IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1301

LOWER TRIBUNAL NO. 97-9232-CF

JASON DEMETRIUS STEPHENS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

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ARGUMENT I

THE TRIAL COURT ERRED IN DENYING MR. STEPHENS' CLAIM THAT HE WAS DENIED AN ADEQUATE ADVERSARIAL TESTING AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Failure to Present Mitigation

During his postconviction evidentiary hearing, and thereafter in his Initial Brief before this Court, Mr. Stephens demonstrated that trial counsel failed to conduct a reasonable investigation in preparation for the penalty phase. As a result, the jury never heard crucial mitigating evidence, both statutory and non-statutory in nature.

In opposition to Mr. Stephens' claim, Appellee's argument appears to rest on the premise that trial counsel cannot be ineffective because he in fact presented a vast amount of

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[1]Mr. Stephens will not reply to every issue and argument. However, he expressly does not abandon the issues and claims not specifically replied to herein. For arguments not addressed herein, Mr. Stephens stands on the arguments presented in his Initial Brief.

mitigation. Appellee refers to the evidence presented by trial counsel at the penalty phase as a "wealth of mitigation" (Answer at 10). Appellee also emphasizes that ten witnesses were presented (Answer at 6), and that the trial court found and gave weight to eleven nonstatutory mitigating factors (Answer at 6-7).

Appellee's argument, however, is flawed because it is based on an inaccurate view of the record. In fact, the record at trial clearly establishes that a "wealth of mitigation" was not presented. Rather than presenting powerful testimony such as that introduced at Mr. Stephens' postconviction evidentiary hearing,[2] trial counsel merely offered, through his ten witnesses, that Mr. Stephens "was good with children, had been raised in a good Catholic family, had an ability to work with

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[2]For example, due to trial counsel's ineffectiveness, Mr. Stephens' jury was never informed that the Stephens' children were subject to severe physical and mental anguish by their father (T. 147-48, 155-56); the jury was never informed that Mr. Stephens had a drug problem, that he used marijuana and powdered cocaine on a regular basis, including the time period of the crime in question (T. 12-13, 16, 17); the jury was never informed of Mr. Stephens' bizarre behavior on the day of the crime and in general (T. 13, 175-180); the jury was never informed that Mr. Stephens suffers from a major mental illness, a borderline personality disorder (T. 89-90), that he was acting under an extreme emotional disturbance at the time of the crime (T. 60), and that he did not have the ability to conform his conduct to the law at the time of the crime (T. 62).

his hands to build things, had been deeply effected by his father's death, was remorseful for Sparrow III's death, and was religious." Stephens v. State, 787 So. 2d 747, 752 (Fla. 2001).

Appellee's description of this evidence as a "wealth of mitigation" is in far contrast to the position taken by the State during Mr. Stephens' trial:

> Let's talk about the evidence presented today. You heard testimony about how loving and wonderful a child Jason Stephens was up until the time his father died. But you will also recall the evidence presented to you that in 1992 he was convicted of a crime you heard about from Mr. Taylor and from the witness this morning about the sawed-off shotgun. That was what he was doing in 1992.
>
> **You heard about a work history, but frankly, it wasn't much of a work history for a 23 year old.**
>
> **You heard testimony from these people who said how this defendant liked children, how he loved children, but you also heard that he robbed Kahari Graham, that he smashed Little Rob's mother in the face while Little Rob watched, and that he suffocated or strangled Little Rob**, or, if you believe the doctor from Atlanta, left him in the car to die.
>
> We proved an intentional, aggravated, terrorizing murder. **Each witness was asked, Well, he never did drugs or alcohol. If you remember his testimony, that was the purpose of going to that location. That was his testimony. That was his defense. "I didn't go to kill anybody or rob anybody, I went to buy drugs."**

(Vol. IV, R. 747-8) (emphasis added). Contrary to its present position, the State was not impressed with Mr. Stephens' "wealth of mitigation" during the penalty phase.

Here, trial counsel's failure to investigate and prepare prejudiced Mr. Stephens. Strickland v. Washington, 466 U.S. 668 (1984). Had Mr. Stephens' jury been presented with the poignant, powerful mitigation now of record and available at trial, there is a reasonable probability that the outcome would have been different.

