IN THE SUPREME COURT OF FLORIDA

Case No. SC05-1617
Lower Court Case No. 1997-754-A CF

PAUL H. EVANS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
IN AND FOR INDIAN RIVER COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Evan's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.851. The following symbols will be used to designate references to the record in this appeal:

"R" -- record on appeal to this Court;

"PC-R" -- record on instant 3.851 appeal to this Court

"Supp. PC-R." -- supplemental record on instant 3.851 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Evans has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr.Evans, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

The Circuit Court for the Nineteenth Judicial Circuit, in and for Indian River County, Florida, entered the judgments of conviction and sentences of death at issue in this case.

Mr. Evans' first trial resulted in a hung jury (R. 1798). The second trial ended in a mistrial during voir dire (R. 2117). In his third trial, Mr. Evans was found guilty, as charged, of one count of first degree murder in the death of Alan Pfeiffer (R. 4283).

The Vero Beach Police arrived at the victim's trailer in the early morning of March 23, 1991 after receiving a complaint of loud music. The police discovered the body on the living room floor. There were no signs of forced entry or a struggle, but the trailer was in disarray. On the kitchen table, the police found a torn wedding photo and the victim's life insurance policies, worth approximately $120,000, each policy listing Connie as the beneficiary. They also discovered a marijuana roach in the living room, and a crack pipe and roach clip in the bedroom. There was lipstick on the roach in the living room, but police did not send it for DNA testing. A television, VCR and camcorder were missing from the trailer. Black high heel

shoes were found near the body. Greg Hill testified at trial that Connie Pfeiffer was wearing black spandex and high heels on the night of the murder.

Police did not speak to Connie until the next afternoon. Detective Elliot testified that Connie was uncooperative throughout the entire investigation. Connie told Elliot she attended the fair with Evans, Waddell and Thomas on the night of the murder. Waddell, Thomas and Evans each gave this same alibi.

After her husband's death, Connie moved from Vero Beach and bought a horse farm near Ocala worth $120,000, the same amount of the life insurance proceeds. Waddell testified that she did not receive anything of value for the murder of Alan, but Waddell did acquire a taxi company some time after the murder.

Eventually, the case grew cold and was closed by police. However, the Vero Beach Police reopened the case in 1997, with Detective Daniel Cook focusing his investigation on Evans, Connie, Thomas and Waddell. Thomas gave a statement to police about the murder and agreed to wear a wire and meet with Waddell. Police arrested Waddell, who agreed to cooperate and provide a statement after police showed her the statement given by Thomas. Based on the cooperation of Waddell and Thomas, police

arrested Connie and Mr. Evans for their involvement in the murder.

The State's theory at trial was that this was a murder-for-hire involving Mr. Evans and three co-conspirators: Sarah Thomas; Donna Waddell; and the victim's wife, Connie Pfeiffer. The State asserted that the victim's death occurred between 8:00 and 8:30 p.m. At trial, testimony of Mr. Evans' alleged involvement in the murder was provided entirely by Thomas, who was never charged with any crime, and Waddell, who pled guilty to second-degree murder in exchange for a sworn statement as to her involvement and her agreement to testify. The victim's wife, Connie, did not testify at Mr. Evans' trial because she invoked her Fifth Amendment rights. Connie was convicted of first-degree murder and received a life sentence.

Leo Cordary, a neighbor of the victim, was the only witness to corroborate the State's timing of events. Cordary testified that on March 23, 1991, the day of the incident, he heard banging at the victim's trailer during the afternoon, but he could not see anything (R. 3389). Cordary heard further banging later that evening, followed by gunshots (R. 3390). He testified that he heard the gunshots "around 8:00 o'clock" (Id.). However, Mr. Cordary

was admittedly drunk on that evening and had made two prior sworn statements, one statement indicating the shooting occurred between 10:30 and 11:00 p.m. and the other indicating the shots occurred around 6:30 p.m.

At trial, Waddell testified that she, Connie, Thomas, and Mr. Evans all agreed on a plan to kill Pfeiffer, and that the four of them arranged the victim's trailer home to look like a robbery scene. Then, according to Waddell, she and Mr. Evans went to her parents' home to steal a gun from her father, after which Waddell, Evans and Thomas went to test-fire the gun. After firing the gun, Waddell said that she, Evans and Thomas returned to the trailer to discuss the alibi with Connie, and that Mr. Evans said he was going to hide behind furniture and shoot the victim when he came into the trailer.

Waddell testified that she, Thomas and Mr. Evans went to the fair that evening, but left the fair and got to the victim's trailer at dusk. Waddell and Thomas left Mr. Evans at the trailer. Waddell did not remember whether they returned to the fair after dropping Mr. Evans off at the trailer, yet Thomas testified that they did return to the fair at that time.

Thomas testified that she and Waddell used quarters at the fair to avoid having their hands stamped so it would

not appear that they left the fair and returned later. Thomas also said that she and Waddell stayed at the fair for one to two hours before going back to the trailer.

During that same night, Alan's girlfriend, Linda Tustin, met with Alan at his workplace. Tustin saw that Alan was agitated during a phone call with his wife, Connie, and when Alan got off the phone, he told Tustin that "his wife and her biker friends are going to clean him out." Alan left work for home around 7:30 p.m. -- a thirty minute drive.

The testimony of Waddell and Thomas is inconsistent in many regards. Thomas testified that Mr. Evans never went to the fair in the early evening hours. Instead, she testified that Thomas and Waddell dropped Mr. Evans off at the victim's trailer before going to the fair. Waddell testified that Mr. Evans went to the fair with both women before dropping him off at the trailer.

Thomas testified that when she and Waddell first went to the pickup spot to get Evans, he was not there, so they drove around and parked at a gravel lot. Thomas said that they did not see Mr. Evans, so they returned to the fair and waited thirty to forty-five minutes before returning to the pickup spot to meet Evans around 10 or 11:00 p.m. Waddell testified that the two women drove around for a

long time and finally parked near the trailer park. When Waddell thought she heard a shot, the two women returned to the pick-up spot where they found Mr. Evans. Waddell believed this to be between 8:30 and 9:00 p.m.

Thomas said that she and Evans disposed of the gun a few days later in a canal near Yeehaw Junction. However, Waddell testified that she, Thomas and Evans disposed of the gun in a canal the night of the murder after firing off the rest of the bullets.

The testimony of Waddell and Thomas was also inconsistent as to Mr. Evans' alleged act of burning his pants in a bathtub after the murder. Waddell testified that this happened the next day and that she, Evans and Thomas were present. However, Thomas said that she and Evans tried to burn Evans' pants after they got home from Denny's.

Thomas also stated that shortly after the murder, Evans threw pieces of a camcorder taken from the victim's trailer in a dumpster. Waddell testified that all three of them smashed a television taken from the trailer and that Thomas and Evans disposed of the pieces.

Thomas and Waddell both testified that upon returning to the fair, Connie took her kids home and returned to the fair to pick up Waddell, Thomas and Mr. Evans and they went

to Denny's. After Denny's, Thomas and Mr. Evans returned to their apartment while Connie and Waddell drove around.

After very heated deliberations, the jury convicted Mr. Evans of first-degree murder. At the penalty phase, the defense presented limited evidence of Evans' troubled childhood, including an incident in which Evans accidentally shot his younger brother, Matthew, while the boys were playing. Trial counsel also presented evidence through two psychologists that Mr. Evans would adapt well in prison. After the penalty-phase proceedings, the jury voted nine to three in favor of death (R. 4460). The court followed the jury's recommendation and sentenced Mr. Evans to death. (R. 4524), finding two aggravating factors: (1) The crime was committed for pecuniary gain, and (2) the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification ("CCP"). The only statutory mitigator found was Mr. Evans' age of nineteen when the murder was committed. The court additionally found eleven nonstatutory mitigators giving them from very little weight to moderate weight. (R. 4524).

On direct appeal, the Florida Supreme Court affirmed the convictions. *Evans v. State,* 808 So. 2d 92 (2001). Mr. Evans timely petitioned the United States Supreme Court

for certiorari. This petition was denied on October 15, 2002.

On October 9, 2002, pursuant to Fla. R. Crim P. Rule 3.852, counsel for Mr. Evans timely filed numerous Demands for Public Records from various state agencies involved in this case. On January 6, 2003 the circuit court held a hearing regarding agency objections to Mr. Evans' Rule 3.852 Demands. On August 19, 2003, the circuit court heard argument pertaining to statutory exemptions claimed by various state agencies and reviewed the exempt records for exculpatory information. At the August 19, 2003 hearing, Mr. Evans was provided with additional public records by the court after the court determined his entitlement to the redacted records.

On October 2, 2003, Mr. Evans timely filed his Motion to Vacate Judgments of Conviction and Sentence pursuant to Fla. R. Crim. P. 3.851, wherein he alleged six claims for relief, including several grounds under each claim. The Court granted an evidentiary hearing for claims I, II (excluding failure to object to serious misstatements of the law) and III. An evidentiary hearing was denied for claims IV, V and VI.

The lower court held an evidentiary hearing on November 8, 9 and 22, 2004. Mr. Evans called numerous

witnesses including Mr. Evans' trial attorneys, alibi witnesses, mental health experts and family members in support of his postconviction claims including ineffective assistance of counsel at the guilt/innocence and penalty phases of his trial.

On June 9, 2005, the circuit court issued an order in Mr. Evans' case denying his Rule 3.851 Motion. (PCR. 1105-28). Mr. Evans' motion for rehearing was denied on July 16, 2005 (PCR. 1143-44).

On May 18, 2005, just prior to the court's denial of releif, Mr. Evans filed a Demand for Additional Public Records to the Office of the State Attorney requesting all letter(s), emails, notes and/or other forms of correspondence from Lawrence Mirman, Assistant State Attorney, to defense witnesses, Mark Harllee, Assistant Public Defender and Diamond Litty, Public Defender, written and delivered between the date of the filing of the Defendant's Motion for Post-Conviction Relief and the date of Mr. Evans' evidentiary hearing. The State objected claiming a work product exemption. On August 12, 2005, the circuit court held a hearing, ultimately sustaining the State's objection and requiring that the document remain under seal.

Thereafter, Mr. Evans timely filed his notice of appeal. (PCR. 1145-46).

SUMMARY OF THE ARGUMENTS

I. Mr. Evans did not receive a full and fair evidentiary hearing due to the State's request to seal favorable impeachment evidence and the lower court's denial of access to public records. During the evidentiary hearing, the State provided trial counsel with a written document that was purported to contain responses to questions or areas of questioning by Mr. Evans counsel. As a result, Mr. Evans did not a true adversarial testing of his claims. Moreover, it taints the findings of the trial court.

II. Mr. Evans received ineffective assistance of counsel at the guilt phase of his capital trial. The case against Mr. Evans was circumstantial. There was no weapon, no eyewitness and the State's key witnesses were convicted felons and co-defendants who escaped prosecution or received a deal for their assistance. Impeachment evidence would have cast reasonable doubt on the already contradictory testimony of Donna Waddell and Sarah Thomas. Had trial counsel thoroughly investigated, prepared, presented alibi and impeachment witnesses and adequately

challenged the State's case, there is more than a reasonable probability of a different outcome.

III. Counsel's ineffectiveness was compounded by the State's willful withholding of relevant impeachment and exculpatory evidence. Here, material impeachment evidence was withheld from counsel which directly attacked the theory of the State's case. Impeaching the unindicted co-defendant, the co-defendant and the only witness placing the timing of the shooting at the same time as testified to by the co-defendants was key to the defense theory that Mr. Evans did not commit this crime because he did not have the opportunity. Because the state unreasonably failed to disclose its existence, or defense counsel unreasonably failed to discover it exculpatory evidence did not reach the jury.

IV. Mr. Evans received ineffective assistance of counsel at the penalty phase of his capital trial in violation of his rights as guaranteed by the fifth, sixth, eighth and fourteenth amendments. There was abundant mitigation available to present to the jury that defense counsel, without tactic or strategy, failed to present. Trial counsel ignored Mr. Evans' psychological history, the effects of institutionalization on Mr. Evans and the effect of the complete lack of supervision and abandonment by both

parents on Mr. Evans. Because counsel was ineffective, the jury never heard Mr. Evans history of inadequate treatment throughout his hospitalizations, the fact that he was ineffectively medicated, he was raised in an inconsistent and unstructured family environment and suffered from long standing cognitive impairment.

V. Trial counsel was ineffective for failing to challenge Juror Schuman, a clearly unqualified juror, for cause; failing to reassert his challenge for cause against Juror Combs, another unqualified juror; and failing to object to the Court limiting his ability to back strike members of the original petit jury. As a result, trial counsel allowed unqualified Jurors Schuman and Combs to remain as triers of fact in Mr. Evans' case.

VI. Due to the sheer number and types of errors involved in his trial, Mr. Evans did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. The lower court failed to conduct a meaningful cumulative analysis of the post-trial evidence in order to evaluate Mr. Evans' claims.

VII. Rule Regulating the Florida Bar 4-3.5(d)(4), which prevents Mr. Evans from investigating any claims of jury misconduct or reliance on external influences that may be inherent in the jury's verdict, is unconstitutional. Here,

where juror misconduct is present, the need to interview jurors is of particular importance. Because ethical rules prohibit Mr. Evans' lawyers from interviewing jurors, Mr. Evans has been denied the effective assistance of counsel in pursuing his postconviction remedies.

VIII. Mr. Evans' death sentence violates Ring v. Arizona, 122 S. Ct. 2428 (2002) because the jury was not required to render a unanimous recommendation and the aggravating factors were not alleged in the indictment.

ARGUMENT I - MR. EVANS WAS DENIED ACCESS TO PUBLIC RECORDS AND A FULL AND FAIR EVIDENTIARY HEARING DUE TO THE STATE'S WITHHOLDING OF MATERIAL IMPEACHMENT EVIDENCE.

It is a fundamental due process right that the playing field be level when both parties present evidence in court. That is the hallmark of *Holland v. State*, 503 So. 2d 1250 (Fla. 1987) upon which this Court has repeatedly relied. In this cause, during the evidentiary hearing and without concern for the due process rights of Mr. Evans, the State provided trial counsel with a written document that was purported to contain responses to questions or areas of questioning by Mr. Evans counsel. In essence, the State was permitted to provide suggested answers. Mr. Evans was denied access to that document. (PC-R. 210).

