the trial court stated, “The Court finds, based upon the evidence adduced at trial and at the evidentiary hearing, logic would dictate that Long would have a bias *in favor* of Defendant. Nothing in the record before the Court hints that there would have been any reason for Long to be biased *against* the Defendant” (PC-R. Vol. VI, p984-985). If the trial court’s **logic** were accurate, then the rules of evidence and this Court’s case law would not permit impeachment as: (1) lying at trial, (2) receiving a reward - $25,000, (3) receiving benefits from the State – no bond and no jail time, and (4) distorted perception by drug usage. Of course Long was biased against Appellant.

Buffkin’s Affidavit

The trial court’s order found that Mr. Buffkin’s evidentiary hearing and affidavit were newly discovered evidence (PC-R. Vol. VI, p986). However, the trial court’s order found Buffkin’s most recent accounts not credible (PC-T. Vol. VI, p988-989). Further, the trial court’s order found that had Buffkin’s testimony been admitted at trial it would not have changed the outcome of the Appellant’s trial (PC-R. Vol. VI, p990).

Again, Appellant concedes that Buffkin’s new testimony

would not change the conviction of Appellant for Felony Murder. However, the trial court's order still fails to examine **all circumstances of the case**, as described above, to determine whether a different sentence would have resulted See Jones v. State, 591 So.2d 911 (Fla. 1991).

It appears that one reason the trial court found Buffkin's testimony unreliable was "Buffkin had apparently tried to escape after his evidentiary hearing testimony" (PC-R. Vol. VI, p989). No substantial competent evidence was produced at the evidentiary hearing that showed Mr. Buffkin was trying to escape. This conclusion is mere conjecture on the part of the Court. The trial court's order states that Officer Hobby (correctional officer) verified that the piece of metal in Buffkin's cuffs was a makeshift key (PC-R. Vol. VI, p989). Appellant could not find anywhere within Officer Hobby's testimony where he utilized the words "makeshift key" (PC-T. Vol. III, p426-434).

In fact, Officer Hobby had no knowledge of Buffkin's alleged attempt to escape.

> Q. So you are apprised of the fact that inmates frequently cause guards trouble?
>
> A. Not always.
>
> Q. Has it been your experience that they sometimes make your work difficult?

A. They can.

Q. With regard to a piece of metal that was in the cylinder, why didn’t you just turn it and open up the lock?

A. Because of the way that it was broken it was too deep into the leg restraint.

Q. So if you couldn’t do it, Mr. Buffkin couldn’t do it either could he?

A. Not with the piece that was in there.

Q. And he might have been inserted that or just got in there just to mess with you guys couldn’t he?

A. There is always that possibility.

Q. Did he do anything else to try to escape?

A. Not in my presence.

Q. You have no knowledge specifically of his attempt to escape?

A. Personally, no.

Q. Or any intent that he planned on escaping?

A. He didn’t even speak to me.

Further, the State introduced Exhibit 4 (PC-R. Vol. IV, p623) indicating that no charges or disciplinary action were presented against Buffkin by the Escambia County Sheriff’s Office. Apparently the piece of metal (Exhibit 5) was introduced in an attempt to conjure up a motive for escape as the reason why he (Buffkin) would testify on Appellant’s behalf (PC-T. Vol. III, p436). Edgar stated that Buffkin

would testify that he wasn't trying to escape (PC-T. Vol. III, p446).

The trial court's order made no mention of the incident report or the other circumstances presented above regarding Buffkin's testimony. Other than a piece of metal stuck in the cuff, no evidence was introduced to suggest that Buffkin had planned to escape. Giving officers a hard time is just as likely a motive as any other. The trial court's order did not discuss the credibility or motive for Buffkin's original statement. Obviously, both versions cannot be true. However, at a hearing held July 1, 1994, Edgar expresses his disbelief in much of Buffkin's previous statement.

> Mr. Buffkin has given an oral statement at the conclusion of his trial in which he embellished some details of this case which the State is not in a position to embrace and believe…The embellishments that Mr. Buffkin gave for whatever reason, perhaps it's because Mr. Kormondy told on him an got him arrested to begin with, I'm not sure, Judge, but those embellishments don't help Mr. Kormondy."

(R1. Vol. II, p311). Buffkin wanted to get back at Appellant. This motive was expressed, not only by Edgar, above, but by Buffkin himself.

The trial court's order states that Buffkin's evidentiary hearing testimony was contradictory with other evidentiary hearing testimony (PC-R. Vol. VI, p990), but does not express any specific contradictions.