Moreover, Appellee's statement, that the trial court found and gave weight to eleven mitigating factors, is quite misleading as it omits the critical point that the sentencing judge dismissed virtually all of the "mitigation" trial counsel presented, giving it either little weight, no weight, or finding that it was not reasonably established by the evidence.[3] In

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[3] The trial court addressed this mitigating evidence as follows: Defendant has shown no tendencies towards violence against children- **not reasonably established as mitigation** (Vol. V, R. 885); the defendant came to the aid of a child being punished at a mall- **little weight** (Vol. V, R. 885); the defendant did not resist arrest- **not established by the evidence** (Vol. V, R. 885); the defendant volunteered at church related functions-some weight (Vol. V, R. 886); the defendant was employed- **little weight** (Vol. V, R. 886); the defendant was from a religious and supportive family and was distraught over the loss of his father- **little weight** (Vol. V, R. 887); the defendant was and still is remorseful- **not reasonably established by the evidence** (Vol V, R. 887); the defendant's educational history shows that he was a good student, thereby capable of rehabilitation in a prison environment- **little weight** (Vol. V, R. 888); the defendant genuinely likes children and has often done things for children- **little weight** (Vol. V, R. 888); the defendant was a good student- **little weight** (Vol. V, R.

reality, and contrary to Appellee's insinuation, the trial court gave significant weight to only two mitigating factors, neither of which trial counsel had a role in presenting.[4]

Here, trial counsel failed to conduct an adequate investigation. During his testimony at the evidentiary hearing, it was revealed that trial counsel Eler didn't know if school records were requested (T. 267); he didn't know if either he or his investigator went through a medical history with Mr. Stephens (T. 268); he didn't recall if he spoke to any of Mr. Stephens' brothers, other than the one who was called as a

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888); the defendant has adjusted well while incarcerated- **little weight** (Vol. V, R. 889); the victim was unconscious and did not suffer for any lengthy period of time- **no weight** (Vol. V, R. 889); the defendant advised other victims where the child could be found when he left- **not reasonable established by the evidence** (Vol. V, R. 890); there is no early release for first degree murder nor is there parole- **no weight** (Vol. V, R. 890); the defendant faces up to life in prison on the other offense- **little weight** (Vol. V, R. 891); the defendant pled guilty to numerous offenses acknowledging his guilt- **little weight** (Vol. V, R. 891)(emphasis added).

[4]Trial counsel had no role in procuring the first mitigating factor, that Mr. Stephens' co-defendant received a life sentence (Vol. V, R. 890). Similarly, trial counsel also had no role in procuring the second mitigating factor, that Mr. Stephens' did not intend to kill the child (Vol. V, R. 889). The weight given to this mitigating circumstance was based on the testimony of Dr. Dunton, who was presented as a witness by trial counsel for Horace Cummings (Vol. XIV, R. 1615).

witness (T. 307)[5]; he didn't think he went to any of the addresses of the list of nine people that Mr. Stephens provided as willing to testify on his behalf (T. 307, 309); he didn't speak to any of Mr. Stephens' friends about his drug use (T. 311-12); he had no information about any prior mental health evaluations (T. 312)[6]; he didn't personally remember obtaining the Department of Juvenile Justice records relating to Mr. Stephens, and no information regarding those records was in his file (T. 312); he didn't recall any information of a head injury Mr. Stephens incurred while playing football (T. 314); he never received any information as to a diagnosis of attention deficit hyper-activity disorder (T. 314-15); he didn't recall asking the family as to how they helped Mr. Stephens deal with the situation of the accidental shooting of his brother or with the fire setting incident (T. 317-18); while he agreed to the importance of demonstrating that Mr. Stephens believed a three year old could get out of a vehicle (T. 251; 254), he didn't obtain or present any such readily available evidence.

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[5]It didn't appear that Eler had any notes in his file reflecting that he or his investigator spoke with Michael or Brian Stephens (T. 309-10).

[6]To his knowledge, there were no prior mental health issues (T. 312).

There is no merit to Appellee's subsequent argument that, "As to the lay mitigation testimony presented at the evidentiary hearing, none of the testimony fits within the portrait of Jason Stephens that trial counsel wanted the jury to see." (Answer at 29).[7] Clearly, Appellee's statement is logically implausible as well as ignorant of the law, as trial counsel cannot strategically decide to refrain from presenting mitigation that he is unaware of due to a lack of investigation. See Wiggins v. Smith, 123 S.Ct. 2527, 2543 (2003); Henry v. State, 862 So. 2d 679, 685 (Fla. 2003)("A reasonable strategic decision is based on informed judgement.").