At the evidentiary hearing Mr. Evans called his trial attorneys, Mark Harlee and Diamond Litty. During his testimony, Mark Harllee made reference, during direct examination, to written communication received by him from the state attorney. In the case of *State v. Kearse*, Case No. 910136-CFA, an evidentiary hearing was held on April 18-21, 2005, in the same circuit as Mr. Evans case before Judge Cianca. During the course of that evidentiary hearing it was discovered that a defense witness, Mr. Robert Udell, trial attorney for Mr. Kearse, had received a 24 page letter from Lawrence Mirman sent to him prior to the evidentiary hearing. That letter was sealed and the issue is currently pending before this Court. After that hearing, counsel for Mr. Evans confirmed by phone with defense witness Diamond Litty, penalty phase trial counsel for Mr. Evans, that she had also received a written correspondence, directed to both her and Mark Harllee, from Lawrence Mirman prior to Mr. Evans' evidentiary hearing. However, Ms. Litty, when asked, declined to provide a copy of the letter to counsel.

As a result, Mr. Evans filed a Demand for Additional Public Records to the Office of the State Attorney requesting all letter(s), emails, notes and/or other forms of correspondence from Lawrence Mirman, Assistant State

Attorney, to defense witnesses, Mark Harllee, Assistant Public Defender and Diamond Litty, Public Defender, written and delivered between the date of the filing of the Defendant's Motion for Post-Conviction Relief and the date of Mr. Evans' evidentiary hearing. The State objected claiming a work product exemption. The trial court held a hearing, ultimately sustaining the State's objection and requiring that the document remain under seal.

Under Fla. Stat. Sec. 119.07(l)(1), a public record prepared by an agency attorney which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney, and which was prepared exclusively for litigation, is exempt from disclosure as attorney work product. The letter received by Mr. Harlee and Ms. Litty is not privileged "work product." The letter was prepared by the State with the knowledge that Mr. Evans would be calling both Mr. Harllee and Ms. Litty to testify at the evidentiary hearing, and to prepare both for their testimony. Mr. Harllee and Ms. Litty are neither public employees of the same agency as the prosecutor, officers of the State Attorney, nor attorneys "consulted" by an agency attorney. Nor are either Mr. Harllee or Ms. Litty a "party" to this litigation. They were two of many witnesses called by the Defendant to testify in a

postconviction proceeding. Given the circuit court's ruling, the State would be free to write lengthy letters to every potential defense witness regarding their anticipated testimony, and the defense would not be entitled to know what the State had said in preparing the defense witnesses to testify.

Even assuming, arguendo, that the letters were privileged, by disclosing the letters to Mr. Evans' witnesses, who were not a party to this litigation, the State waived that privilege. If the public record is released to another <u>public employee or officer of the same agency or any person consulted by the agency attorney</u>, that exemption is not waived. Fla. Stat. Sec. 119.07(l)(2) (emphasis added). However, disclosure to others who are not party to the litigation may waive the work product privilege.

Furthermore, some documents contained within an agency attorney's files are non-exempt public records that are subject to public inspection.[1] While information regarding the opinion of an attorney may be exempt from disclosure as privileged work product, information regarding facts is

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[1] *See* *Pietri v. State*, 885 So. 2d 245 (Fla. 2004); *State v. Kokal*, 562 So. 2d 324 (Fla. 1990); *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*, 379 So. 2d 633 (Fla. 1980).

not. In addition, where the material contains mixed fact and opinion work product, the "fact" work product. (i.e., factual information which pertains to the case and is prepared or gathered in connection therewith) is subject to disclosure. *State v. Rabin*, 495 So. 2d 257 (Fla. 3rd DCA 1986); *Whealton v. Marshall*, 631 So. 2d 323 (Fla. 4th DCA 1994).

The requested records are relevant to the subject matter of the Mr. Evans' post-conviction proceeding and are reasonably calculated to lead to the discovery of admissible evidence in that such records contain, or, through further investigation, will lead to the discovery of evidence that Mr. Evans' did not receive his right to a full and fair evidentiary hearing. Specifically, Mr. Evans' believes that the letter sent by prosecutor Mirman to defense counsel went beyond mere witness preparation. In fact, Mr. Harlee testified that while on the witness stand he had "some work product of the state attorney **who prepared some responses** to things he anticipated would be asked of me" (PC-R. 210)(emphasis added).

The effect of this was to deprive Mr. Evans of a true adversarial testing of his claims. Moreover, it taints the findings of the trial court so that no deference can be given to those findings where there was not a fair

presentation of Mr. Evans case. In essence, Mr. Evans was deprived of a full and fair post-conviction proceeding where he was denied the ability to challenge the State's involvement with or influence on the testimony of his trial counsel. *Holland v. State*, 503 So. 2d 1250 (Fla. 1987); *Easter v. Endell*, 37 F.3d 1343 (8th Cir. 1994). Mr. Evans is entitled to the document and a full and fair evidentiary hearing.

ARGUMENT II - MR. EVANS RECEIVED INEFFECTIVE ASSITANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF HIS RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The lower court's order denying Mr. Evans' Rule 3.851 Motion is replete with findings that trial counsel's actions or inactions were based on strategic decisions. However, deeming a decision as strategic is not the end of the legal analysis. Rather, an attorney's performance must be **reasonable** under the prevailing professional norms, considering **all of the circumstances**, and viewed from the attorney's perspective at the time of trial. *See Strickland v. Washington,* 466 U.S. 669 (1984); *Downs v. State*, 453 So. 2d 1102 (Fla. 1984). Although there is a strong presumption of reasonableness that must be overcome, and strategic or tactical decisions by counsel made after a

thorough investigation are virtually unchallengeable, "patently unreasonable decisions, while they may be characterized as tactical, are not immune". *Light v. State,* 796 So. 2d at 616 (Fla. 2nd DCA 2001). The trial court accepted trial counsel's assertions of strategy despite contradictory evidence in the trial and postconviction record. The lower court's findings are not supported by competent and substantial evidence.

Failure to Present Evidence

The State's theory at trial was contingent on the victim's death occurring between 8:00 and 8:30 p.m. In support of this theory the State presented Leo Cordary, Sarah Thomas and Donna Waddell. Additionally, the State argued that this was a murder for hire and Mr. Evans was to receive cash from a life insurance policy, a television and a camcorder for shooting the Alan Pfeiffer (R.3119). This was supported by only the testimony of Sarah Thomas and Donna Waddell.

Leo Cordary lived in the trailer next to the victim's. According to Leo Cordary, the victim's wife Connie Pfeiffer approached him approximately eight weeks prior to the victim's death asking if he knew anyone who could "take care of" her husband(R. 3386-87). He then testified that on March 23, 1991, the day of the incident, he heard

banging at the victim’s trailer during the afternoon, but he could not see anything (R. 3389). Cordary heard further banging later that evening, followed by gunshots (R. 3390). He testified that he heard the gunshots “around 8:00 o’clock" (Id.).

Leo Cordary’s testimony coincides with the testimony of Sarah Thomas and Donna Waddell. According to Donna Waddell, she, Paul and Sarah initially went to the fair where they saw Connie Pfeiffer, Greg Hill and Connie’s children (R. 3826). Donna testified that she, Paul and Sarah did not stay long (Id.), leaving the fair at “dusk” (R. 3827). Donna clearly stated twice that it was not dark yet (Id.). After leaving the fair, they drove to the victim’s trailer and dropped off Paul (R. 3828). Donna stated she and Sarah left the trailer, but could not remember if they went back to the fair (R. 3831, 3833). After driving around for an amount of time she could not remember, she heard what she thought to be gunshots and returned to the designated pick-up spot (R. 3834). Donna claims that Paul was at the pick-up spot when they arrived (R. 3835). Although Donna could not intially remember what time they met Paul at the pick-up spot, she finally agreed that it was between 8:30 and 9:00 p.m. (R. 3897).

Donna further testified regarding the items they received for committing the crime. She specifically recalled receiving a television, VCR and camcorder. However, she stated that she, Paul and Sarah smashed the television and Paul and Sarah took the pieces (R. 3847). She does not know what happened to the broken television pieces, nor did she ever see the camcorder again (R. 3848). Conveniently, the police never found these items to verify Donna's story.

Although Sarah Thomas' testimony and statements are very inconsistent, not only between statements, but also with Donna Waddell's testimony, Sarah's timeline puts Paul at the trailer at approximately 6:30 p.m., or at dusk. Further, Sarah's time line puts all three, Paul, Sarah and Donna, back at the fair between 10:00 and 11:00.

The defense theory very clearly was that Paul Evans could not have committed this crime. Paul Evans did not have the opportunity and given the timing asserted by the State, it was not possible for Mr. Evans to be at the fair, travel to the trailer, shoot the victim and make it back to the fair. In opening argument, trial counsel stressed to the jury:

> Because what the evidence will show is that Donna and Sarah give completely different stories as to what happened that night. So it's important to

> listen to their details. **Who was in the cars before the fair? When did they drop Paul off at the trailer? When did they go back to the trailer? Where did they pick him up? Did Paul go to the fair that night? Did he go twice? Where did they go after they picked him up?** And what you'll hear are two diametrically opposed stories.

(R. 3128-29)(emphasis added). Further, the defense argued that the victim, Alan Pfeiffer, was not at the trailer when the State said he was killed by Mr. Evans, between 8:00 and 8:30 p.m. (R. 3127). Finally, the defense emphasized that there was no motive for Mr. Evans to kill Alan Pfeiffer, no evidence of any payment to Mr. Evans and not evidence of a television or camcorder (R. 3131-32).

Mr. Evans has proved that numerous witnesses were available to testify who would have cast reasonable doubt on the State's theory at trial, not only the time of death, but Mr. Evans' alleged motivation as well. These witnesses supported the defense theory that Mr. Evans could not have committed this crime because he did not have the opportunity. Further, the witnesses corroborated trial counsel's argument that Mr. Evans received no payment for the alleged crime and no television or camcorder. Trial counsel knew of these witnesses, but failed to adequately interview and prepare these witnesses and for no strategic reason failed to call them to testify on Mr. Evans behalf.

Mr. Evans' trial counsel, Mark Harllee, testified that he utilized two investigators for Mr. Evans case. Sandy Warner is the only investigator employed at the public defender's office. The Public Defender's Office also uses a private investigative firm, Investigative Support Specialists, Inc., when court-appointed, (PC-R. 215). Mr. Brandon Perron, the head of that firm, began working on Mr. Evans' case around April, 1998. (PC-R.217). Mr. Harllee testified that he had asked Mr. Perron several things when Mr. Perron first became involved in the case, including locating and interviewing various witnesses (PC-R. 217-219). Mr. Perron's investigation was limited to primarily finding and interviewing potential alibi witnesses, and therefore his investigation was for the guilt phase only (PC-R. 219-220).

According to Harllee, included in Perron's bill for services were the location of and interview of Jesus Cruz on 9/14/98 (PC-R. 219) and of Jose Mejia on 1/7/99 (PC-R. 220). Mr. Harllee referred to Perron's investigative report regarding Jesus Cruz and Jose Mejia's statements that they heard firecracker type noises (gun shots) around 10:00 - 10:30 pm on the night of the homicide, as the basis for Mr. Harllee having the men subpoenaed for trial (PC-R.

222-223). However, he did not call them to testify for Mr. Evans (PC-R. 225).

Jesus Cruz testified at the evidentiary hearing.[2] Mr. Cruz stated that he has lived at Citrus Park Village for about 15 years and was living there in 1991 at the time when his neighbor was shot and killed (PC-R. 410). He had one roommate, Jose Mejia, at the time (PC-R. 410-411). Mr. Cruz said that he had been home that evening watching a movie and admitted he and Mr. Mejia were drinking and that he considered himself to have been drunk (Id.). However, he did remember the movie was called "Lombada" and he remembered going out to rent the movie and returning back about 6 or 7 p.m. (PC-R. 411). He testified that he remembered hearing gunshots between 9:30 and 10:00 p.m. that evening and that he had given that information to detectives who had questioned him later (PC-R. 411-412). Mr. Cruz did not remember speaking to any attorneys from the public defender's office (Id.). Although Mr. Cruz acknowledged having a head injury which he thought had an effect on his memory, on re-direct examination, Mr. Cruz was adamant that he remembered hearing gunshots between 9:30 and 10:00 even though he was drinking, stating: "Yes.

[2] It is important to note that Mr. Cruz testified through a Spanish interpreter due to his lack of command of the English language.

I repeat myself. I do remember it, but I was drunk and all I can tell you is what I heard and that's it" (PC-R. 416).

Mr. Harllee admitted that he had no personal contact with Cruz or Mejia at all prior to the trial (PC-R. 225). Although he couldn't remember much, he did recall having a conversation with one or both of them in the hallway during the trial (he thought it was only one of them, but couldn't remember which one he spoke with) (PC-R. 224-225). Mr. Harllee recalled having someone acting as an interpreter but couldn't recall whom that person was (PC-R. 226). He couldn't attest to the quality of the interpretation (PC-R. 227). He also didn't remember if he had Cruz or Mejia review any of their prior statements and couldn't remember trying to refresh their recollection before deciding not to use them as witnesses (PC-R. 225). However, due to the fact that one of them allegedly stated, in Spanish, through an unknown interpreter, that he/they couldn't give a time as to when they heard the firecracker sound because of intoxication, Mr. Harllee testified that he "made a strategic decision not to call them as witnesses" (PC-R. 225). The trial court relied on this statement by Harlee and concluded that the strategy decision was reasonable. The court's conclusion is contradicted by the record from the evidentiary hearing and the trial. The trial court did

not address the fact that Mr. Harllee’s only contact with these witnesses was in the hallway at trial, despite having subpoenaed both men to testify and despite having a memorandum from his investigator which was favorable to the defense theory.

Mr. Harllee’s decision is unreasonable in light of the consistency of Cruz and Mejia’s statements with each other as well as over time. In fact, Mr. Harllee had a memo from his investigator indicating both men did recall what time they heard the gunshots. Furthermore, his decision is unreasonable given that the state’s key witness, Leo Cordary, was also admittedly intoxicated. Finally, the fact that Harllee met with them in the hallway at trial is completely ineffective. Had he met with them prior to trial, adequately interviewed both men, and reviewed their prior statements, both Cruz and Mejia[3] would have testified that they heard shots between 9:30 and 10:00 p.m.

