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

REPLY BRIEF OF APPELLANT

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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.

The State argues that the letter written by Assistant State Attorney Mirman to trial attorneys Mark Harlee and Diamond Litty was privileged work product and that the court was correct in denying Mr. Evans access to it. The State reasoned, in part, that Mr. Evans had an "adversarial relationship" with Mr. Harlee and Ms. Litty because he has raised an ineffective assistance claim. (Answer Brief, p. 16, 17). This reasoning is contrary to prevailing case law, and adopting such an "adversarial relationship" is contrary to prevailing professional norms.

The American Bar Association Guidelines for the Performance of Counsel in Death Penalty Cases, the standards to which the Supreme Court has long referred as guides to determining whether counsel's performance is reasonable, impose a continuing duty for trial counsel to act in the interests of the client, regardless of whether an ineffective assistance claim is raised in postconviction. The Guidelines read, in relevant part:

> Continuing duty to client.
>
> Guideline 10.13 The Duty to Facilitate the Work of Successor Counsel
>
> In accordance with professional norms, all persons who are or have been members of the defense team have a

> continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel.

ABA Guideline 10.13 (2003)(emphasis added).

As the Commentary to the Guideline explains,

> Even after team members have been formally replaced, they must continue to safeguard the interests of the client. Specifically, they must cooperate with the professionally appropriate strategies of successor counsel (Subsection D). And this is true even when (as is commonly the case) successor counsel are investigating or asserting a claim that prior counsel was ineffective.

Commentary to ABA Guideline 10.13 (emphasis added).

Furthermore, the general rule is that "the attorney owes a duty of complete fidelity to the client and to the interests of the client." Id. Trial counsel owes no duty of confidentiality to the State; rather, trial counsel has a continuing duty to act in the interests of his/her former client, regardless of whether that client has claimed ineffective assistance of counsel.

The State cites to case law holding that letters written by attorneys to their expert witnesses is privileged. The State infers that trial counsel's relationship to their client is the same as that of a State-retained expert to a criminal defendant, which is clearly not the case. The State cites no authority for the proposition that an attorney may claim privilege when writing to former counsel for a capital defendant. In any event, by disclosing thoughts and impressions regarding pending

litigation to Mr. Evans' attorney, the State has waived any privilege that might exist.

Mr. Evans is aware of this Court's recent holding in *Kearse v. State*, Case No. No. SC05-1876, finding a similar letter to be work product. In *Kearse*, the Court determined that the letter fits within the exemption of attorney work product prepared in postconviction proceedings. In its reliance on Fla. R. Crim. P. 3.220 and *State v. Kokal*, 562 So. 2d 324, 327 (Fla. 1990), the Court misapprehended the applicable law. Similar to Mr. Kearse, Mr. Evans' has not sought disclosure of the State's postconviction file, as was the issue in *Kokal*. By limiting its analysis to the issue of whether the information in the letter fits within the definition of work product, the Court has failed to consider the fact that any privilege enjoyed by the prosecutor was waived by the voluntary disclosure of that information to trial counsel.

By allowing communications between the State and a capital defendant's trial counsel to remain cloaked in secrecy, the Court is endorsing the notion that trial counsel is either represented by the State Attorney, or in some way is now a party to the prosecution of his former client. Mr. Evans must point out that in his case this pattern of creating a privileged relationship with trial counsel is even more troubling, where here trial counsel was the public defender's office. The fact

that some privileged relationship exists between the State Attorney's Office and the Public Defender's Office is contrary to the Public Defender's duty of loyalty to its clients. The idea that the State Attorney's office represents the interests of the Public Defender's Office flies in the face of ethical representation.

Further, Mr. Evans' claim with respect to the letter goes beyond a mere denial of public records. Mr. Evans argued that the letter goes beyond mere witness preparation and as a result he was denied a full and fair hearing. 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). While the State argues that Mr. Evans should have raised the issue at this point in the evidentiary hearing, counsel for Mr. Evans did not automatically assume that the prosecutor was acting in bad faith. Rather, it was not until the same issue arose in the evidentiary hearing in *State v. Kearse*, Case No. 910136-CFA, that undersigned counsel believed further investigation was required. As such, counsel acted diligently in pursuing the issue by contacting trial counsel and through a public records request.