Moreover, with regard to "the portrait of Jason Stephens

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[7]Respondent fails to even address evidence presented at Mr. Stephens' evidentiary hearing regarding his frequent cocaine use, despite the fact that this Court has repeatedly found that an individual's chemical dependency on drugs and alcohol constitutes valid mitigation. See e.g., Merck v. State, 763 So. 2d 295, 298 (Fla. 2000); Hildwin v. Dugger, 654 So. 2d 107, 110 (Fla. 1995); Miller v. State, 770 So. 2d 1144, 1150 (Fla. 2000); Mahn v. State, 714 So. 2d 391, 400-1 (Fla. 1998).

that trial counsel wanted the jury to see", Appellee ignores the fact that in deciding to present a "human face" defense (Answer at 29), Eler readily admitted this was his focus to the exclusion of other investigation, including potential abuse in the home:

> Q **Did you ever specifically question any of the Stephens' family about discipline in the home?**
>
> A You know, you were talking about sensitive stuff before. It's a sensitive matter and I asked - - in general, and once again this is not a specific recollection. **I know I met with the family, and when I say family Mrs. Stephens, and I was trying to ask for good things, good points out of Jason's life to present to the jury, and I don't recall if I specifically asked about any abuse.**
>
> I don't recall specifically asking about that. I would have hoped that that had been the case - - and they are bright individuals. They are very articulate family and folks, that they would have brought that to my attention.
>
> Q **But you don't specifically recall asking that?**
>
> A **No.** I don't recall and I don't think Mr. Stephens presented with any of that even at the clinical stage with Doctors Miller or Dr. Knox because I didn't see that in their reports. That's something that I would have looked into had I known.

(T. 311)(emphasis added). As a result of counsel's failure to investigate and prepare, the evidence which was presented at the penalty phase was torn apart by the State, rejected by the jury,

and given little to no weight by the sentencing judge. Here, trial counsel failed to carry out his obligation to conduct a thorough investigation of his client's background. Williams v. Taylor, 529 U.S. 362, 396 (2000); State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000). Mr. Stephens was prejudiced as a result. Strickland.

Appellee also concludes that trial counsel cannot be ineffective for failing to present mental health mitigation at the penalty phase because he in fact consulted two experts and made a strategic decision not to call them (Answer at 31). Again, Appellee's argument is quite misleading and is refuted by the actual record in this case. For example, according to Appellee, "Mr. Eler asked the experts to look both at competence and insanity, and to steer him toward possible mental mitigation." (Answer at 26). The reality, however, is that trial counsel, either through ignorance or simply bad lawyering, never sought out mental health experts to evaluate Mr. Stephens for mitigation purposes. Instead, Eler requested and was appointed two mental health experts by the Court to determine:

> (a) **whether the Defendant meets the criteria for involuntary hospitalization** pursuant to the provisions of 394.467(1), Florida Statutes. ... (b) **whether he is incompetent to stand trial** within the meaning of Florida Rules of Criminal Procedure 3.211, ie., whether Defendant has sufficient present ability to consult

> with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as factual, understanding of the proceedings against him. ... (c) **whether the Defendant was insane at the time of the commission of the crime** charged herein, i.e., whether the Defendant was suffering from a mental illness and that, as a consequence thereof, was not able to understand the nature, quality and wrongness of his acts.

(Vol. I, R. 36-39), (Vol. II, R. 212-215)(emphasis added).