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[3]Jose Mejia did not testify at the evidentiary hearing because he was unavailable. Trial counsel proffered his affidavit into the record (PC-R. 418-19). Mr. Mejia’s affidavit indicated he was unavailable because he was moving to Columbia on October 20, 2004 and had no immediate plans for return. Mr. Mejia further indicated, consistent with his original report to police, that on the night Alan Pfeiffer was killed he heard gunshots between 9:30 p.m. and 9:45 p.m. Mejia confirmed that his original police report would be accurate.

Mr. Harllee did remember a possible witness named William Lynch, and upon refreshing his memory from a Vero Beach police report (3-26-91). Mr. Lynch would have testified he and his wife returned home from dinner and heard 2-3 gunshots at around 10:30 p.m. (PC-R. 254). Mr. Harllee did not remember if that police report had been provided to him in discovery, but did remember that he was not able to locate either Mr. Lynch or his wife.[4] However, upon review of Mr. Perron's bill for services, Mr. Harllee didn't see any billing entries for attempts to locate Mr. or Mrs. Lynch (PC-R. 258). The trial court failed to address this testimony entirely.

Leo Cordary is the only witness who heard gunshots at 8:00 p.m. Trial counsel argued that Leo Cordary's testimony about the time of the gunshots was not reliable (R. 4143), yet he presented no testimony to refute Cordary. Cruz, Meija and Mr. Lynch set the shooting of Alan Pfeiffer much later in the evening and provided the testimony to support counsel's argument. Both the State and the defense ignored the numerous witnesses whose statements set the shooting of Alan Pfeiffer much later in the evening. There

[4] Of course, although Mr. Lynch is now deceased, post-conviction counsel was able to locate his family years after the fact. Mr. Evans admitted into evidence the police report and death certificate of Mr. Lynch – showing he died in 2000. (PC-R.258).

are no other witnesses who heard shots between 7:30 and 8:00 p.m. and interestingly, the timing of the gunshots provided by the witnesses presented at the evidentiary hearing are similar.

Numerous alibi witnesses were also available, yet were not presented by Mr. Harllee. Mr. Harllee remembered a potential witness named Rosa Hightower, and remembered that she would testify that she had seen Mr. Evans at the Fireman's Fair around 6:30 pm (PC-R. 229-231). He decided her testimony was weak, not really providing an alibi and therefore he decided not to call her so as not to lose the "sandwich" in closing argument (PC-R. 230). Upon further questioning, Mr. Harllee also remembered that Ms. Hightower had seen Mr. Evans another time at the fair (PC-R. 233). Contrary to the trial court's finding that Harllee did not know that Ms. Hightower saw Mr. Evans a second time, he acknowledged that he did remember that information. Rosa Hightower confirmed this information at the evidentiary hearing.

Ms. Hightower testified that she remembered going to the Fireman's Fair in March of 1991, and had first seen Mr. Evans at the fair at approximately 6:30 p.m. – that he greeted her and walked around with her for about 15-20 minutes (PC-R. 400-403). She said she left the fair around

9:00 – 9:30 p.m., and that she had again seen Mr. Evans at the fair about 45 minutes before she left, i.e. around 8:15-8:45 p.m. (PC-R. 403-404).

She had been subpoenaed to testify in Mr. Evans' trial in 1999, and had been contacted by a female investigator who only told her she would be subpoenaed for the trial but didn't tell her what it was about (PC-R. 404). She believed the investigator was for the defense (PC-R. 405). Ms. Hightower testified that she told the defense investigator not only that she had seen Mr. Evans early in the evening, but that she had left the fair around 9:00 p.m. – 9:30 p.m., and had seen Mr. Evans again about a half an hour to 45 minutes before she left (PC-R. 403). Although she had been subpoenaed to testify, and did come to the courthouse pursuant to the subpoena, she never entered the courtroom and nobody came and talked to her (PC-R. 404). She didn't know why she wasn't called to testify, and did not recall ever meeting an attorney for Mr. Evans (Id.). Trial counsel made the effort to subpoena this witness, but decided to dismiss her without even speaking to her. This decision ignored the fact that she did provide an alibi even in the later hours of the evening.

Yet another potential guilt phase witness, Tony Kovaleski, was available and would have testified that he

and Mr. Evans were together at the fair for about one hour, starting around dusk (PC-R. 262-263). In fact, Mr. Kovaleski testified that he remembered arriving at the Vero Beach Firefighter's fair in March 1991 at dusk (PC-R.453).[5] Upon arriving at the fair, he met up with Mr. Evans (Id.). Mr. Kovaleski confirmed that Mr. Evans stayed with him and his son for approximately an hour and a half to two hours (Id.). Again on cross-examination, Mr. Kovaleski reiterated that he was with Mr. Evans from approximately 6 p.m. to 8 p.m. or 6 p.m. to 7:30 p.m.[6] Therefore, if Mr. Evans stayed with Mr. Kovaleski until 7:30 p.m., at the earliest, Mr. Evans could not have killed Alan Pfeiffer. Witnesses at trial testified that the trailer park was approximately twenty minutes from the trailer (R. 3756). Given Kovaleski's testimony, Mr. Evans could not have been at the trailer by approximately 8:00 p.m., in advance of the victim arriving home.

Mr. Harllee agreed that this testimony would have contradicted testimony by Donna Waddell and Sarah Thomas (PC-R. 263). For example, Sarah Thomas testified at trial

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[5] While the trial court's order indicates that sunset was at 6:43 p.m. on the night in question, this is incorrect. According to questions posed by trial counsel at trial, sunset that evening occurred at 6:34 p.m. (R. 3751).

[6] Interestingly, Mr. Kovaleski did not ever see Paul Evans with Donna Waddell or Sarah Thomas.

that Mr. Evans never went to the fair during the early evening hour. Rather, she and Donna Waddell dropped Mr. Evans off at the trailer where he waited an hour to an hour and a half for the victim (R. 3682-83; 3692). During cross-examination at trial, Thomas reiterated that Mr. Evans was dropped off at the trailer around sunset and only Waddell and Thomas went to the fair (R. 3752-53). Sarah Thomas testified that she "definitely did not go to the fair at first with Paul," yet, two disinterested witnesses who have now testified at the evidentiary hearing saw him there at dusk.

However, Mr. Harllee decided that Mr. Kovaleski was not a credible witness due to his demeanor, the fact that he has prior felony convictions and that he was in jail at the time of the trial (Id.). However, he agreed that if this witness were to be impeached by use of prior convictions, that would only allow testimony about the number of convictions and not their substance (PC-R. 264-265). Mr. Harllee discounts the fact that the State's key witness, Cordary, also had a prior felony record and was in jail at the time of trial.

A third witness, Christopher Evers, recalled seeing Mr. Evans at the fair on March 23, 1991. Mr. Harllee did not think that he had ever spoken with potential trial

witness, Chris Evers, the son of Connie Pfeiffer. He also did not see any reference to Chris Evers on the bill from his investigator, therefore, did not think that he had asked his investigator to interview Chris Evers at the time of Mr. Evans' trial (PC-R. 324). Trial counsel should have been alerted to the importance of speaking to Mr. Evers due to the fact that his fingerprint was found on a glass in the victim's trailer although he didn't live there and was forbidden to visit the trailer.

Mr. Evers testified that he was driven to the fair by Donna Waddell and his mother, Connie Pfeiffer (PC-R. 429-430). Donna Waddell dropped off Mr. Evers, his brother and his mother at the fair, but she never came into the fair (T. 240). Mr. Evers believed they stayed at the fair at least until after dark and estimated that he left the fair around 7:00 p.m. or 8:00 p.m. While inside the fair, Mr. Evers, his mother and brother met a group of people (Id.). Both of these statements are consistent with his deposition given in his mother's case. See State's Exhibit 3 for identification (Supp. PC-R. 366-67; 374). The group included "Mr. Evans, a guy with blonde hair, [and] a lady" (T. 241). Mr. Evers reiterated that Donna Waddell never came into the fair, instead the group exited the fair and Waddell was waiting in the parking lot (PC-R. 431-433).

Waddell, along with Mr. Evers' mother, Connie, drove Mr. Evers and his brother home (PC-R. 432). This is likewise consistent with his previous deposition (Supp. PC-R. 369).

The trial court's conclusory finding that Mr. Evans failed to show that Mr. Evers testimony would have changed the outcome of the proceeding, ignores Mr. Evans' argument below. Mr. Evans demonstrated that Mr. Evers testimony is significant for several reasons. First, he puts Mr. Evans at the fair between 7:00 and 8:00 p.m. Second, Mr. Evers testimony directly contradicts the testimony of Donna Waddell, Mr. Evans co-defendant.[7] Waddell specifically maintained that after she and Sarah Thomas picked up Mr. Evans, after allegedly killing Alan Pfieffer, they returned to the fair, met up with Connie and gave her the car keys to the rental car (R. 3839). Waddell testified at trial that Connie took her kids home in the rental car and Waddell, Thomas and Mr. Evans stayed at the fair with no transportation (R. 3840). According to Mr. Evers, this is untrue. Contrary to the circuit court's characterization of Mr. Evers as an alibi witness, Mr. Evers also provided evidence that Donna Waddell was untruthful.

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[7] This is only one of many contradictions within Ms. Waddell's police statements and trial testimony.

Furthermore, the testimony provided by Christopher Evers, shows that Connie Pfeiffer and Donna Waddell were together with the car during the timing of the shooting provided by witnesses Cruz, Mejia and the Lynches. Greg Hill's testimony at trial also supports the fact that Pfeiffer and Waddell had the opportunity to return to the Pfeiffer trailer and shoot Alan Pfeiffer. Hill testified that when he left the fair, Connie "seemed to be fine" (R. 3665). Later, when she came to his home at approximately 10:30 p.m., she was sweating, nervous and shaking (Id.). Donna and Connie had the opportunity to commit this crime while Mr. Evans was at the fair. The witnesses that testified at the evidentiary hearing confirm that Mr. Evans was at the fair, at a minimum, from dusk until 8:15 p.m.[8] and did not leave with Donna and Connie when they left to take Connie's kids home.

Evidence that the timing of the shooting occurred much later than the state asserted, coupled with Mr. Evans alibi witnesses, would have cast a reasonable doubt with the jury and impeached the State's key witnesses, yet trial counsel unreasonably failed to present any of this information.

[8] This time frame is based on Kovaleski's testimony that he stayed with Mr. Evans at least until 7:30 p.m., Evers testimony that he saw Mr. Evans approximately 8:00 p.m. and Hightower's testimony that she saw Mr. Evans between 8:15 and 8:45 p.m.

Paul Evans did not have the opportunity and given the timing asserted by the State, it was not possible for Mr. Evans to be at the fair, travel to the trailer, shoot the victim and make it back to the fair. Defense counsel even argued in closing that Connie Pfeiffer was directly responsible for her husband's death. The jury was not provided with any evidence to support this theory.[9] In fact, because the defense failed to investigate and call these witnesses regarding the timing of the victim's death and Mr. Evans alibi, the State was able to argue to the jury that no one heard shots after 9:30 p.m. and that no one else had the opportunity to commit the murder (R. 4205). This simply was not true.

In addition, trial counsel argued that Leo Cordary's testimony about the time of the gunshots was not reliable (R. 4143), yet he presented no testimony to refute Cordary. Concerning his knowledge and memory about State's witness Leo Cordary, Mr. Harllee recalled that Mr. Cordary testified to hearing gunshots being fired between 8:00 and 8:30 p.m. (PC-R. 251-252).[10] Upon review of the trial

[9] The state highlights the lack of alibi evidence during closing argument stating: "This is the time the defendant says he's at the fair. He doesn't give us any testimony in that regard" (R. 4224).
[10] Mr. Cordary in fact testified that he heard shots at 8:00 pm (R.3390).

transcript, Mr. Harllee also remembered that Mr. Cordary had been arrested for a felony violation of probation the day before Mr. Evans' trial, and was in the jail at the time he testified at Mr. Evans' trial (PC-R. 245). He agreed that on violations of (felony) probation, the defendants are commonly held without bond (Id.).

What Mr. Harllee didn't know is that Mr. Cordary, without objection from the state, was permitted to bond out on his violation of probation charge (See Connie Pfeiffer Trial Record [CP-R] 2011-2017). In fact, Assistant State Attorney, Nikki Robinson, assisted in facilitating an emergency bond hearing on a Friday afternoon. There was no bond reduction investigation and no objection to the setting of bond by the State (CP-R. 2016-17).[11]

Mr. Harllee testified that he was never made aware that prosecutor Nikki Robinson was trying to make arrangements to have Mr. Cordary bonded out – but had he known, he absolutely would have used that information for cross-examination of Mr. Cordary (PC-R. 245-246), agreeing that:

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[11] A copy of the excerpt of the bond hearing was admitted at the evidentiary hearing as defense exhibit 8. The excerpt of the hearing actually reflects that Assistant State Attorney Chris Taylor was present at the hearing.

> . . . I believe Mr. Cordary, in a disinterested position, was the only one to put the shots at that time (PC-R. 252).

Thus, by counsel’s own testimony, impeaching Cordary was key. The State’s withholding of this impeachment evidence (See Argument III, infra), coupled with trial counsel’s failure to call the witnesses from the trailer park and alibi witnesses from the fair, left the jury without any evidence to support the defense theory that Mr. Evans had no opportunity to commit this crime.

Likewise, Mr. Evans had no motive for committing this crime. At the evidentiary hearing, Mr. Evans presented the testimony of Mindy McCormack. Ms. McCormick becamehas lived in Vero Beach for about 25 years and had known Connie Pfeiffer, having met her through a mutual friend (PC-R. 438). Ms. McCormick became friendly with Connie Pfeiffer about two weeks after the death of Alan Pfeiffer and was friendly with her for about five or six months (PC-R. 439).