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 State makes the same error as the trial court. The trial court failed to review the testimony from the evidentiary hearing witnesses as a whole or in conjunction with the trial record. 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. Ms. Thomas and Ms. Waddell were the only evidence, by form of their testimony, that the State had against Mr. Evans.

It is important to note that what little investigation that was conducted by trial counsel, was cursory at best regarding potential alibi witnesses and witnesses 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 (PCR. 50). Trial counsel, or the investigator, never spoke to Christopher Evers.

With regard to Jesus Cruz, the State argues "[g]iven his lack of memory and drunkenness, neither Strickland deficiency nor prejudice has been shown." (Answer Brief at 32). This ignores the fact that Cruz gave consistent statements to the police[1] and Mr. Harlee's investigator prior to trial, and that the State's key witness on the timing of the gunshots, Leo Cordary, was admittedly drunk on the night of the crime too.[2] It is also important to point out that Cordary provided inconsistent statements as to the timing of the gunshots. At trial, he said this was around 8:00 p.m. (R. 3390). He had made a sworn statement that he thought he heard the shots around 10:30 or 11 (R. 3401). He also made a sworn statement that the shooting occurred as it was just getting dark – around 6:30 (R. 3402-3403). Harlee did not remember if he had Cruz review any of their prior statements and couldn't remember trying to refresh their recollection before deciding not to use him as a witness (PC-R. 225). Yet, Mr. Harllee had a memo from his investigator indicating Cruz did recall what time he heard the gunshots.

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[1] Both the taped statement to the police and the police narrative report indicate that Mr. Cruz heard gunshots at approximately 9:45 p.m. Although he could not remember that he told the police in his statement that he looked at his watch (R. 416), he has been consistent on the timing of the gunshots.

[2] The state referred to Cordary as "quite a character", "convicted of numerous felonies". T 4203. The fact that the State's own witness was drunk and a felon equally contradicts trial counsel's reasons for not presenting Anthony Kovaleski.

Rosa 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). The State incorrectly argues that "Harlee has no recollection of Hightower stating that she saw Evans at the fair later that evening." (Answer Brief at 32). The record reflects that Mr. Harllee did recall that he knew at the time of trial that Ms. Hightower had seen Mr. Evans a second time at the fair (PC-R. 233, 234). While he did not recall the timing of the second encounter with Mr. Evans, he thought she did not provide an alibi because Ms. Hightower and Mr. Evans were not together the entire time. Ms. Hightower's testimony contradicts Mr. Harlee's memory that she did not provide an alibi. Her recollection of when she saw him places Mr. Evans at the fair between 8:15-8:45 p.m. (PC-R. 403-404). This is precisely the time frame he was allegedly shooting Alan Pfeiffer or waiting near the trailer to be picked up after shooting Alan Pfeiffer (R. 3390; 3897). Mr. Harlee was deficient for failing to recognize this important timeline.

The State argues that any testimony of Chris Evers would have been compared to the testimony of Greg Hill. The State is

correct in asserting that the testimony of Greg Hill is largely consistent with Mr. Evers postconviction testimony. What Mr. Hill did not testify to and which was not asked of him at trial, are the most significant aspects of Mr. Evers testimony. Just before leaving the fair, Mr. Evers and his mom met up with a group of people. The group included "Mr. Evans, a guy with blonde hair, [and] a lady" (T. 241). Mr. Evers stated that the group exited the fair and Donna 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).

Mr. Evers testimony directly contradicts the testimony of Donna Waddell, Mr. Evans co-defendant.[3] 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. Furthermore, the testimony provided by Christopher Evers, shows that Connie Pfeiffer and Donna Waddell were together with the car during the timing of

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

the shooting provided by witnesses Cruz, Mejia and the Lynches.

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.[4] and did not leave with Donna and Connie when they left to take Connie's kids home.

The jury was left to believe the testimony of Thomas and Waddell, the two witnesses with the most to gain. 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. It was crucial for Mr. Harlee to refute the timeline of Mr. Evans participation which was asserted at trial. The witnesses and evidence presented at the evidentiary hearing below do this.