The reports generated by the experts reflect that they were neither requested, nor did they conduct, an evaluation for mitigation.[8] As Dr. Miller's report concludes, "Addressing your specific concerns, the patient in my opinion merits adjudication of competence to proceed and was not insane at the time of the alleged crime. It is further my opinion that he does not meet any criteria for commitment." (S-Ex. 1, at 3). And as Dr. Knox's report states, "Mr. Stevens {sic} was interviewed and tested for approximately one hour and fifteen minutes on November 14th, 1997 by the undersigned, to assess his competency

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[8]Moreover, an examination of the reports themselves demonstrates that no background information was provided by Eler to the experts. Dr. Miller's report specifically states that his evaluation of Mr. Stephens and the report from Dr. Knox are the data which form the basis of the report (S-Ex. 1, at 1). Dr. Knox's report states that "The conclusions in this report are based upon integration of information from the clinical interview, behavioral observations, and the results of the psychological testing." (S-Ex. 1, at 5).

to proceed and to determine his current intellectual functioning." (S-Ex. 1, at 5).[9]

Since Eler never consulted a mental health expert to evaluate Mr. Stephens for mitigation, Appellee cannot now claim that trial counsel made a strategic decision not to present a mental health expert at the penalty phase. See Ponticelli v. State, 941 So. 2d 1073 (Fla. 2006) ("'A competency and sanity evaluation as superficial as the one [the mental health expert] performed . . . obviously cannot serve as a reliable substitute for a thorough mitigation evaluation.'; *see also Sochor, 883 So. 2d at 772* (finding counsel deficient when counsel introduced the reports of three mental health experts who testified during the guilt phase but did not 'specifically instruct [the experts] to examine and evaluate [the defendant] for the purpose of establishing mitigating evidence')").

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[9]Moreover, contrary to Appellee's statement, Mr. Eler did not testify that he "asked the experts to look both at competence and insanity, and to steer him toward possible mental mitigation." (Answer at 26). What Eler actually stated was that, "so in addition to the competency **I was hopeful that they would maybe steer me** in a little more direction towards mental mitigation which was not available." (T. 232)(emphasis added). Rather than communicating his specific needs to the experts, Eler apparently relied on wishful thinking, much to the detriment of Mr. Stephens.

Appellee also attempts to discredit Dr. Toomer's conclusions by arguing that he failed to consider important information in arriving at his findings (Answer at 33, fn 5). As part of his evaluation, Dr. Toomer reviewed the Florida Supreme Court opinion, police reports, transcripts from the trial, reports from experts, school records, and D.O.C. records, which included testing that was conducted there (T. 24). Dr. Toomer also spoke with several of Mr. Stephens' family members, including his mother Delena, his sister Angela, and his brothers, Michael and Eric (T. 25). In addition, during Mr. Stephens' evaluation, which lasted for four or five hours, Dr. Toomer administered a battery of tests to assess personality functioning, academic skill, intellectual functioning and substance abuse (T. 25). Further, Dr. Toomer reviewed prior evaluations, including reports from Dr. Miller and Dr. Knox (T. 27).

Unlike trial counsel Eler or the two experts he used for a competency and insanity evaluation, Dr. Toomer was the only one to thoroughly review Mr. Stephens' background. His information was derived from records that trial counsel never obtained and from witnesses who trial counsel never spoke to. Clearly, it is trial counsel, and not Dr. Toomer, who failed to consider important information on behalf of Mr. Stephens. "[A]n attorney

has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." Riechmann, 777 So. 2d at 350, quoting Rose v. State, 675 So. 2d 567, 571 (Fla. 1996). Here, trial counsel's failure to conduct a reasonable investigation prejudiced Mr. Stephens.

B. Failure to Challenge or Neutralize Prior Violent Felony Conviction

In addressing trial counsel's failure to challenge or neutralize Mr. Stephens' 1992 burglary conviction as a prior violent felony aggravator, Appellee argues that since trial counsel objected to the use of this conviction as a prior violent felony, "he cannot be deemed ineffective for failing to do something he actually did." (Answer at 36). Appellee's argument here is misleading as it is only based on a half-truth. While trial counsel did make some sort of minimal attempt to argue against the admission of the prior violent felony, the record reflects that trial counsel ultimately stipulated to the admission of it as an aggravating circumstance:

> MR. ELER: Judge, I just want to object on the record. I don't think we put this on the record before, but I want to object to that coming in. I understand that one of the aggravators they are asking for is conviction of a felony involving the use or threat of use of force, and intend to present evidence to that effect. **I think they are legally entitled to it, however, I would like to object for the record as I don't think a burglary with an assault in this**

> **particular case should be admitted as an aggravator**. I just wanted to put that on the record.
>
> MR. TAYLOR: **By earlier agreement you agreed if the Court finds that it is relevant that this is a judgment of sentences of your client evidencing his convictions of these two crimes.**
>
> MR. ELER: **I did, that's correct.**
>
> THE COURT: Well, that's fine, but do we have a stipulation that in this burglary under this conviction there was an assault with a firearm on another human being?
>
> MR. ELER: Yes, sir, I have deposed the victim who identified Mr. Stephens.
> MR. TAYLOR: Yes, sir, we're prepared to prove that.