During this time, Ms. McCormick accompanied Connie Pfeiffer to her storage unit to get some of her personal items (PC-R. 441). While at the storage unit, Ms. McCormick noticed that Connie Pfeiffer had stored a nice TV, a stereo and a black case containing a camcorder. Ms. asked Connie Pfeiffer why she didn’t have those things in her apartment, and she remembered Connie telling her it was

because she didn't want them to get stolen (Id.). Ms. McCormick testified that several times she told the police about going to the storage unit, and in fact was taken by the police to Curtis Mathis[12] to point out the items that she had seen in the storage unit (Id.).

Upon reviewing the McCormick defense deposition, Mr. Harllee said Ms. McCormick told him about going to a warehouse with Connie Pfeiffer where she observed a TV and camcorder being stored by Pfeiffer (PC-R. 237). Mr. Harllee agreed that during the trial the State had alleged that part of the payoff to Mr. Evans included a TV and camcorder. (Id.). However, he didn't call Ms. McCormick as a defense witness because he felt her testimony was non-specific with regard to the timing of seeing the items and the description of the items (PC-R. 238-239).

Mr. Harllee didn't follow-up with questions as to the time frame of when Ms. McCormick saw the items in storage, and didn't send any investigators to look into the storage facility for those items (PC-R. 239). Mr. Harllee did remember State's witness, Sarah Thomas, testifying that the camcorder was broken up into pieces and Ms. Thomas and Donna Waddell's testimony that those items were disposed of

[12] The victim had been employed at Curtis Mathis, which is a store where electronic equipment is sold.

at different places (PC-R. 240). Mr. Harlee acknowledged that McCormick's testimony "may have negated somewhat the allegation of a payoff with these good" (PC-R. 241).[13] It certainly would have created doubt in the minds of the jury and contradicted the testimony of Thomas and Waddell. However, he did admit that had he followed up with further questioning during the McCormick deposition, he could have at least had more information regarding the aggravator of pecuniary gain (Id.).

Ms. McCormick also testified about another incident that occurred while she was alone with Connie Pfeiffer. Connie met a man who gave her a package described by Ms. McCormick as a brown manila envelope – pretty thick and a little heavy (PC-R. 442). Later that evening Ms. McCormick and Connie Pfeiffer drove to the river and Connie threw the package in the river. Connie stated she was getting rid of old memories (Id.). This, too, was told to the police during their investigation. Ms. McCormick further testified that, from her description, the police made a sketch of the man who had given Connie Pfeiffer the package (PC-R. 442-443).

[13] Mr. Harllee had to concede that he did not "get the specifics as to the brand names …nor the time frame of when this occurred" (PC-R. 240).

Mr. Harllee had no memory at all of seeing a statement taken of Mindy McCormick by the State, (PC-R. 242), or that Ms. McCormick said a package had been delivered to Connie Pfeiffer, or that there was a sketch made of an individual who was delivering packages to Ms. Pfeiffer (PC-R. 241). However, he did agree that had he known anything about the package, he would have had his investigator find out further information, and would have asked Ms. McCormick about it in his deposition of her, (PC-R. 243), and would have followed up on it as part of his investigation (PC-R. 244).

The trial court concluded that Mr. Evans had not met the burden of showing how failure to present McCormick's testimony prejudiced the outcome of trial. The case against Mr. Evans was circumstantial. There was no weapon, no eyewitness and the State's key witnesses were convicted felons and co-defendants who escaped prosecution or received a deal for their assistance. Impeachment evidence, like that offered by Mindy McCormick, would have cast reasonable doubt on the already contradictory testimony of Donna Waddell and Sarah Thomas. Where the defense argued that the State had no proof of a camcorder or a television (R. 3132), but provided no evidence to show that Connie Pfeiffer remained in possession of such items,

the jury was left to believe the testimony of Thomas and Waddell. The two witnesses with the most to gain, Thomas and Waddell, put these items in Mr. Evans possession.

Further, the trial court failed to review the testimony from the evidentiary hearing witnesses as a whole or in conjunction with the trial record. Unfortunately, the lower court conducted no meaningful cumulative analysis of the overwhelming evidence in this record. Rather, the court simply concluded that individually Mr. Evers testimony would not have made a difference and Ms. McCormick's testimony would not have made a difference in the outcome.

Counsel's highest duty is the duty to investigate and prepare. See, e.g., R. Regulating Fla. Bar 4-1.1. Where, as here, counsel unreasonably fails to investigate and prepare, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. *See, e.g., Kimmelman v. Morrison,* 477 U.S. 365, 384-88 (1986) (failure to request discovery based on mistaken belief state obliged to hand over evidence); *Henderson v. Sargent*, 926 F.2d 706 (8th Cir. 1991)(failure to conduct pretrial investigation was deficient performance); *Chambers v. Armontrout*, 907 F.2d 825, (8th Cir. 1990)(en banc) (failure to interview potential self-

defense witness was ineffective assistance); *Nixon v. Newsome*, 888 F.2d 112 (11th Cir. 1989)(failure to have obtained transcript of witness's testimony at co-defendant's trial was ineffective assistance); *Code v. Montgomery*, 799 F.2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witnesses). Here, counsel, through his investigator, conducted only a cursory investigation regarding potential alibi witnesses and witness that refuted the testimony of the State's key witnesses. Despite initially having favorable information, trial counsel failed to speak to Jesus Cruz, Jose Mejia and Rosa Hightower prior to trial, leaving any "decision" regarding their testimony to be made in the hallway at trial. Admittedly, Mr. Harlee did not pursue the information provided him during Mindy McCormick's depostition (PC-R. (t.50)). Trial counsel, or the investigator, never spoke to Christopher Evers.

The alibi and timing witnesses presented at the evidentiary hearing had knowledge of relevant admissible evidence. In closing argument defense counsel argued to the jury that Connie Pfeiffer was the shooter and that Mr. Evans was not even present when the shooting occurred. Given the time frame provided by witnesses Mejia, Cruz and the Lynches, Connie Pfeiffer had the opportunity to return

to her trailer and shoot her husband. This is corroborated by the testimony of Greg Hill, Connie's boyfriend who was with her at the fair. Greg Hill testified that he left the fair at 9:30 p.m. after meeting up with Connie's friends (R. 3659). Connie also left at that time to take her kids home and to meet with Hill at his house afterwards (Id.). Hill testified that Connie arrived at his house at approximately 10:30 p.m. Therefore, as trial counsel argued, Connie, along with Donna Waddell, had a "window of opportunity" (R. 4160).

Because the defense failed to investigate and call these witnesses regarding the timing of the victim's death, the State was able to argue to the jury that no one heard shots after 9:30 p.m. (R. 4205). This simply was not true. Had the jury heard the witnesses trial counsel failed to present, they would have heard that the gunshots occurred much later in the evening, thus making it more likely than not that Connie Pfeiffer and Donna Waddell were responsible. They also would have heard that Mr. Evans received no payment of any kind.

Trial counsel, with no reasonable tactic or strategy, failed to call these witnesses. Each of these witnesses had information relevant to Mr. Evans' defense and their testimony is consistent with the unsupported argument made

by trial counsel at the time of trial. Had trial counsel thoroughly investigated, prepared and presented these witnesses, there is more than a reasonable probability of a different outcome. The jury was thus deprived of important, relevant and admissible evidence which would have caused them to have a reasonable doubt. Mr. Evans was denied the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 123 S. Ct. 2527 (2003).

Failure to object to an individual juror's participation in trial

During the first day of the trial, Juror Geneva Taylor was admonished by the Court for participating in the trial. Once the jury was excused for a fifteen minute break the Court explained what happened and trial counsel acknowledged that he heard the juror say something about the light at an intersection (R. 3180-81).

At the evidentiary hearing, Mr. Harllee admitted that he did not move to have Ms. Taylor removed from the jury, did not ask for an inquiry of the jury as to whether Juror Taylor's comment had influenced them, didn't ask for an instruction to the panel to disregard Juror Taylor's comments, made no objections to the extraneous information given by Juror Taylor, and did not make an objection to her

being admonished in front of the entire panel (PC-R. 281-82). Mr. Harllee plainly stated he could not think of any reason for not making those requests and/or objections (PC-R. 282).

Despite Mr. Harllee's concession on direct examination, upon review of his notes during cross, he saw that he had given Juror Taylor three (3) plusses (meaning she was a good potential juror) and then agreed that due to this, he chose not to challenge Juror Taylor when she interjected her words in a witness's testimony – even without knowing what she had said (PC-R. 327-328). The trial court relied on this testimony in finding Harllee's trial strategy reasonable. This overlooks the impact Juror Taylor's "testimony" may have had on other jurors, as well as the impact of her admonishment in front of the entire panel. This reasoning also does not provide a reasonable strategy decision for not requesting an instruction to disregard Ms. Taylor's "testimony."

Trial counsel was ineffective for not objecting to this extraneous information about the intersection light once it was volunteered by Juror Taylor. By interjecting herself Ms. Taylor became an unsworn witness who Mr. Evans could not cross-examine. The introduction of such extraneous information threatens the "constitutional

safeguards guaranteed to all criminal defendants such as the right to confront accusers, the right to cross-examine witnesses, and the right to be represented by counsel." 75B Am. Jur. 2d Trial § 1544. *See also Turner v. Louisianna* 379 U.S. 466, 85 S.Ct. 546, 13 L. Ed. 2d 424 (1965).

This information was of particular import due to the defense theory that it was impossible for the defendant to travel the alleged distances by car as asserted by Sarah Thomas and Donna Waddell, the only two witnesses that testified that Mr. Evans ever had any involvement in the case. Juror Taylor's acknowledgement regarding the existence of a street light at an intersection negatively influenced the plausibility of the defense case and improperly bolstered the credibility of the prosecution's theory and either way served to improperly influence one or more of the members of the jury. Admittedly, there was no strategic reason for not objecting to the extraneous information and the court's resolution of the matter.

Failure to timely request a Richardson hearing

During the testimony of Charles John Cannon, III, counsel for Mr. Evans, on cross-examination, began to impeach the witness with his prior testimony (R. 3505 - 3537). The main focus of this questioning was on the key

issue of whether Mr. Cannon saw Alan Pfeiffer's Black Trans Am parked in front of the trailer between 9:30 to 9:45 pm on March 23, 1991 (R. 3511 - 3516). This was the key issue for the defense, the fact that Mr. Evans would not have been able to commit this crime at the time Ms. Thomas or Ms. Waddell said he did, at approximately 8:00 pm. During his testimony, Mr. Cannon made mention of the prior trial and the Court excused the jury in order to continue the inquiry as to the change in his testimony (R. 3517 - 3518). Mr. Cannon explains that he had inquired of the State prior to his current testimony whether he should testify to what he remembers now, or to what he had said in prior statements (R. 3519 - 3524). It was made very clear by Mr. Cannon that he was told by Assistant State Attorney Robinson that if he didn't remember something to answer accordingly (R. 3520). Ms. Robinson was placed on notice that there would be a change in Mr. Cannon's testimony,[14] but did not inquire as to what that change would be.

Mr. Harllee, upon refreshing his memory by viewing the trial transcript, agreed that he had requested a Richardson hearing (PC-R. 285), and that the court denied that

[14] Mr. Cannon testified at Mr. Evan's first trial that he had seen the victim's car in front of the victim's trailer around 9:30 pm. However, when testifying at the third trial, Mr. Cannon testified the he didn't remember looking to see any cars at the victim's property. (PC-R.283-284).

request, finding that a there was no discovery violation (PC-R. 286). However, Mr. Harllee agreed that he did not request a Richardson hearing at the immediate time the witness was testifying, (PC-R. 289), nor did he specifically request that a full inquiry be made in order to lay a record for appellate review, (PC-R. 287), did not make an objection to the lack of an inquiry by the court, (PC-R. 292) and also did not request any type of sanctions against the State (PC-R. 288).

Trial counsel failed to adequately object to this new testimony and was thus, ineffective. The Court denied the request for the *Richardson* hearing and made a finding of no violation on the part of the State.[15] The trial court found that once the trial court declared there was no Richardson violation, trial counsel could do no more. The lower court missed the crux of Mr. Evans claim. There was no inquiry from the prosecution by the Court and no objection by Mr. Harllee as to a lack of a hearing (R. 3587-3588).

It was incumbent upon Mr. Harllee to properly pursue these issues and follow through on his objections. The

[15] The proper inquiry under *Richardson v. State*, 246 So. 2d 771 (Fla. 1971), and its progeny is: whether the discovery violation was willful; whether the violation was trivial or substantial; what effect it had on the complaining party as to their ability to prepare for trial; and what sanction, if any, is appropriate. *See Wilcox v. State*, 367 So. 2d 1020, 1022 (Fla. 1979).

entire defense case relied upon the timing of the death of Alan Pfeiffer. Mr. Evans was prejudiced by Mr. Cannon's change in testimony and should have been afforded, at a minimum, an appropriate objection, *Richardson* inquiry, and/or ruling by the Court. Trial counsel did not accomplish this for Mr. Evans and was, in turn, ineffective.

Failure to Object to Inflammatory and Prejudicial Comments Elicited by the State

The State, during their direct examination of Sarah Thomas, repeatedly elicited Ms. Thomas' age at the time of the offense. She was 16 to 17 years old (R. 3678). Her age at the time was completely irrelevant and only served to prejudice the jury against Mr. Evans. There was no objection by the defense. The State went further and brought forth that one month after the death of Alan Pfeiffer, Ms. Thomas became pregnant with Paul Evans' baby and that she no longer wanted to live with him and she moved back in with her parents (R. 3699 - 3700). On a third occasion the State reiterated that Ms. Thomas was intimate with Mr. Evans and became pregnant. (R. 3701 - 3703). This too is irrelevant and served only to place Mr. Evans in a bad light, given that the jury was now privy to the fact that he impregnated a minor, a crime he could have

been prosecuted for in 1991. On each occasion trial counsel failed to object.

Trial counsel reiterated this information during his cross-examination of Ms. Thomas, only serving to highlight the prejudice even more (R. 3737 - 3738). Mr. Harllee agreed that there were several references made, by the State, as to Ms. Thomas' age being 16-17 years old at the time of the incident, and to the fact that Mr. Evans had a sexual relationship with this minor and had fathered her child (PC-R. 292-293). Mr. Harllee also agreed that he did not object to the State eliciting this information, and in fact, agreed that he too had elicited this information (PC-R. 294). Mr. Harllee attempted to explain that this "was one of our theories of defense is that Sarah had born Paul's child, that she was now in a different relationship with a different man and was trying to basically get Paul out of the picture" (PC-R. 293). However, Mr. Harllee had to concede that after eliciting the prejudicial information of Sarah's age and sexual relationship with Mr. Evans, he never asked any questions during cross examination as to her motivation to get Mr. Evans out of the picture (Id.).