Much of the State's argument is premised on the fact that the evidence presented would not negate Mr. Evans' involvement in committing the murder as testified to by Sarah Thomas and Donna Waddell. The State even argues that the evidence from Waddell and Thomas "was overwhelming and supported the forensic evidence collected." This ignores that no forensic evidence linked Mr. Evans in this crime and the State's case hinged on the testimony of Thomas and Waddell. It further ignores the

[4] 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.

important inconsistencies in Thomas and Waddell's testimony, not only with their own statements but with each other.

Not only was the testimony of Donna Waddell and Sarah Thomas inconsistent, but there was ample evidence implicating Connie Pfeiffer as the person who killed her husband, either alone or with Donna Waddell. When officers found Alan Pfeiffer dead from three gunshot wounds, (R 3144-45, 3192-93), there was a torn wedding photo, along with life insurance policies totaling over $100,000 payable to Connie on Alan's death on the dinner table (R. 3300-01).

Near the body was a lipstick-stained marijuana roach (R. 3297, 3324-25). Marijuana cigarettes and paraphernalia were found in Connie's Fiero (R. 3357-58). Black high heel shoes found near the body were never processed for blood; the police gave them to Connie's sister (R. 3361-62). Connie was wearing black spandex and high heels on the night of the murder (R. 3667). The police found Connie's fingerprint on a fan light bulb that had been unscrewed (R. 3544, 3572-73). They found Donna's fingerprint near the door (R. 3348, 3563). After Alan's death, Connie bought a $120,000 horse farm near Ocala while working as a waitress at Cracker Barrel (R. 3643, 3650). Donna Waddell acquired a taxi company (R. 3855, 4001). Mr. Evans went to live in an apartment behind a convenience store (R. 3644). The State largely ignores these inconsistencies and record evidence.

Juror Taylor

The State's argument that Harlee's choice 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), is reasonable based on the fact that he viewed her as favorable is flawed.[5] First and foremost, the State's reasoning and reliance on Harlee's voir dire notes to gleen this strategy, 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." Further, Harlee's suggestion that he would not want to have embarrassed a favorable juror, ignores the fact that she had already been admonished in open court. The plain fact is that Harllee admitted that he had no significant reason for not moving to have Ms. Taylor removed from the jury, for not asking for an inquiry of the jury as to whether Juror Taylor's comment had influenced them, for not asking for an instruction to the panel

[5] The cases cited by the State for the proposition that Harlee did not make any objections to Juror Taylor's testimony because she was a favorable juror are distinguishable from the instant set of facts. Both *Harvey v. Dugger*, 656 So. 2d 1253 (Fla. 1995) and *Salmon v. State*, 775 So. 2d 148 (Fla. 3d DCA 2000) address the reasonableness of trial counsel's decisions during voir dire, not once what may have been a favorable juror injects herself into the trial by testifying.

to disregard Juror Taylor's comments, for not making objections to the extraneous information given by Juror Taylor, and for not making an objection to her being admonished in front of the entire panel (PC-R. 281-82).

While the State maintains that information regarding the existent of a traffic light was inconsequential, 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. 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). How long it would take Mr. Evans, Ms. Waddell and Ms. Thomas to travel between the fair and the trailer was crucial to these questions.

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

The State's argument misses the point that, despite Harlee's testimony that he evaluated the prejudicial information that Thomas had a child with Mr. Evans and would use it to his advantage, he did not use this information to Mr. Evans' benefit. 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.). 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.

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

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. Whether this Court recognized the constitutional violation or simply restated Mr. Evans' direct appeal claim, does not change the legal precedent that where there exists the possibility that the "jury may be divided as to the elements of the crime" both the State and Federal Constitutions are violated. *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).

While the State argues that the Court in rejecting Mr. Evans claim on direct appeal because it was not preserved during trial, necessarily finds that the claim does not constitute fundamental error reads a holding into this Court's opinion that is not there. In fact, it was never raised as fundamental error on direct appeal. Because Mr. Harllee never objected to this part of the closing 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* at 106, Mr. Evans was denied a unanimous jury. The distinction between the two theories is important to Mr. Evans' level of culpability. Mr. Evans was not only prejudiced because there was no unanimous jury as to guilt, but the implications on his death sentence is equally, if not more prejudicial.