(Vol. IV, R. 588) (emphasis added). Contrary to Appellee's statement, counsel did in fact erroneously concede that the burglary conviction constituted a prior violent felony (Vol. IV, R. 754). Moreover, counsel failed to make any attempt to rebut or neutralize the weight of this conviction.[10] Counsel's inability to effectively litigate this issue was prejudicially

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[10]In fact, trial counsel testified during Mr. Stephens' evidentiary hearing that he would probably never introduce evidence to lessen the weight of a prior violent felony aggravator (T. 318-20). Appellee fails to even acknowledge this statement or the fact that it is contrary to United States Supreme Court precedent. See e.g., Rompilla v. Beard, 125 S.Ct. 2456, 2465, n5 (June 20, 2005), Wiggins, 123 S.Ct. at 2527.

deficient performance under Strickland v. Washington, 466 U.S. 668 (1984).[11]

Because of counsel's ineffectiveness, the jury heard uncontroverted, damaging testimony from the victim of the burglary. The trial court, in its sentencing order, quoted the victim's testimony almost verbatim.[12] Further, the court proceeded to assign "great weight" to this aggravating circumstance. The absence or minimization of this aggravating circumstance puts Mr. Stephens' death sentence in a much different light.

C. Concession of Aggravating Factors Not Found by the Trial Court

In addressing the concession of the HAC and pecuniary gain aggravators, Appellee seemingly commends trial counsel for attempting to soften the impact of these two aggravators (Answer at 46). Subsequently, Appellee makes the contradictory argument

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[11]Appellee also notes that "[A]s noted by this Court on direct appeal, Ms. Jackson's account of the events painted a remarkably similar picture to the home invasion which culminated in the death of Robert Sparrow III." (Answer at 37). This statement underscores the importance of minimizing the weight of this aggravator and demonstrating that its factural scenario is erroneous.

[12]Specifically, the court stated that Mr. Stephens "wielded a sawed-off shotgun. He threw Ms. Jackson against a car, pointed

that while trial counsel did argue to the jury that they should give little weight to the HAC aggravator, he did not concede the aggravator (Answer at 46).[13] Appellee's argument is flawed, as trial counsel's attempt to "soften the impact" of an aggravator necessarily signifies that the aggravator exits.

Here, trial counsel's concession of these aggravating circumstances to the jury is especially egregious as they were not found by the trial court:

> **The crime for which the defendant is to be sentenced was committed for financial gain.**
>
> This aggravating factor applies only where the murder is an integral step in obtaining some sought-after specific gain. If the theft of money or other are property is over, and therefore the murder was not committed to facilitate it, this factor does not apply.
>
> Under either theory advanced as to the cause of young Robert's death, the theft of money or other property was completed at the time of the murder. Although a CD player was taken when the defendant left

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a shotgun at her head and shouted 'let me kill this bitch.'" (Vol II, R. 389).

[13]Appellee fails to address trial counsel's concession that the pecuniary gain aggravating circumstance should be given "adequate weight." (Vol IV, R. 756-57).

> the victim's automobile, the Court does not find that the death of young Robert was committed to facilitate this taking. **Accordingly, it does not find that this aggravator was proved beyond a reasonable doubt.**

(Vol. V, R. 883) (emphasis added).