The lower court states that "testimony concerning the child and custody battle were to the defendant's advantage because they gave Thomas a motivation to lie" (PC-R. 1111).

At trial there was no questioning, nor any mention of a "custody battle." The only testimony elicited at trial by counsel included Sarah's marital status and her admission that she does not care for Paul (R. 3747-48). She merely stated that it did not matter to her whether Paul is around or not (Id.). This is hardly exposing a motivation to lie. Further, trial counsel did not adequately evaluate the impact of this testimony.[16] Trial counsel testified that he did not ask any questions of the jurors during voir dire on this issue (PC-R. 294), even though he stated it was part of his defense.

Mr. Harllee recalled State's witness, co-defendant Donna Waddell, testifying that Mr. Evans was part of a gang,[17] and that the trial was the first time he had heard about that, but he agreed that he did not ask for a *Richardson*[18] inquiry (PC-R. 297-298). Mr. Harllee had objected to this statement, and a cautionary instruction was given for the jury to disregard the speculative

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[16] Mr. Harllee didn't make any inquiry during voir dire about the juror's reaction to this type of information (PC-R. 294). Nor did he make a motion in limine to keep this information from the jury (PC-R. 295).

[17] Ms. Waddell testified that Mr. Evans had threatened her with retaliation by the "old family" which she explained, in front of the jury, was the name of his former gang (R. 3855 - 3856). Mr. Harllee moved for a mistrial (R. 3855 - 3856).

[18] 246 So. 2d 771 (Fla. 1971).

statement by Ms. Waddell (PC-R. 298). Therefore, Mr. Harllee admitted that he had agreed to the curative instruction and did not object to the instruction as drawing more attention to the statements (Id.). Mr. Harllee waived the motion for mistrial by agreeing to the curative instruction that the "gang" remark by Donna Waddell was pure speculation on her part and that the jury is to disregard her statement (R. 3862).

Mr. Evans never testified at trial, nor did he ever put his character at issue. The testimony elicited by the State and volunteered by Ms. Thomas and Ms. Waddell about the Defendant's bad character was improper as a whole and individually. *See Martinez v. State*, 761 So. 2d 1074 (Fla. 2000). Trial counsel put forth no reasonable strategy for failing to object to the improper and prejudicial comments elicited during the testimony of Ms. Thomas and Ms. Waddell.

Furthermore, during its closing argument, the State had referred to the murder as execution style (R. 4204). Mr. Harllee did not object to that comment by the State, yet agreed that this would possibly have gone towards, and influenced the jury in their determination of finding the aggravator of cold, calculated and premeditated (PC-R. 299-300). The lower court did not address the impact on the

jury at the penalty phase. The cumulative effect of this testimony violated his right to a fair trial and due process. Trial counsel did not object and/or failed to maintain his objections on behalf of Mr. Evans in each instance of improper testimony. Trial counsel was deficient.

Failure to Object to Improper Bolstering of Witness Credibility

While conducting the direct examination of Det. Cook, the State elicited various improper comments that bolstered the credibility of Sarah Thomas and Donna Waddell before their credibility ever came into question. Det. Cook testified at trial that during the initial interrogation of Sarah Thomas no promises were made to her and that at all times she was under the belief that she could be arrested. Trial counsel objected on the grounds of speculation and the objection was sustained. (R. 3605). Though the objection was timely, it stated only part of the grounds that the testimony was improper. Trial counsel's failure to object on the additional ground of improper bolstering of Ms. Thomas' credibility by a police officer should have been made. This same line of questioning, regarding no promises being made to Ms. Thomas, continued immediately

after the objection as to speculation was sustained (R. 3605). Mr. Harllee did not object to this testimony.

Det. Cook then explained that Ms. Thomas was asked to assist in the investigation by wearing a "body bug" and approach Donna Waddell and Paul Evans to see if they would make any incriminating statements to her (R. 3606). When the State asked again if any promises were made to Thomas in exchange for her cooperation, trial counsel failed to object (R. 3606). The State was permitted to continue bolstering Ms. Thomas' credibility. Further along in his testimony, Det. Cook explained that during the same occasion that he interviewed Ms. Thomas, they did not permit her to make any unmonitored calls prior to her initial contact with Ms. Waddell (R. 3607). When asked why this was done Det. Cook explained that it was to ensure that she was being truthful (R. 3607). This answer was not objected to and left the jury with the impression that whatever Ms. Thomas said under these circumstances was the truth. This invaded the province of the jury by taking from them their independent judgment of assessing the credibility of any taped statements made while Ms. Thomas wore this "body bug". These statements were one of the key features in the trial. To the extent that trial counsel allowed this testimony by Det. Cook, he was ineffective.

Mr. Harllee did not have a recollection of Detective Cook's testimony concerning contact with Sarah Thomas and therefore relied on the record for much of this questioning. He relied on the record as to his failure to object to speculation or improper bolstering through Detective Cook concerning whether Ms. Thomas knew she would be arrested, or whether any promises were made to her (PC-R. 300-301). In fact, upon review of the relevant portions of the trial transcript, Mr. Harllee **admitted that there was no strategic reason for not objecting to Detective Cook testifying that no promises were given to Ms. Thomas** (PC-R. 303)(emphasis added). Mr. Harllee also **admitted that there was no strategic reason for failing to object to Detective Cook's testimony** that Ms. Thomas was not permitted to make unmonitored phone calls in order to insure the police would "get the truth from her" (PC-R. 304) (emphasis added). Mr Harllee acknowledged that even the trial court judge pointed out that there was objectionable testimony that Mr. Harllee hadn't objected to (PC-R. 307).

Towards the end of Mr. Harllee's cross-examination, the most egregious example of bolstering is committed by Det. Cook. In a series of questions regarding what potential charges Ms. Thomas was facing at the time of her cooperation, Det. Cook indicated that the Grand Jury made

the final decision (R. 3637). Though trial counsel did bring the Grand Jury issue to the Court as improper (R. 3637 - 3638), he failed to adequately object.

The Grand Jury comment was improper because it not only served to inappropriately bolster Ms. Thomas' testimony, it also served to again invade the province of the jury by letting them know that another jury heard this same testimony and found Ms. Thomas credible (so as not to charge her with murder) and found the other co-conspirators to be guilty of the murder as charged. Despite his agreement with the State at the evidentiary hearing that he intended to bring out the fact that Thomas was not charged with the crime in which she had participated (T-139), on re-direct examination, Mr. Harllee confirmed that it was not good at all that the trial jury was informed (by Det. Cook) that the grand jury had heard the same evidence and made a decision based on it.

Throughout Det. Cook's initial testimony, trial counsel permitted the State to elicit multiple hearsay accounts of conversations had between Ms. Thomas and Ms. Waddell, improperly bolstering the credibility of the investigation and Det. Cook's testimony (R. 3606 - 3609). Trial counsel finally objected and moved for mistrial (R. 3610 - 3611). After acknowledging that multiple hearsay

statements had been elicited, the court denied the motion (Id.). Though trial counsel did finally move for mistrial and stated improper bolstering was the problem, Mr. Harllee still failed to object to the numerous instances of improper bolstering of both Ms. Thomas and Ms. Waddell's testimony in the exchange between Det. Cook and the State before moving for a mistrial. This was ineffective representation by Mr. Harllee.

Det. Cook's testimony only served to improperly bolster the credibility of himself, Ms. Thomas and Ms. Waddell. "The law is well-settled that a witness's testimony offered to vouch for the credibility of another is inadmissible." *Weatherford v. State*, 561 So. 2d 629, 634 (Fla. 1st DCA 1990); *See also Capehart v. State*, 583 So. 2d 1009 (Fla. 1991); *Tingle v. State*, 536 So. 2d 202 (Fla. 1988); and *Norris v. State*, 525 So. 2d 998 (Fla. 5th DCA 1988). This improper bolstering was even more egregious because Det. Cook is a law enforcement officer. *Stamper v. State*, 576 So. 2d 425, 426 (Fla. 1st DCA 1991). This Court has found in an analogous context, in *Martinez v. State*, 761 So. 2d 1074, 1080 (Fla. 2000) that ". . . this Court has expressed it's concern that error in admitting improper testimony may be exacerbated **where the testimony comes from**

a police officer. See *Rodriguez v. State*, 609 So. 2d 493, 500 (Fla. 1992)." *Emphasis added*.

Ms. Thomas and Ms. Waddell were the only evidence, by form of their testimony, that the State had against Mr. Evans. The improper bolstering of Ms. Thomas and Ms. Waddell's credibility was topped off by the prosecution during closing argument (R. 4205). This argument served only to further prejudice Mr. Evans by saying that the jury had to believe Ms. Thomas and Ms. Waddell because they took the plea deal and in turn, they had to believe Mr. Evans was guilty, because these women took the plea deal.[19] This invaded the province of the jury, improperly tainted their perception of the evidence, and rendered their job of weighing and evaluating the credibility of these witnesses as simply a perfunctory stamp of approval of what the Grand Jury had already done. Trial counsel's failure to object, and do so adequately when called for, made him ineffective.

Failure to Object during State's Closing Argument Regarding Mutually Exclusive Factual Theories of Prosecution

Trial counsel was ineffective for not objecting to the State's closing argument that the jury did not have to agree as to which theory; half the jury could determine

[19] Again, Mr. Harllee offered no strategy for not objecting (PC-R.307).

that Mr. Evans was the shooter and the other half could believe he was a principal (R. 4173 - 4174). Trial counsel never objected to this argument by the prosecution and, as this Court pointed out, "nor did he request a jury instruction or special verdict form that would have required jury unanimity on whether he was the shooter or the principal." *Evans v. State*, 808 So. 2d 92, 106 (2001).

The lower court does not refute that trial counsel failed to object.[20] However, the lower court misconstrues Mr. Evans argument. The issue is not the presentation of dual theories, nor arguing dual theories during closing. In fact, trial counsel filed a motion for statement of particulars, seeking to make the State choose one of two theories: either Mr. Evans was the shooter or he was a principal. *Evans v. State*, 808 So. 2d 92, 106 (2001). That motion was denied. The issue is the State's closing argument indicating the jury could be **divided** on the theories. As this Court recognized, where there exists the possibility that the "jury may be divided as to the elements of the crime" both the State and Federal

[20] To explain trial counsel's failure to object though, the court below stated "defense counsel did argue to the jury that the State could not have it both ways" (PC-R. 1115). This overlooks the State's argument that the jury could be divided and overlooks that counsel's argument is not evidence or jury instruction.

Constitutions are violated. *Evans* at 106, citing *Schad v. Arizona*, 501 U.S. 624, 115 L. Ed. 2d 555, 111 S. Ct. 2491 (1991), and *Richardson v. United States*, 526 U.S. 813, 143 L. Ed. 2d 985, 119 S. Ct. 1707 (1999).

An additional problem that was created by this either/or theory of prosecution was the confusion over the applicability of the alibi instruction. The State argued that Mr. Evans, by providing an alibi, was a principal to the crime charged. Though Mr. Harllee objected as to the State misinstructing the jury, he failed again to recognize and bring to the Court's attention in the form of an objection the fact that the mutually exclusive factual theories of prosecution combined with this argument only served to confuse the jury.

Trial counsel did not recognize and object to the fact that their only defense was now made an element of the crime. This, coupled with the State arguing that they don't have to prove every element of the crime, caused Mr. Evans to have an unfair trial and violated his right to due process. Trial counsel's failure to object during closing argument to the State's contention that a divided and misinstructed jury could render a fair and just decision was ineffective assistance of counsel.

Conclusion

Had trial counsel thoroughly investigated, prepared, presented alibi and impeachment witnesses and adequately challenged the State's case, there is more than a reasonable probability of a different outcome. The record reveals that jurors were in disagreement during guilt phase deliberations (R. 4382), and in fact the deliberations became quite heated (Id.). The trial court indicated that it could hear raised voices (Id.). Additionally, the first trial resulted in a hung jury. Had trial counsel thoroughly investigated and challenged the State's case, the evidence that went unpresented would have tipped the scale in Mr. Evans' favor. Mr. Evans is entitled to relief.

ARGUMENT III - THE STATE WITHHELD MATERIAL EXCULPATORY OR IMPEACHMENT EVIDENCE

Counsel's ineffectiveness was compounded by the State's willful withholding of relevant impeachment and exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83 (1963). The State had or knew of material impeachment evidence and failed to turn it over to defense counsel.

In order to insure that an adversarial testing, and hence a fair trial occurs, certain obligations are imposed upon both the prosecutor and defense counsel. The

prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and `material either to guilt or punishment'". *United States v. Bagley*, 473 U.S. 667, 674 (1985), *quoting Brady v. Maryland*, 373 U.S. 83, 87 (1963). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 685. Where either or both fail in their obligations, a new trial is required if confidence is undermined in the outcome. *Smith v. Wainwright*, 799 F. 2d 1442 (11th Cir. 1986). To the extent that newly discovered evidence is uncovered, that evidence must be considered along with the evidence not disclosed by the State and/or not investigated by defense counsel in assessing the reliability of the outcome. *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996).

First, the State withheld information that it's key witness, Leo Cordary, received a benefit from the State for his testimony in Mr. Evans' trial. While Mr. Evans' proceedings were pending, Nikki Robinson arranged for a bond hearing for Leo Cordary who had been arrested for violation of probation two days before he testified in Mr. Evans' trial. Despite the fact that in violation of probation cases defendants are commonly held without bond

in the Nineteenth Judicial Circuit (PC-R. 245), the State did not object to Mr. Cordary's bond being set at ten (10) thousand dollars (See Defense Exhibit 8). Ms. Robinson conceded that the assistance she provided Mr. Cordary with regard to his bond, would be a potential problem (PC-R.596). Ms. Robinson believed that her communication with Mr. Cordary's attorney and the subsequent bond hearing occurred either at the close of the guilt phase, but before the penalty phase or just after the penalty phase (PC-R. 598-99). Regardless of when it occurred the State has a continuing obligation to disclose exculpatory and/or impeachment information to the defense. *Johnson v. Butterworth*, 713 So. 2d 985 (1998). Even if the bond hearing did not occur until the close of the penalty phase, this *Brady* evidence could have been the subject of a motion for new trial.