The culmination of Buffkin's testimony on both direct and cross-examination revealed that he, Curtis Buffkin, shot Mr. McAdams and not Mr. Kormondy (PC-T. Vol. I, p71).

On cross-examination, Edgar asked Buffkin to describe the chain of events leading up to and including the death of Mr. McAdams (PC-T. Vol. I, p76-105). Buffkin had the .44 pistol (p77). Buffkin stated he chose the house when the McAdams' car drove by. He thought he might have to shoot Kormondy and Hazen if they didn't go with him (p77). Buffkin testified it was his plan to rob an occupied home. He previously discussed it with Hazen, but not Kormondy (p78). He knew Kormondy would come along because they had already committed one burglary together, and he told Kormondy if he said anything, "something is going to go on, man" (p80).

Buffkin testified Edgar apprized him that if his previous deposition was false, his plea bargain could be withdrawn, and he could be retried and sentenced to death (p82-83).

When Edgar asked Buffkin if Kormony raped Mrs. McAdmans, Buffkin stated he didn't see Kormondy rape her and Kormondy didn't tell him that he had (p86). Buffkin stated he lied because he didn't want to get the death penalty and "I figured since [K]ormondy was going to run his mouth, I'm going to put him where he's got to face the death penalty, not me" (p85).

Buffkin testified he and Hazen raped Mrs. McAdams (p86).

After entering the house, Buffkin told them to pull the blinds and the phone cords (p87). Kormondy and Hazen began searching the house (p87). Hazen found a .38 in the bedroom (p87). Buffkin took the .38 and gave Kormondy the .44 and stated to Mr. McAdams, “What are you going to do with this…?” (p87). Buffkin and Hazen took Mrs. McAdams to the back room while Kormondy stayed with Mr. McAdams (p87). Buffkin took the .38 so that Mr. McAdams would see the .44 pointed at him by Kormondy (p88). Buffkin brought Mrs. McAdams back to Mr. McAdams, naked. Kormondy went back in the bedroom (p88) and Buffkin still had the .38 (p88).

Edgar questioned Buffkin about his previous lies:

Q. So who did you lie to before?

A. Who did I lie to at first?

Q. You lied to the jury.

A. I did what you wanted me to do.

Q. You lied to me.

A. You told me to –

Q. You lied to your lawyer. You lied to your lawyer, didn’t you.

A. Yes, sir, I did.

Q. So you lied to everybody.

A. Well, you could say that. That's why I'm telling the truth.

(PC-T. Vol. I, p91-92).

Buffkin testified that when Mrs. McAdams was brought back to Mr. McAdams, he (Buffkin) gave him a beer. Hazen then stated he wasn't through with Mrs. McAdams. Hazen took Mrs. McAdams back to the bedroom and Kormondy followed. Kormondy came back to the kitchen while Hazen stayed in the bedroom (p95). Kormondy then began to look through Mrs. McAdams' purse (p95). When asked why he killed Mr. McAdams, Buffkin stated, "I told him to keep his fucking head down, and at that time when I bumped him in the head, the gun fired off. I couldn't – there wasn't nothing I could do to save him. If I could bring the man back, I would love to bring him back" (p97).

After Mr. McAdams fell back, Buffkin told Kormondy, "Man, let's get this stuff and let's go."… "Call back there and holler, Bubba, let's go" (p97-98). Buffkin further stated, "At the time, I figured he killed Mrs. McAdams at that time because I heard the gunshot go off back there when I was getting ready to go out the door. If I had known that she was not dead, I would have turned around, since Gary was already dead, I would have went back there and killed her" (p98).

Edgar asked Buffkin if he was planning to kill Hazen and

Kormondy. Buffkin stated, “Well, I told them when we got in the car, I says, you don’t know nothing about this. Just act like it was a movie. If you say anything about this, I’m going to try to get back to you” (p98).

Edgar asked Buffkin if he was trying to get Kormondy out of the death penalty. Buffkin testified:

> I’m not trying to help him. Why would I want to help somebody that tried to get me the death penalty and told these people what I did? It was my job to try to fight my case the best way I could that would get around the death sentence, and that’s what I did. (p100)

Mr. Beck (Buffkin’s trial attorney) testified at the evidentiary hearing he was confident that the State made the offer for a life sentence because of concerns that the jury might only return a second-degree murder conviction (PC-T. Vol. I, p31-32). Beck testified that he had no knowledge about the State making any offer for a life sentence until the jury asked their question (PC-T. Vol. I, p34).