* * * *

> The Court, unable to conclude beyond a reasonable doubt, that the defendant intended to kill the child, **does not find that this aggravator [HAC] was proved beyond a reasonable doubt.**

(Vol. V, R. 883) (emphasis added). Here, there was simply no reason to concede an aggravator that had not been proven by the State. An attorney is responsible for presenting legal argument consistent with the applicable principles of law. Davis v. Secretary for the Department of Corrections, 341 F.3d 1310 (11th Cir. 2003); Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). No tactical motive can be ascribed to an attorney whose omissions are based on ignorance. see Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991); Hardwick v. Crosby, 320 F.3d 1127, 1163 n9 (11th Cir. 2003). Counsel's concession of these aggravators to the jury, ones which were not found by the court, prejudiced the outcome of the penalty phase.[14]

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[14]Appellee claims that trial counsel argued to the judge at the sentencing hearing that neither of these aggravators applied (Answer at 46). Appellee does not explain what strategic reason

D. Cumulative Analysis

Similar to the lower court's analysis, Appellee attempts to demonstrate a lack of prejudice by focusing on each instance of ineffectiveness on an individual basis. Such a narrow focus is contrary to clearly established precedent. As the United States Supreme Court has explained, the "prejudice" component of a Brady standard, the same standard as the one used for ineffective assistance of counsel claims, requires evaluation of the evidence that the jury did not hear "collectively, not item-by-item." Kyles v. Whitley, 514 U.S. 419, 436 (1995). Thus, Appellee's approach here is an incorrect one.[15] When evaluated cumulatively, it is clear that confidence is undermined in the outcome of Mr. Stephens' trial.

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trial counsel could possibly have had in conceding the very same aggravators to the jury.

[15]Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or that the deficiencies substantially impair confidence in the outcome of the proceedings. Strickland, 466 U.S. at 695. "In assessing prejudice, [this Court] must reweigh the evidence in aggravation against the totality of mitigating evidence." Wiggins, 123 S.Ct at 2542.

ARGUMENT II

THE TRIAL COURT ERRED IN DENYING MR. STEPHENS'CLAIM THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Failure to Attend Depositions

In addressing trial counsel's failure to attend a number of depositions, Appellee argues that Mr. Stephens "presented no evidence that Mr. Nichols failed to read or consider each of the depositions about which Stephens takes issue." (Answer at 55). Of course, Appellee's argument is both convenient and misleading, as Nichols was deceased at the time of Mr. Stephens' evidentiary hearing.[16] Moreover, Appellee misses the more critical point, that trial counsel was not actually present for the depositions. This was a capital case in which Mr. Stephens was facing the death penalty. Counsel had the opportunity to question witnesses in order to formulate a defense and to better defend his client. Yet, at this critical juncture, counsel was

[16]In addition, Mr. Stephens was prevented from determining whether Nichols even had copies of these depositions, because his files in this case had been "lost".

simply a no-show.[17] Certainly, this demonstrates counsel's failure to follow through on his duty to investigate and prepare. Rompilla, 125 S.Ct at 2466.

B. Failure to Argue Motions

With regard to trial counsel's failure to adequately argue for a change of venue, Appellee argues that Mr. Stephens "has not demonstrated, or even alleged, that any particular juror was so tainted by pre-trial publicity that he or she was unable to set aside what he may have heard outside the courtroom and decide the case solely on the evidence and the judge's instructions." (Answer at 60-61). In making this statement, Appellee fails to inform the Court that Mr. Stephens was prohibited from interviewing any of the jurors during postconviction proceedings.[18] Certainly, a remand on this issue would be more than appropriate in the instant case.

C. Concession of Guilt

With regard to the fact that trial counsel pled Mr. Stephens' guilty to first degree murder without his permission,

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[17]As the lower court noted, **"**The absence of trial counsel at discovery depositions is very disturbing.**"** (PC-R. 255-56)(emphasis added).

Appellee argues that there was "ample evidence trial counsel's advice was reasoned trial strategy." (Answer at 49). This argument is simply not credible and is contradicted by the record in this case as well as by the findings of the lower court. First, Appellee ignores the fact that this "reasoned trial strategy" was based on a conversation in the sallyport on either the day of jury selection or the actual beginning of the trial (T. 206-07).[19] Second, contrary to Appellee's assertion that Mr. Stephens agreed to this strategy of pleading guilty to first degree murder, co-counsel Eler acknowledged at the evidentiary hearing that Mr. Stephens never indicated he wanted to plead guilty to first degree murder (T. 248). In fact, according to Eler, Mr. Stephens' position from day one was that he didn't intend to kill anyone, and certainly that was consistent with his desire not to plead guilty to that count (T.

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[18]During the proceedings below, Mr. Stephens filed a Motion/Notice of Intent to Interview Jurors (PC-R. 76-80). However, the lower court denied this motion (PC-R. 103-4).