Mr. Harllee testified that he was never made aware that prosecutor Nikki Robinson was trying to make arrangements to have Mr. Cordary bonded out – but had he known, he absolutely would have used that information for cross-examination of Mr. Cordary (PC-R. 245-246).[21] Mr.

[21] The excerpt of the bond hearing reflects that prosecutor Chris Taylor was present at the hearing. Regardless of which prosecutor was present, Mr. Harllee would have used

Harllee explained that Cordary had a motivation to keep the State happy in his testimony and as a result his credibility was in question due to this extra motivation. (Id.). Instead the jury was unable to thoroughly evaluate Mr. Cordary's credibility. This information creates a reasonable probability of a different outcome because " . . . Mr. Cordary, in a disinterested position, was the only one to put the shots at that time" (PC-R. 252).

Additionally, the State was in possession of two letters detailing Ms. Waddell's psychological instability at the time of the crime and at the time of Mr. Evans trial. During the evidentiary hearing, Mr. Harllee reviewed the two letters obtained by Mr. Evans. The first letter was identified as a letter from Peter Jorganson, the attorney for Donna Waddell, sent to Maria Lawson. The second was identified as a hand-written letter from Donna Waddell to Judge Hawley (Defense Exhibit 9). According to these letters, Donna Waddell was undergoing psychological and/or psychiatric treatment throughout the relevant time periods. Mr. Harllee admitted that had he known of Ms. Waddell's state of mind, he would have used this for

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in cross-examination the fact that the State was trying to facilitate a bond for Mr. Cordary (PC-R. 251).

challenging the veracity of Ms. Waddell's statement (PC-R. 312).

Further, exculpatory evidence was withheld from counsel. Ms. McCormick testified about an incident that occurred while she was with Connie Pfeiffer. Connie met a man who gave her a package described by Ms. McCormick as a brown manila envelope – pretty thick and a little heavy (PC-R. 442). Later that evening, Ms. McCormick and Connie Pfeiffer drove to the river and Connie threw the package in the river. Connie Pfeiffer stated that she was getting rid of old memories (Id.). Ms. McCormick told the police of this during their investigation. Ms. McCormick further testified that, from her description, the police made a sketch of the man who had given Connie Pfeiffer the package (PC-R. 442-43).

Mr. Harllee had no memory at all of seeing a statement taken of Mindy McCormick by the State, (PC-R. 242), or that Ms. McCormick said a package had been delivered to Connie Pfeiffer, or that there was a sketch made of an individual who was delivering packages to Ms. Pfeiffer (PC-R. 241). However, he did agree that had he known anything about the package, he would have had his investigator find out further information, and would have asked Ms. McCormick about it in his deposition of her, (PC-R.243), and would

have followed up on it as part of his investigation (PC-R. 244). This sketch quite possibly indicated another suspect.

Here, exculpatory evidence did not reach the jury. Either the state unreasonably failed to disclose its existence, or defense counsel unreasonably failed to discover it. Counsel's performance and failure to adequately investigate was unreasonable under *Strickland v. Washington*. Moreover, the prosecution interfered with counsel's ability to provide effective representation and ensure an adversarial testing. Defense counsel failed to seek and the prosecution denied the defense the information necessary to alert counsel to the avenues worthy of investigation and presentation to the jury.

Evidence which supports the theory of defense is exculpatory and must be disclosed to the defense. *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Spagnoulo*, 960 F.2d 995 (11th Cir. 1992). Exculpatory and material evidence is evidence of a favorable character for the defense, **including impeachment evidence**, which creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability

that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 680 (1985). The benefit received by Cordary and the mental state of Waddell directly attacks the theory of the State’s case. Impeaching both of these witnesses was key to the defense theory that Mr. Evans did not commit this crime because he was at the fair at the time of the shooting and that Waddell and Pfeiffer had the opportunity to kill Alan Pfeiffer without Mr. Evans involvement. Whether the prosecutor failed to disclose this significant and material evidence or whether defense counsel failed to do his job, the jury did not hear the evidence in question and Petitioner did not receive a fair trial and an adversarial testing. Mr. Evans is entitled to a new trial.

ARGUMENT IV - MR. EVANS RECEIVED INEFFECTIVE ASSITANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF HIS RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

There was abundant mitigation available to present to the jury that defense counsel, without tactic or strategy, failed to present. Counsel's highest duty is the duty to investigate, prepare and present the available mitigation. *Wiggins v. Smith*, 123 S. Ct. 2527 (2003); see also *Williams v.*

Taylor, 120 S. Ct. 1495 (2000). The conclusions in *Wiggins* are based on the principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." The *Wiggins* Court clarified that "in assessing the reasonableness of an attorney's investigation, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins* at 2538. Here, trial counsel's failure to pursue a thorough investigation, and the subsequent failure to present the mitigation evidence counsel had obtained, was unreasonable in light of all the circumstances.

Mr. Evans has a long history of psychological instability. In fact, at the time of his arrest, Mr. Evans was receiving social security disability compensation. Records indicate that he was granted disability as a result of long standing depression and a personality disorder. Trial counsel ignored Mr. Evans' psychological history and the effects of institutionalization on Mr. Evans. Instead, counsel testified that she limited the mitigation presentation in this regard in order to keep out what she deemed to be negative. Likewise, although trial counsel touched on Mr. Evans' childhood through the testimony of

his parents, the effect of the complete lack of supervision and abandonment by both parents was ignored.

Penalty phase counsel, Diamond Litty,[22] testified that her theory at the penalty phase involved presenting Mr. Evans as an emotionally disturbed, overall troubled child (PC-R. 358). To that end, Ms. Litty testified that the defense utilized three experts, Drs. Rifkin, Landrum and Levine (PC-R. 363). However, Ms. Litty decided not to call Dr. Rifkin, and limited the testimony of Dr. Landrum and Dr. Levine to Mr. Evans' ability to adapt to prison (Id.).

On cross-examination, Ms. Litty explained that she had purposefully limited the expert's testimony because she wanted to keep out specific incidents of things that Mr. Evans would do at the hospitals or institutions that she felt were more damaging than the good that could be elicited (PC-R.384-388).[23] Despite her testimony on cross-examination, Ms. Litty agreed that all the issues regarding violence or threats of violence in Mr. Evans' childhood had

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[22] Co-counsel, Diamond Litty, concentrated on the penalty phase of Mr. Evans' trial (PC-R. 356). However, Ms. Litty agreed that she consulted with Mr. Harlee when making decisions (PC-R. 356-357).

[23] Had counsel thoroughly investigated, she would have known that there were several notations in the hospital records indicating that Mr. Evans was remorseful. Additionally, any indication of an inability to show his emotions, could be attributed to his family's complete abandonment of him after the incident and their refusal to allow him to attend his brother's funeral.

actually been brought out by the State's cross-examination of both Dr. Landrum and Dr. Levine (Id.). Therefore, the reason given for not presenting detailed evidence of Mr. Evans physical and mental problems was admittedly not valid. The circuit's court's order does not consider that the jury heard this "damaging" evidence.

Not only did the jury hear what counsel deemed as damaging evidence, but the jury did not hear any rebuttal of this evidence by defense counsel. Defense counsel did not present additional experts to explain Mr. Evans' behavior and did not even bother to conduct redirect once the State brought the information out (R. 4381).

Ms. Litty also agreed with the State that Dr. Rifkin, in his deposition, opined about Mr. Evans having a conduct disorder,[24] and also believed that Mr. Evans suffered from a learning disability and that he probably had some type of frontal lobe brain injury (PC-R. 392-393). However, she chose not to present Dr. Rifkin, again due to the fact that other factual information that Ms. Litty felt would be harmful would come out on cross-examination, and due to the fact that the defense at trial was that Mr. Evans didn't

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[24] In his deposition, Dr. Rifkin states that he did not make any diagnosis of Mr. Evans, he simply indicates he took into consideration the diagnoses found in the extensive medical records (PC-R. 419-20).

commit the crime, so having an expert testify as to all of Mr. Evans' physical and mental problems would be inconsistent with their defense[25] (PC-R. 393).

Although Dr. Rifkin opined that Mr. Evans probably had frontal lobe injury, the defense failed to hire the appropriate expert to conduct further testing and/or failed to elicit his brain damage through the neuropsychologist that was presented. Appropriate experts were available to explain Mr. Evans' behavior which was being termed conduct disorder and to confirm that Mr. Evans' suffered frontal lobe damage.

Ms. Litty admitted that she did not present any expert testimony about the medications that had been prescribed to Mr. Evans throughout his life, (Id.), or the effects of the medications used when Mr. Evans was an adolescent (PC-R. 364-365). Ms. Litty relied solely on psychologists and did not hire a psychiatrist to explain the impact of these medications on Mr. Evans' functioning. She also admitted that she did not present any expert testimony about the

[25] This testimony ignores the fact that some mitigation, including two experts, was presented and it further ignores that it is trial counsel's duty to present evidence in the penalty phase regardless of the defense at trial. On re-direct examination, Ms. Litty acknowledged that she had attended seminars, "Life Over Death", and "Death is Different", where they teach precisely how to present appropriate mitigation evidence regardless of what defense is presented in the guilt phase (PC-R. 394).

specifics of Attention Deficit Hyperactivity Disorder,[26] and didn't have the experts address the impact on Mr. Evans of the death his brother (PC-R. 365). Furthermore, even though Mr. Evans had many hospitalizations and was placed in several programs from the time he was a child, Ms. Litty stated that she did not seek anyone from any of the treatment facilities to testify (PC-R.366). Although Mr. Evans had been diagnosed as an infant with a medical condition called "Failure to Thrive," Ms. Litty agreed that she did not have a medical doctor testify about this condition or its effects (Id.). Also, although both parents admitted to not providing adequate supervision of Mr. Evans as a child, Ms. Litty acknowledged that she did not inquire of her experts what effect this lack of parental supervision would have had on Mr. Evans (PC-R.368). As to her preparation for the penalty phase, Ms. Litty could not recall speaking to any other family members other than Mr. Evans' parents (PC-R. 369).

At the evidentiary hearing, Mr. Evans presented the testimony of Patricia Dennis to corroborate the neglect and abandonment of Mr. Evans throughout his childhood. Ms. Dennis testified that Mr. Evans (P.J.) is her nephew, the son of her brother, Paul Evans, Sr. (PC-R. 467-468). Ms.

[26] Mr. Evans was diagnosed with ADHD as a young child.

Dennis resides in Alabama and her parents, P.J.'s paternal grandparents, also lived in Alabama (PC-R. 469). After P.J.'s parents divorced, Ms. Dennis would see P.J. and Matthew, P.J.'s brother, in the summer when they would come to their grandmother's house in Alabama (PC-R. 471). Ms. Dennis testified that when the boys would arrived at her parent's house looking pitiful, malnourished, and their clothes smelled like urine (Id.). Ms. Dennis described P.J. and Matthew's behavior during the visits as real good, just typical little boys (Id.).

Ms. Dennis testified that her brother remarried and relocated to Okinawa sometime before P.J. turned 12 years old (PC-R. 472). She said that at that time, her brother's relationship with P.J. was not a good one. She felt the children were ignored and that her brother had his own agenda (PC-R. 472-473). Ms. Dennis also said that when P.J. and Matthew would come to visit her parents in the summers, that her brother was not around most of the time.

Ms. Dennis' recalled that the boys' mother had left the boys in her boyfriend's house and there were guns lying around everywhere. She didn't know if the boys were playing or what, but that P.J. shot Matthew in the head and killed him (Id.). Ms. Dennis said she and her mother came down to Florida as soon as they could get there after the

shooting of Matthew. When they arrived at P.J.'s house, he was once again home alone, with his mother at work (PC-R. 475). Ms. Dennis also discussed Matthew's funeral, saying that it was held in Alabama and Matthew's mother did not attend (Id.). P.J. was not allowed to go to his brother's funeral, due to either his father's or his grandmother's decision (PC-R. 475-476). She said that after that incident, P.J. was placed in Charter Woods hospital in Alabama, and that the family was not involved with P.J. while he was there; the family completely ignored him (PC-R. 474).

Sandy Kipp, the mother of Paul Evans, testified that she was married to Paul's father for 10 years, and there were problems throughout the marriage. She related that Paul Evans, Sr., had a bad temper, would get angry and would become violent (PC-R. 480-481). Paul, Sr. would sometimes punch walls, putting holes in them. Therefore, when he was angry, Ms. Kipp would try to stay out of his way (PC-R. 481).

She told of an incident where her husband was angry with her and had her in a painful hold, and then pushed her against a bookcase with glass on it. The glass fell down and Mr. Evans, Sr., who was barefoot, stepped on the glass, making him even angrier (Id.). There was another time

where Mr. Evans was so angry that he grabbed Ms. Kipp and threw Ms. Kipp across the room. The children were in the home, and were probably able to hear what was going on (PC-R. 481-482). She said that the punching of the walls and arguing continued in front of the children (Id.).

Ms. Kipp discussed Mr. Evans, Sr., not having contact with his sons and testified that the absent father would often disappoint his son. Six months after the divorce he just stopped seeing his children, telling Ms. Kipp that (due to his being relocated by the armed forces in 6 months) they're going to have to get used to not seeing him (PC-R. 482-483). There were other times when the father would make plans with his son, then just cancel them – disappointing his son (PC-R. 483-484). Ms. Kipp gave an example of when Paul, Jr. was turning six or seven years old and his father promised to take him to the movie *Star Wars*. When Ms. Kipp and her son arrived at the military housing to meet the father, there was a note on the door saying, "Can't make it. Will explain later" (PC-R. 483). Also, when the boys were supposedly visiting their father in Alabama, Ms. Kipp found out that the father was leaving them with their grandmother and would just stop by every once in a while to see them (PC-R. 486). One time the boys were at the grandmother's house, the youngest son,

Matthew, had fallen into the pool and Paul Evans, Jr., had jumped in to try to save his brother. However, both boys began to sink and an adult had to save them (PC-R. 487).