The trial court’s order incorrectly denotes that Beck’s affidavit was of no value because Beck didn’t inform Buffkin of the conversation with Edgar (PC-R. Vol. VI, p989 n206). The trial court misses the point. The purpose of Beck’s affidavit (PC-R. Vol. V, p919) was to show that Edgar intended to void Buffkin’s agreement and try him for murder if Buffkin testified at the evidentiary hearing. Voiding the agreement

could only occur if Edgar believed that Buffkin's evidentiary hearing testimony was the truth.

Buffkin adamantly expressed that if had he known Kormondy would talk to law enforcement, he would have shot Kormondy on the evening of the offense. When asked why he was coming forward now, Buffkin stated he "wanted the family to know what actually happened" (PC-T. Vol. I, p75-76).

Buffkin testified he had read Kormondy's statement prior to his trial (PC-T. Vol. I, p71). When asked whether his statement or Kormondy's statement was the truth, Buffkin stated that Kormondy's statement was the truth (PC-T. Vol. I, p71).

Buffkin also testified that Mrs. McAdams was incorrect about him being with her when Mr. McAdams was shot. Buffkin stated it was Hazen in the bedroom with Mrs. McAdams when Mr. McAdams was shot, not him. (PC-T. Vol. I, p96).

Buffkin was asked if he was changing his testimony because he had nothing to lose. Buffkin believed he did have something to lose: The State could void his deal and reprosecute him for murder seeking the death penalty (PC-T. Vol. I, p82).

William Long's Recent Statement

The trial court's order found that Long's testimony was

not newly discovered evidence and could have been acquired with due diligence (PC-R. Vol. VI, p992). Appellant concedes Long's testimony is not newly discovered evidence. However, if Stitt had obtained Long's file, she could have learned about the benefits Long received from law enforcement. However, not obtaining Long's records is another item added to the list of Sitt's evidence of ineffective assistance of counsel, as described in Issue IV above.

The trial court's order found that six months' community control was a reasonable sentence (PC-T. Vol. VI, p993). Even assuming the sentence was reasonable, Long believed he was going to jail for another drug violation of probation, because his lawyer told him to "pack my toothbrush because I was going to jail for violation of probation" (PC-T. Vol. I, p60-61). Under the threat of impending jail time, Long contacted law enforcement for help (PC-T. Vol. I, p61).

Additionally, the trial court found "Long's most recent testimony, that Investigator Cotton went to Long's violation of probation hearing and spoke on his behalf, does not indicate to the Court that Long's previous testimony regarding Defendant's statement was false" (PC-R. Vol. VI, p993). The trial court's finding is specious. At trial, Long was specifically asked if anyone spoke up for him at his violation

hearing.

> Q. And no one spoke up on your behalf on any violation of probation.
>
> A. No.

(TT. Vol. VII, p1197-1198).

Long's trial testimony was lie, notwithstanding the trial court's validation.

Long stated at the evidentiary hearing he believed he correctly heard Kormondy say that he shot Mr. McAdams. However, he also acknowledged he could have been mistaken about the exact words used (PC-T. Vol. I, p64). This is an essential disclosure since his deposition testimony fails to indicate that Kormony "shot Mr. McAdams."

This Court has defined "probably produce an acquittal on retrial" to include a different result at the penalty phase See Jones *v.* State, 591 So.2d 911, 915 (Fla. 1991) (Newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. The same standard would be applicable if the issue were whether a life or a death sentence should have been imposed.)

The Appellant contends the evidentiary hearing testimony combined with the evidence presented at Appellant's trial, as

well as the other circumstances in the case, clearly would have provided a different result at the guilt phase and/or the penalty phase, and most importantly to this Court when considering proportionality.

Appellant is extremely aware that this Court has not reversed a trial court's credibility finding on recanted testimony. However, Appellant contends there is a systemic problem in the justice system when a judge substitutes for a jury to determine the reliability of a witness, simply to achieve finality. The people who were present when the crimes occurred are Mrs. McAdams, Appellant, Buffkin and Hazen. Mrs. McAdams did not see the shooting. Among Buffkin, Hazen, and Appellant, they know who actually shot Mr. McAdams, and all three are now able to testify before a jury that Buffkin shot McAdams, and not the Appellant. While a new jury is at liberty to believe whom they wish, Appellant's first jury did not have that option, since neither Hazen nor Buffkin testified at Appellant's trial. Although Buffkin's evidentiary hearing testimony was recanted from his previous deposition statement, it was not presented at Appellant's trial. Realistically, Buffkin's previous statement that Appellant shot Mr. McAdams was substantially more tainted than his evidentiary hearing testimony. Buffkin's previous

statement was made to bargain for to obtain a life sentence, while his evidentiary hearing testimony could possibly subject him to a death sentence.