[19]Nichols, not having attended many depositions or having paid much attention at all to the case, asked Mr. Stephens in the sallyport which charges he committed and felt the State could prove (T. 206-07). Nichols then pled Mr. Stephens guilty to these charges (T. 208). Here, Nichols acted in violation of his duty to investigate and prepare and to neutralize the aggravating circumstances and present mitigation. Starr v.

249). Further, Appellee fails to explain how pleading a client guilty to the underlying crime of a felony murder constitutes a reasonable trial strategy.[20] This is not a case, as Appellee suggests, that trial counsel did this "to save Stephens' life." (Answer at 52). Eler, who was penalty phase counsel (T. 191), testified that he "wouldn't have done that" (T. 209, 249-50). Moreover, it is clear from the lower court's order that Nichols' decision was unreasonable:

> **However, the Court does find that Nichols' recommendation to plead guilty to kidnaping was not a reasonable recommendation.** It is a questionable strategy to enter a plea of guilty to the underlying felony [kidnaping] when charged with felony murder. By pleading guilty to the underlying felony, the State, under the law, was assured of a conviction absent a jury nullification. **Since the only purpose advanced for the strategy was to maintain credibility with the jury, this purpose was served by pleading guilty to seven (7) other counts. By pleading guilty to kidnaping, counsel was left with an unpersuasive legal argument** that the death occurred after the crime had

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Lockhart, 23 F.3d 1280 (8th Cir. 1994); Rompilla v. Beard, 125 S.Ct. 2456 (2005); Wiggins, 123 S.Ct. at 2527.

[20]"[S]imply because trial counsel claims 'strategy', this does not immune them from review." Hardwick, 320 F.3d at 1185-6.

> been completed, despite the child never being returned to a place of safety. See Stephens v. State, at p. 754.

(PC-R. 265-66)(emphasis added).

"[S]o called 'strategic' decisions that are based on a mistaken understanding of the law, or that are based on a misunderstanding of the facts are entitled to less deference." Hardwick, 320 F.3d at 1185-6 (citation omitted)(note omitted). Here, Nichols decision to plead Mr. Stephens guilty to the underlying felony was unreasonable.

D. Guilty Plea on Armed Robbery Charge

Similarly, Nichols' decision to plead Mr. Stephens' guilty to the armed robbery of Derrick Dixon resulted from either neglect and/or a lack of diligence. Had trial counsel attended Mr. Dixon's deposition, he would have been aware of the fact that Dixon specifically stated that Mr. Stephens took nothing from him (D-Ex. 10 at 106). Again, based on his failure to investigate and prepare, trial counsel's "strategic" decision was an unreasonable one.

E. Legal Analysis

As with Argument I, Appellee again asserts a lack of prejudice by separately examining each individual failure by trial counsel. However, Appellee never addresses the errors in a cumulative fashion, contrary to Kyles, 514 U.S. at 436. When

evaluated cumulatively, it is clear that Mr. Stephens was ultimately prejudiced by counsel's deficient performance. While Mr. Stephens' co-defendant, Horace Cummings, was also convicted of first degree murder, he was given a life sentence as the State did not pursue his case to a penalty phase. However, subsequent to Mr. Stephens' conviction, he was sentenced to death.[21]

ARGUMENT III

THE LOWER COURT ERRED IN DENYING MR STEPHENS' CLAIM THAT TRIAL COUNSEL WAS OPERATING UNDER A CONFLICT OF INTEREST WHICH VIOLATED MR. STEPHENS' RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Mr. Stephens asserted in his Initial Brief that a conflict of interest existed due to the fact that counsel for his co-defendant assumed representation of him for a majority of pre-trial and guilt phase proceedings.

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[21]Moreover, Appellee fails to address Mr. Stephens' argument in his Initial Brief that under the particular circumstances of this case, prejudice is to be presumed (See Initial Brief, Argument II (H)).

Appellee attempts to refute the claim by arguing that Mr. Stephens has not presented a claim of a violation of his right to conflict-free counsel because he was officially represented by Refik Eler and Richard Nichols (Answer at 81-82). Here, Appellee entirely misses the point. While Eler and Nichols were in fact appointed to represent Mr. Stephens, the fact is that this representation was simply a facade.[22] Because of counsel's inaction, counsel for Cummings conducted the vast majority of arguments, filed virtually all of the pretrial motions (which Mr. Stephens' attorneys copied), conducted the vast majority of cross-examinations and performed other work involved in the defense of Mr. Stephens. Additionally, counsel for Cummings covered depositions, hearings, and called the witness most critical to Mr. Stephens' defense, Dr. Dunton.