Ms. Kipp testified that Paul, Jr. repeatedly received head injuries as a child, due to his hyperactivity or other incidents. When he was 7 years old, he was attacked by an older youth who flung Paul into a tree causing a cut on his head (PC-R. 491). When Paul was 2 years old, Ms. Kipp, while trying to dress him, somehow dropped him on his head, causing her to seek medical attention and to be looking for signs of a concussion (Id.) Ms. Kipp also admitted to allowing a boyfriend to take Paul, Jr. to a park in winter when the child was about 7-8 years old. While at the park, Paul fell through the ice, which Ms. Kipp found out when she arrived home and found her son in the bathtub "kind of thawing them out, so to speak" (PC-R. 492).

The court incorrectly found the testimony of Patricia Dennis and Sandra Kipp to be cumulative. While Ms. Kipp and Paul Evans, Sr. testified at Mr. Evans' penalty phase, they did not detail or explain his childhood. Mr. Evans, Sr., likewise confirmed that that most of the time Mr. Evans' was growing up, he was without the care and guidance of his parents. Mr. Evans has now presented a third family member who not only corroborates the absolute neglect of

Mr. Evans by both parents, but also provides important details as to how Mr. Evans was treated by the people he needed the most after his brother's death. The details gleaned from the evidentiary hearing show that Mr. Evans' parents were admittedly unable to raise him. Mr. Evans fell through the cracks at home with parents too busy to provide the necessary supervision, at school and in hospitals ill equipped to deal with his emotional and behavioral problems.

This is evident from the testimony of experts presented at the evidentiary hearing. Dr. Silverman conducted an evaluation of Mr. Evans, which consisted of a thorough psychosocial history, a mental status examination and review of background materials supplied by the defense (PC-R. 515). Dr. Silverman found it significant to his evaluation and diagnosis that Mr. Evans had spent substantial time in mental hospitals during his childhood and adolescence, was on stimulants the whole time, yet never improved and even got worse (PC-R. 519). According to Dr. Silverman, Mr. Evans had been diagnosed with and treated with stimulants for attention deficit disorder [ADD] and personality disorder from early childhood (PC-R. 520-21). However, Dr. Silverman opined that the drug treatment didn't improve the symptoms because the

professionals had diagnosed and treated a symptom and not the underlying problem (PC-R. 520). He commented that many reports talk about Mr. Evans' lack of progress in therapy and that he was showing anger or aggression. He also commented on other statements found in reports drafted during Mr. Evans' adolescent years that indicate a more accurate diagnosis, schizotypal, basically someone who has unusual thought processes (Id.).

Dr. Silverman explained the danger and significance of placing children with unusual thought disorders on stimulants by saying:

> You've actually made it worse because you're not addressing the underlying symptoms. With stimulants it's even worse, because if you're borderline psychotic or schizotypal it can push you over, because you're barely holding it together and it makes it even harder to process the world in a way that other people make sense.

(PC-R. 521).

Dr. Silverman testified that he found specific documentation in records he reviewed that showed Mr. Evans had been diagnosed with "Failure to Thrive" as an infant. This is manifested by lack of weight gain and inability to bond with people – which was also indicated in hospital reports saying that as an infant in the hospital he was left alone with the parents failing to attend to him (PC-R. 524). Dr. Silverman also relied upon a psychological

report that Mr. Evans had some kind of functional lobe problems and an abnormal EEG (PC-R. 524-25).

According to Dr. Silverman, Mr. Evans was not fully diagnosed correctly during his many hospitalizations, showed no signs of improvement from the therapeutic interventions and drug therapy and probably didn't receive the structured environment that he required[27] (<u>Id</u>.). Instead, Dr. Silverman's diagnosis of Mr. Evans is that he has idiosyncratic thought process and he is in the schizoid/schizotypal personality disorder, which is basically unusual thought process. He described this diagnosis as a stable, long-term maladaptive functioning overtime (PC-R. 526). Dr. Silverman did not discount other diagnoses of Mr. Evans, but felt that this is the primary diagnosis, the one that needed to be treated (PC-R. 526-27).

Dr. Silverman had also reviewed Mr. Evans' educational history, where he noted that Mr. Evans had failed 7th and 10th grades but was socially promoted. However, Mr. Evans

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[27] Dr. Silverman testified that these hospitals in which Mr. Evans resided were not structured at all. He explained that there is often "secondary gain. In other words, there's a reason to misbehave, and you actually get more attention. You have more techs around you. You get more therapy" (PC-R. 542). While some people benefit from the attention, Mr. Evans could not due to his unusual thought disorder.

had no vocational testing, no vocational training, no life skills training, and there was no educational plan, leading Dr. Silverman to remark, "…he kind of fell through the cracks" (PC-R. 521). Furthermore, even with all the hospitalizations throughout Mr. Evans' childhood, there was no long-term plan developed for when Mr. Evans was to be discharged from hospitalization close to 18 years of age (Id.). Instead, he continued to be returned to the same environment which was so lacking in supervision.

Dr. Silverman agreed that there were behaviors exhibited by Mr. Evans through his youth that might be classified as conduct disorder, and gave examples of those types of behaviors as including aggression, frightening people and bed wetting, among others. Dr. Silverman understood how those behaviors could lead professionals to a diagnosis of conduct disorder, but in his opinion, a conduct disorder is secondary to Mr. Evans' thinking disorder (PC-R. 532-534).

Additionally, Dr. Silverman noted that Mr. Evans had been receiving SSI benefits for a mental disability. Based on Dr. Silverman's experience, Mr. Evans would not have received social security benefits simply on the basis of conduct disorder (PC-R. 535). The court below incorrectly found that Mr. Evans offered no evidence of an alternative

basis for the award of disability compensation. Dr. Silverman indicated in his testimony that he reviewed extensive background materials as part of his evaluation and that he relied upon these materials to corroborate his opinions (PC-R. 517-16). The background materials entered into evidence contained the SSI Disability Determination records. The primary diagnosis in those records was dysthymic disorder with a secondary diagnosis of personality disorder (PC-R. 847). The psychological evaluation contained within these records specifies schizotypal personality disorder (PC-R. 853). Trial counsel did not present evidence that Mr. Evans was receiving SSI benefits although this would have refuted the damaging cross-examination counsel was anticipating.

Dr. Silverman did not agree with the State that he was trying to minimize other professional's diagnosis of conduct disorder (PC-R. 545). Despite the trial court's similar finding that Mr. Evans was attempting to refute the diagnosis of conduct disorder, Mr. Evans is not refuting that the hospital records contain just that diagnosis. Rather, Mr. Evans has shown that the records are equally replete with the alternate diagnosis of schizotypal disorder. Further, many of the "damaging" behaviors giving rise to the conduct disorder diagnosis could have been

explained to a jury, in the context of Mr. Evans' schizotypal behavior, his brain damage, learning disabilities, lack of structure in the hospitals and complete parental neglect.

Dr. Silverman agreed that many hospital's records showed a diagnosis of conduct disorder, and also recorded instances of behavior that could be indicative of conduct disorder, (PC-R. 546-66), and even agreed with the prosecutor's statement that there was ample evidence in Mr. Evans' records that could support a diagnosis of conduct disorder (PC-R. 553). However, Dr. Silverman opined on re-direct examination that just because hospitals continued to make the same diagnosis and continued the same treatment, it didn't make that diagnosis and treatment accurate or correct (PC-R. 579). Furthermore, Dr. Silverman discussed each behavior pointed to by the State for the State's argument that Mr. Evans suffers from a personality disorder, and showed how those individual behaviors are equally indicative of schizotypal personality disorder – and also noted that some of those reports also indicated a diagnosis of schizotypal personality as well as personality disorder (PC-R. 581-85).

Mr. Evans also presented the testimony of Dr. Harvey. Dr. Harvey conducted an evaluation of Mr. Evans, which

included testing and assessment of Mr. Evans at the prison as well as an extensive review of background material provided by the defense (PC-R. 615). Dr. Harvey's evaluation of Mr. Evans included evaluation of cognitive functions, intellectual functioning, memory, problem solving ability, verbal skills, spatial skills, and process and capacity, in order to determine whether or not there were discrepancies between different cognitive ability areas (Id.). Upon review of all information, and after conducting his thorough examination of Mr. Evans, Dr. Harvey formed the opinion that Mr. Evans has a profile of fairly striking cognitive impairments (PC-R.620).

The diagnosis of the condition called "failure to thrive" when Mr. Evans was an infant was significant to Dr. Harvey, as it was a possible source of Mr. Evans' cognitive impairments. He said that failure to thrive is a condition that, in many cases, causes neurodevelopmental impairments and it happens at a critical period of brain development (PC-R.622). Dr. Harvey testified that he reviewed empirical literature on failure to thrive and it suggested that the typical profile of cognitive impairment seen in these individuals is a striking deficit in their verbal skills relative to their performance skill. Dr. Harvey also stated that children with failure to thrive syndrome

have a number of conduct problems. They're often diagnosed with conduct disorder or attention deficit hyperactivity disorder as well. (Id.).

Dr. Harvey found evidence of this syndrome upon review of Mr. Evans' EEG. He testified that although Mr. Evans' EEG exam was normal, what was detected in the exam were abnormalities in the frontal and temporal lobe between the left hemisphere (PC-R. 623). Dr. Harvey found that quite striking since the empirical literature indicates that is exactly the profile of EEG abnormalities that are detected in children with failure to thrive (Id.). Therefore, Dr. Harvey found a life long pattern of cognitive change, a history of failure to thrive, and corroborating neurological evidence that was collected long before the incident in question ever took place. (Id.). Furthermore, Dr. Harvey found that the intellectual assessments that had been performed on Mr. Evans and his school records were all consistent with a verbal specific learning disability. He noted that he found multiple notes in clinical records regarding Mr. Evans' impulsivity, attention deficit disorder and impaired conduct, all of which have been recorded clinically in children who have failure to thrive syndrome (PC-R. 624). Therefore, Dr. Harvey concluded that Mr. Evans had a significant profile of cognitive

impairments and that it was consistent with a profile that's seen in children who have failure to thrive (PC-R. 625).[28]

The State was unable to rebut Dr. Harvey's findings on cross-examination. The state inquired about the significance of the delay of several years between the crime and Mr. Evans' arrest, where Mr. Evans was living in the community and "functioning in society", and Dr. Harvey replied:

> Well, I note that he had a Social Security disability that he was awarded when he was around 18 or 19 years of age. And I think functioning in society can be a relative term. I think he was disabled and not employed but living in the community, yes.

(PC-R. 630). Dr. Harvey was also asked if he was aware of an opinion of another defense expert, Dr. Rifkin, who felt that Mr. Evans had frontal lobe damage and was consequently impulsive. Although Dr. Harvey wasn't aware of that opinion, he said that he pretty much agreed with it. However, he further explained that it has been shown in

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[28] Dr. Harvey stated that the methods of assessment that he used in evaluating Mr. Evans were absolutely available in 1996 through 1999, and even available at least ten years prior to the time that his other assessments were done (PC-R. 628). He also testified that the cognitive and behavioral consequences of failure to thrive have been described in empirical literature for at least 20 years, and that there were competent clinical psychologists or neuropsychologists available in 1996 through 1999 (Id.).

empirical studies of impulsivity that there are actually two different kinds of impulsivity (PC-R. 631). According to Dr. Harvey, the empirical studies indicate that one kind of impulsivity is acting without thinking, and the other is being unable to resist an impulse that other people would resist. Therefore, in the context of Mr. Evans' impulsivity and the fact that he was alleged to have committed a murder for hire, Dr. Harvey stated "…impulsivity would reflect the inability to consider the consequences of your actions when someone is proposing something to you, such as murder for hire" (Id.).

According to Dr. Harvey, in terms of everyday cognitive functioning, the effect of this cognitive impairment in Mr. Evans would greatly reduce his ability to solve problems and to consider the consequences of his actions (PC-R. 627). Dr. Harvey testified that Mr. Evans' ability to actually plan complex outcomes is likely to be reduced. He could be easily led by others and wouldn't carefully evaluate the consequences of his actions (Id.). Therefore, in Dr. Harvey's opinion, Mr. Evans' cognitive impairments were present and detectible in early adolescence and were very likely to have been operative at the time of the commission of the crime (PC-R. 627-28).

The trial court’s order demonstrates its lack of understanding with the issues before the court and its failure to adequately review the trial record.

Both experts presented at the evidentiary hearing testified to abundant mitigation. Had trial counsel adequately investigated and researched Mr. Evans behavior including the cause of the behavior and the subsequent inadequate hospitalizations, they would have been able to refute any negative rebuttal by the State. Because counsel was ineffective, the jury never heard Mr. Evans history of inadequate treatment throughout his hospitalizations, the fact that he was ineffectively medicated, he was raised in an inconsistent and unstructured family environment and suffered from long standing cognitive impairment. As a result, Mr. Evans had no life skills and no meaningful relationships.

The question is not whether counsel should have presented a mitigation case. Rather, the focus should be on whether the investigation supporting counsel’s decision not to introduce mitigation evidence of Mr. Evans’ background was itself reasonable. *See*, *Wiggins v. Smith*, 2003 U.S. Lexis 5014 (June 26, 2003). Mr. Evans has proved that it was not. Further, an attorney’s performance must be **reasonable** under the prevailing professional norms,

considering **all of the circumstances**, and viewed from the attorney's perspective at the time of trial. *See Strickland v. Washington,* 466 U.S. 669 (1984); *Downs v. State*, 453 So. 2d 1102 (Fla. 1984). Although there is a strong presumption of reasonableness that must be overcome, and strategic or tactical decisions by counsel made after a **thorough investigation** are virtually unchallengeable, "patently unreasonable decisions, while they may be characterized as tactical, are not immune". *Light v. State,* 796 So. 2d at 616 (Fla. 2nd DCA 2001).

Mr. Evans has demonstrated how the entire picture of his emotionally disturbed troubled childhood and adolescence should have been presented to a jury in a light most favorable to him despite the diagnosis of conduct disorder and the "damaging" behaviors giving rise to that diagnosis. Due to his cognitive impairments, Mr. Evans is unable to plan complex outcomes, can easily be led by others and is unable to evaluate the consequences of his actions. Mr. Evans could not have been the "mastermind" who planned out a "murder for hire" as the State argued.