This Court reversed Hazen's death sentence to life because he was less culpable than the "shooter." Assuming Buffkin shot Mr. McAdams, this Court will not be in a position to review Appellant' proportionality unless Appellant is provided with, at least, a new penalty phase.

Assuming again Buffkin shot Mr. McAdams, Appellant was no more culpable than Hazen. Other than Mrs. McAdams' questionable memory, no evidence exists that Appellant raped Mrs. McAdams. No DNA evidence has been provided or introduced in any proceeding that Appellant raped Mrs. McAdams. However, it goes unrefutted that Hazen raped Mrs. McAdams and threatened to blow her head off, twice. No testimony was presented about Appellant making any threats. Appellant's death sentence must also be vacated.

Edgar stated on the record he disbelieved Buffkin's deposition statement and threatened to reprosecute Buffkin for murder and to seek the death penalty. Therefore, Buffkin's testimony at the evidentiary hearing is made indisputably more credible than his deposition and testimony at Hazen's trial.

ISSUE VIII

MR. KORMONDY IS DENIED HIS RIGHTS UNDER THE FIRST, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES BECAUSE OF THE RULES PROHIBITING MR. KORMONDY'S LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT.

The Appellant acknowledges that absent specific allegations, this Court has ruled against this issue. However, the claim is being asserted for preservation.

Florida Rules of Professionalism 4-3.5(d)(4) is unconstitutionally vague, because it fails to put counsel on notice of what behavior is subject to disciplinary action. By its terms the rule only requires that counsel provide notice to the Court and opposing counsel of intention to interview jurors. The rule is to be interpreted in accordance with the complementary evidentiary rule found in 90.607(2)(b), Florida Statutes Powell, 652 So.2d at 356. Appellant is denied due process of law and access to the Courts if counsel is not permitted to interview jurors.

ISSUE IX

MR. KORMONDY IS DENIED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS

OF THE FLORIDA CONSTITUTION BECAUSE EXECUTION BY ELECTROCUTION AND LETHAL INJECTION ARE CRUEL AND UNUSUAL PUNISHMENTS

The Appellant acknowledges that this Court has ruled against this issue. This claim is being asserted for preservation.

The practice of executing Florida's condemned by means of judicial electrocution unnecessarily exposes Appellant to substantial risks of suffering and degradation through physical violence, disfigurement, and torment. These risks inhere in Florida's practice of judicial electrocution and have been repeatedly documented See Provenzano v. Moore, 744 So.2d 413 (1999)(Shaw, J., dissenting, joined by Anstead, J.); Jones v. State, 701 So.2d 70, 82-88 (Fla. 1997)(Shaw, J., dissenting, joined by Kogan & Anstead, JJ.).

Should Appellant be forced to make such a choice, this adds to his psychological torture. This waiver provision is unconstitutional. Appellant's rights guaranteed by the Eighth and Fourteenth Amendments will be violated.

ISSUE X

APPELLANT'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS APPELLANT MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

Appellant has been incarcerated since 1993. Statistics have shown that an individual incarcerated over a long period

of time will suffer diminished mental capacity. Inasmuch as Appellant may well be incompetent at the time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated See Ford v. Wainwright, 477 U.S. 399 (1986).

This claim is not yet ripe, however it is being raised for preservation purposes.

ISSUE XI

APPELLANT'S TRIAL PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS THAT CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

This Court recognized that errors occurred in Appellant's original appeal. These findings must be taken into consideration with the other errors detailed throughout this argument. Appellant did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence he would receive State v. Gunsby, 670 So.2d 920 (Fla. 1996).

CONCLUSION AND RELIEF SOUGHT

Appellant prays for the following relief: That his

judgment and sentence be vacated, and he be provided a new trial and a new penalty phase. However, if the court should deny Appellant a new trial, Appellant prays the court find Appellant's role in the offense was no greater than that of Hazen and certainly less than Buffkin, and reduce his sentence to Life.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by hand delivery to Meredith Charbula, Office of the Attorney General, Department of Legal Affairs, The Capitol, PL01, Tallahassee, FL 32399, on February 6, 2006.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is Courier New 12 point

MICHAEL P. REITER
Attorney for Appellant
4543 Hedgewood Drive
Tallahassee, FL 32309
(850) 893-4668

MICHAEL P. REITER
Florida Bar #0320234