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[22]As part of their "representation" of Mr. Stephens, Nichols and Eler pled him guilty to the maximum sentence on eight counts of the indictment (See Initial Brief, Argument I), conceded his guilt to first degree murder (See Initial Brief, Argument II), and pled him guilty to a charge which even the State later conceded should have resulted in a directed verdict (See Initial Brief, Argument I). Conversely, counsel's "representation" apparently did not include making proper objections, arguing relevant motions, conducting an adequate investigation, appearing at depositions, calling critical witnesses or conducting cross-examinations (See Initial Brief, Arguments I and II).

The conflict arises out of the fact that while counsel for Cummings was taking on the added responsibility of defending Mr. Stephens, counsel's ultimate loyalty lay with their own client, Cummings. And in this case, the two clients did not have a harmonious defense.[23] A defendant is deprived of the sixth amendment right to counsel where (i) counsel faced an actual conflict of interest, and (ii) that conflict "actually affected" counsel's representation of the defendant. Strickland, 466 U.S. at 692 (1984)(quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)). Here, there is no doubt that the conflict "actually affected" counsel's representation. For example, Chipperfield attempted to elicit the fact that while at the victim's house, it was Mr. Stephens and not Cummings who attempted to choke the

[23]Attorney Chipperfield stated during the trial, "In this case we have positions in the case that are about as antagonistic as we can get." (Vol. VI, R. 14). Attorney White also testified that he felt that the defense for Stephens and Cummings were not harmonious (T. 143). Attorney Eler also acknowledged that he was aware that Chipperfield and White were representing Cummings as having an antagonistic defense to Mr. Stephens (T. 255).

victim.[24] (Vol. XIII, R. 1598-99)(Vol. XIV, R. 1604). During closing arguments, Chipperfield stated to the jury, "Are you going to hold Horace Cummings criminally responsible for the acts of Jason Stephens? That's your question." (Vol. XV, R. 1827). Chipperfield concluded his closing argument by stating "He's [Horace Cummings] not criminally responsible for what Jason Stephens did, so we ask you to return verdicts of not guilty on every count that he's charged with." (Vol. XV, R. 1876).[25]

Because the right to counsel's undivided loyalty "is among those constitutional rights so basic to a fair trial . . ., [its] infraction can never be treated as harmless error." Holloway v. Arkansas, 435 U.S. 475, 489 (1978). Although the general rule is that a criminal defendant who claims ineffective assistance of counsel must show both a lack of professional competence and prejudice, the prejudice test is relaxed where

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[24]The State's position at trial was that Cummings choked the child, and the child said to Cummings, "Are you going to kill me." (Vol. VI, R. 31).

[25]In addition, during the postconviction evidentiary hearing, Chipperfield testified that when he was doing the depositions in which Eler or Nichols didn't attend, he did not ask questions on behalf of Mr. Stephens (T. 134). Likewise, Bill White never asked any questions with Mr. Stephens' defense in mind (T. 143).

counsel is shown to have had an actual conflict of interest. Strickland, 466 U.S. at 693; Kimmelman v. Morrison, 477 U.S. 365, 381 n.6 (1986); Cuyler, 446 U.S. at 345-50. Where an actual conflict is present, the defendant need only show that the conflict had "some adverse effect on counsel's performance." McConico v. Alabama, 919 F.2d 1543, 1548-49 (11th Cir. 1980); Buenoano v. Dugger, 559 So. 2d 1116, 1120 (Fla. 1990). Clearly, the conflict that existed here "had some adverse effect on" the representation of Mr. Stephens.

CONCLUSION

Mr. Stephens submits that relief is warranted in the form of a new trial and/or a new sentencing proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by U.S. Mail, postage prepaid, to Meredith Charbula, Assistant Attorney General, Office of the Attorney General, 400 South Monroe Street, PL-01, Tallahassee, FL 32399-6536, this ____ day of February, 2007.

CERTIFICATE OF FONT

This is to certify that this Reply Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

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