If evidence of these nonstatutory mitigating factors had been presented to the jury, and had trial counsel

challenged the aggravating factors,[29] there is a reasonable probability that the jury would have recommended life and the judge would have given that recommendation great weight. Despite hearing very little evidence in mitigation and being misinstructed on the law,[30] the jury recommendation was only 9-3 for death. As such, Mr. Evans was prejudiced by counsel's failure to reasonably investigate and present mitigation.

ARGUMENT IV - MR. EVANS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING VOIR DIRE

In *Strickland v. Washington*, 466 U.S. 669 (1984), the Supreme Court held that counsel has a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland* requires a defendant to plead and show unreasonable attorney performance, and prejudice. Here, trial counsel rendered

[29] Trial counsel admittedly failed to present evidence through Mindy McCormick to refute the pecuniary gain aggravator. See Argument II, supra.

[30] The jury was also repeatedly misinformed as to its responsibility in the sentencing process. The jurors were, over and over, told that their role was simply to render a "recommendation" or an "advisory sentence." These statements of "law" were in fact misstatements of law to which trial counsel unreasonably failed to object. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985). Mr. Evans' jury was also improperly told and misinstructed that it was Mr. Evans' burden to demonstrate that the mitigating factors outweighed the aggravating factors. Counsel did not object.

ineffective assistance by allowing several unqualified jurors to serve as members of the petit jury.

Mr. Evans' trial counsel unreasonably failed to challenge for cause Juror Schuman who said that she would ***automatically*** vote for the death penalty for anyone convicted of first-degree murder (R. 2629). Specifically, she stated that she would automatically vote for the death penalty if this were a case that did not involve a self-defense claim (PC-R. 267-68)(R. 2629). Yet, Mr. Harllee accepted Ms. Schuman onto the jury panel without challenge by the defense (PC-R. 270).

Ms. Schuman's views and attitudes regarding the death penalty disqualified her as a juror in a capital case,[31] yet defense counsel neglected to seek her removal. Trial counsel had every opportunity to challenge Ms. Schuman for cause and failed to do so. At the time that she was added

[31] If there is any reasonable doubt concerning a juror's impartiality, the juror must be excused for cause. *Singer v. State*, 109 So. 2d 7 (Fla. 1959) (emphasis added). *See also Farias v. State*, 540 So. 2d 201 (Fla. 3d DCA 1989); *Hamilton v. State*, 547 So. 2d 630 (Fla. 1989); *Moore v. State*, 525 So. 2d 870 (Fla. 1988); *Salazar v. State*, 564 So. 2d 1245 (Fla. 3d DCA 1990). This Court reaffirmed this standard in *Hill v. State*, 477 So. 2d 553 (Fla.1985), stating that, "[a] juror is not impartial when one side must overcome a preconceived opinion in order to prevail. When **any reasonable doubt** exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause."

as a juror to the panel, defense counsel had unsuccessfully moved for cause on Juror Weinstein and had only used one peremptory challenge (R. 2663 - 2664). Trial counsel was thus ineffective for failing to challenge Juror Schuman for cause, or in the alternative, for failing to peremptorily strike her.

Allowing Ms. Schuman to remain on the jury not only prejudiced the jury as a result of her attitude regarding the death penalty, but Ms. Schuman also displayed behavior during the penalty phase indicating that she had knowledge of extrinsic information. Mr. Harllee explained that during the trial there was a newspaper article regarding Mr. Evans' accidental shooting of his younger brother (PC-R. 272). When testimony of the shooting came out during the penalty phase, Ms. Schuman "turned her head around and basically made a motion like 'see, I told you,' or something like that" (Id.). Mr. Harllee and co-counsel Ms. Litty, did request that an inquiry be made of Ms. Schuman by the Court (PC-R. 273), based on Ms. Schuman's physical reaction (body language – turning head around and making a nonverbal motion) (PC-R. 272), but the Court denied the request and told counsel to file a motion after the rendering of the advisory verdict (PC-R. 361-62). However, Ms. Litty admitted that neither she nor Mr. Harllee had

followed up with a post-trial motion regarding juror Schuman (PC-R. 363). Mr. Evans was clearly prejudiced by this juror remaining on the panel.[32]

Another juror, Mr. Combs, had said during voir dire that he knew several lay witnesses from a bar that he worked at downtown (PC-R. 275), and Mr. Harllee agreed that Mr. Combs said he would accord those witnesses greater credibility than somebody he didn't know (PC-R. 276)(R. 2295-96). Mr. Harllee moved to strike Mr. Combs for cause, which was denied, and agreed that he never exercised a peremptory challenge on Mr. Combs, who ultimately sat on the jury (PC-R. 277).[33] He did not exercise the peremptory because when he asked the Court for an additional peremptory, the Court denied the request on the basis that the jurors which Mr. Harllee challenged for cause were

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[32] The circuit court concluded that Mr. Evans presented no authority to show that a juror's body language was grounds for a cause challenge. However, juror Schuman's actions during the penalty phase exemplify the resulting prejudice to Mr. Evans of leaving an unqualified, biased juror on the panel, not the grounds for a cause challenge.

[33] When a cause challenge is wrongfully denied and the defendant is thereby forced to exhaust his peremptory strikes reversible error is presumed. In order for defense counsel to preserve the erroneous denial of a cause challenge for appellate review he must: (i) exercise a peremptory on the challenged juror after the cause challenge is denied, (ii) exhaust his remaining peremptories, (iii) request an additional peremptory strike, and (iv) identify an objectionable juror against whom defense counsel would use the requested peremptory. *Pietri v. State*, 644 So. 2d 1347, 1352 (Fla. 1994).

“gone” (R. 2673). This was inaccurate. Mr. Harllee acquiesced to the Court’s incorrect recollection of the voir dire challenges. Mr. Harllee himself admitted that he could not remember who he had objected to for cause (R. 2673). Counsel’s negligence allowed a second unqualified juror to sit on this panel.

Furthermore, Mr. Harllee recalled that a chosen juror’s voluntary absence from court had angered the judge, and that the State and the defense had agreed to strike that juror for cause (PC-R. 277-78). This created a vacancy on the jury and required further voir dire. At this time, Mr. Harllee inquired about back striking while picking the final juror, and the court said they would have another 170 jurors on Monday. Mr. Harllee responded by saying, “I get your drift, Judge”. Upon review of this part of the trial record, Mr. Harllee agreed that his response was verifying that he thought the Judge did not want any back striking of jurors (PC-R. 278-79). Therefore, at that time he also did not exercise a peremptory challenge to Juror Combs (PC-R. 279).

Although the judge said he would allow back striking, Mr. Harllee believed that the judge did not want him to back strike. Due to Mr. Harlee’s responses on cross-

examination,[34] the lower court found that it was clear that Harllee knew that backstriking was permitted. The only thing that is clear is that Mr. Harllee's responses waffled between direct, cross and redirect examination. It is also clear that Mr. Harllee did not exercise a peremptory challenge of juror Combs after "getting the judge's drift."

Trial counsel was ineffective when he did not object to the Court limiting his use of the three additional peremptory challenges to only the selection of the 12th member of the petit jury. The Court improperly limited Mr. Evans' right to back strike and trial counsel's failure to object and/or exercise the defendant's right to back strike allowed for unqualified Jurors Schuman and Combs to remain as triers of fact in Mr. Evans' case.

Trial counsel was ineffective for the following reasons: he failed to challenge Juror Schuman, a clearly unqualified juror, for cause; he failed to reassert his

[34] Mr. Harllee, on cross-examination stated that during the trial it was clear to him that the judge was going to allow him to back strike the jurors (PC-R. 341). Yet, Mr. Harllee reiterated on re-direct examination that when he responded to the trial judge by saying, "I get your drift, judge", he was affirming that the judge probably wanted no back striking and to just pick a jury (PC-R. 351). Therefore, although he had moved to excuse juror Combs for cause, which was denied, he did not back-strike and make a preemptory challenge to this juror - who had stated he knew several of the state's witnesses and would afford them more credibility than witnesses he didn't know (PC-R. 276-77).

challenge for cause against Juror Combs, another unqualified juror; and he failed to object to the Court limiting his ability to back strike members of the original petit jury. A new trial and/or penalty phase jury proceeding must be ordered.

ARGUMENT VI - THE LOWER COURT FAILED TO CONDUCT AN ADEQUATE CUMULATIVE ANALYSIS

Mr. Evans 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). Due process was deprived by the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive. *See, Jones v. State*, 569 So. 2d 1234 (Fla. 1990), *Nowitzke v. State*, 572 So. 2d 1346 (Fla. 1990). *Jackson v. State*, 575 So. 2d 181, 189 (Fla. 1991), *Ellis v. State*, 622 So. 2d 991 (Fla. 1993), *Taylor v. State*, 640 So. 2d 1127 (Fla. 4th DCA 1994).

The severity of the sentence here "mandates careful scrutiny in the review of any colorable claim of error." *Zant v. Stephens*, 462 U.S. 862, 885 (1983). Accordingly, the cumulative effects of error must be carefully

scrutinized in capital cases. The lower court failed to adhere to this mandate that it conduct a meaningful cumulative analysis of the post-trial evidence in order to evaluate Mr. Evans’ claims. In a conclusory fashion, the lower court merely states because each claim was denied individually, there is no cumulative procedural or substantive errors. Taken as a whole, all guilt and penalty phase issues, clearly demonstrate that Mr. Evans failed to get a fair determination of guilt or punishment.

ARGUMENT VII - MR. EVANS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES BECAUSE OF THE RULES PROHIBITING MR. EVANS’ LAWYERS FROM INTERVIEWING JURORS.

Rule Regulating the Florida Bar 4-3.5(d)(4), which prevents Mr. Evans from investigating any claims of jury misconduct or reliance on external influences that may be inherent in the jury's verdict, is unconstitutional. Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, is invalid because it is in conflict with the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Under the Fifth, Sixth, Eighth and Fourteenth Amendments Mr. Evans’ is entitled to a fair trial and sentencing. His inability to fully explore possible misconduct and biases of the jury prevent him from

fully showing the unfairness of his trial. *Cf. Turner v. Louisiana*, 379 U.S. 466 (1965); *Russ v. State*, 95 So. 2d 594 (Fla. 1957). Additionally, the failure to allow Mr. Evans the ability to interview jurors is a denial of access to the courts of this state under Article I, §21 of the Florida Constitution. Rule Regulating the Florida Bar 4-3.5(d)(4) is unconstitutional on both state and federal grounds.

Mr. Evans should have the ability to interview the jurors in this case. Yet, the attorneys statutorily mandated to represent him are prohibited from contacting them. The need to interview jurors is of particular importance in Mr. Evans' case due to juror misconduct and counsel's ineffectiveness in failing to object to the misconduct.

Juror misconduct occurred when Juror Taylor assisted a witness in answering a question pertaining to the existence of a traffic light. Although the court reporter did not record Juror Taylor's response, the record is clear that such a response was made due to the Court's admonishment of Juror Taylor (R. 3180-81). Trial counsel failed to object to Juror Taylor testifying, failed to request a mistrial when the Court admonished Juror Taylor, particularly given that the admonishment was made in the presence of the other

jurors and failed to request an inquiry of the entire jury panel to determine the effect of Juror Taylor's comments on the rest of the jurors (Id.). Without proper inquiry made of the jury, Mr. Evans is unable to determine the extent of the effect of Juror Taylor's comments. This juror's misconduct demonstrates that she had no intention of judging the case fairly or following the Court's instructions and was "so fundamental and prejudicial as to vitiate the entire proceeding." *Baptist Hospital v. Maler*, 579 So. 2d 97.

Mr. Evans may have additional constitutional claims for relief that can only be discovered through juror interviews. However, Mr. Evans is incarcerated on death row and is unable to conduct such interviews. He has been provided counsel who are members of the Florida Bar. Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, precludes counsel from contacting jurors and conducting an investigation into constitutional claims that would be discovered through interviews. Mr. Evans asks that this Court declare rule 4-3.5(d)(4), Rules Regulating the Florida Bar, unconstitutional and allow his legal representatives to conduct discrete, anonymous interviews with the jurors who sentenced him to death.

ARGUMENT VIII - FLORIDA'S CAPITAL SENTENCING STATUTE VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS UNDER RING V. ARIZONA.

Ring v. Arizona, 122 S. Ct. 2428 (2002), held unconstitutional a capital sentencing scheme that makes imposing a death sentence contingent upon the finding of an aggravating circumstance and assigns responsibility for finding that circumstance to the judge. Capital sentencing schemes such as Florida's and Arizona's violate the notice and jury trial rights guaranteed by the Sixth and Fourteenth Amendments because they do not allow the jury to reach a verdict with respect to an "aggravating fact [that] is an element of the aggravated crime" punishable by death. Ring, 122 S. Ct. at 2446 (quoting Apprendi, 530 U.S., at 501 (Thomas, J., concurring)). Florida law only requires the judge to consider "the recommendation of a majority of the jury. Fla. Stat. §921.141(3). In contrast [n]o verdict may be rendered unless all of the trial jurors concur in it. Fla. R. Crim. P. 3.440. Neither the sentencing statute, nor the jury instructions in Mr. Evans' case required that all jurors concur in finding any particular aggravating circumstances, or "[w]hether sufficient aggravating circumstances exist," or "[w]hether

sufficient aggravating circumstances exist which outweigh the mitigating circumstances." Fla. Stat. Sec. 921.141(2).

Furthermore, Mr. Evans' death sentence is unconstitutional because the aggravating circumstances were not alleged in the indictment. See Jones v. United States, 526 U.S. 227, 243 n. 6 (1999)(holding that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt."). Mr. Evans' should be granted relief.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing Paul Evans respectfully requests that this court immediately vacate his convictions and sentences, including his sentence of death and order a new trial and/or sentencing. In the alternative, Mr. Evans additionally requests that this court remand for a full and fair evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first-class postage prepaid to Leslie Campbell, Asst. Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, FL 33401, on the 12th day of March, 2007.

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This is to certify that the Petition has been reproduced in 12 Courier New type, pursuant to Rule 9.100 (l), Florida Rules of Appellate Procedure.

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