The State fails to see the significance of *Schad v. Arizona*, 501 U.S. 624 (1991) to the facts in Mr. Evans case. While the Court in *Schad* found no constitutional violation where jury unanimity was not required on alternative theories of premeditated and felony murder, the Court pointed out that at some point "differences between means become so important that they may not reasonably be viewed as alternatives to a common end, but must be treated as differentiating what the Constitution requires to be treated as separate offenses." *Id*. at 633. The Court held "that the Constitution did not command such a practice on the facts" presented by Schad. *Id*. at 645.

The State also misses the important distinction between the facts in *Schad* and Mr. Evans claim of a constitutional violation. As Mr. Evans argued on direct appeal, under either of the state's legal theories in *Schad*, it was Schad who committed the murder without any co-defendant. The facts, as discussed by the Supreme Court at 501 U.S. at 627-28, and by the state court in *Schad v. State*, 788 P.2d 1162, 1164 (Az. 1989), show that Schad was alone when he committed the murder. The legal question turned only on Schad's state of mind. In contrast to the facts in *Schad*, in Mr. Evans' case, the State, in order to prove Mr. Evans was a principal, had to show that someone else committed the murder, that appellant had a conscious intent that the murder occur, and did or said something which was intended to,

and did, abet its commission.[6] Further, the defense of alibi applied to one theory but not to the other. As the State acknowledged, the theory of principal does not require his presence at the crime, only that he participated in planning and benefited from the crime. This is significant as to Mr. Evans' culpability. The State misunderstands these important distinctions.

The fact remains that this Court rejected Mr. Evans claim that his due process rights were violated when the State argued that the jury could be divided as to the theory of guilt because **it was not preserved by trial counsel**. Mr. Harlee was ineffective for failing to object.

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. As Mr. Evans pointed out in his intial brief, jury deliberations were quite contentious. 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

[6] It is important to note, that under *Richardson v. United States*, 526 U.S. 813, 119 S. Ct. 1707 (1999)a court must decide if the state's two theories referred to a single element of murder or whether the state had to prove different elements to establish each crime.

relief.

ARGUMENT III

THE STATE WITHHELD MATERIAL EXCULPATORY OR IMPEACHMENT EVIDENCE

With respect to Mr. Evans's claim that the State withheld information that it's key witness, Leo Cordary, received a benefit from the State for his testimony in Mr. Evans' trial, the State argues that there was no favourable evidence suppressed by the State because Leo Cordary was unaware of any decision by the State not to oppose bond on his violation of probation. However, the record from co-defendnat Connie Pfeiffer's trial[7] reflects that Leo Cordary's attorney on the violation of probation was first contacted by Cordary's wife. The testimony of his attorney indicates that Cordary's wife left messages for him at his office telling him to get in contact with the State Attorney's Office regarding scheduling a bond hearing and getting Cordary out of jail (Transcript in State v. Connie Pfeiffer, Case No. 97-754-CFB at 2010, 2019). Specifically, Cordary's wife indicated he should get in contact with assistant state attorney, Nikki Robinson (Id. at 2019). Arguably, if Mr. Cordary's wife knew the State was not going to

[7] At the start of Mr. Evans' evidentiary hearing, the lower court took judicial notice of the trial transcript and record in Ms. Pfeiffer's case (PC-R. 201).

oppose bond on his violation of probation,[8] Mr. Cordary knew as well.

Subsequent to these messages, a bond hearing was held on an emergency basis (Id. 2013-2016). At the bond hearing, State did not object to Mr. Cordary's bond being set at ten (10) thousand dollars (See Defense Exhibit 8). Trial counsel was never informed of this favorable treatment.

Further, contrary to the State's assertion that no reasonable probability exists that the outcome of the proceedings would have been different given that Cordary's testimony had not changed since his first statement to the police, this is not the case. Cordary did provide inconsistent statements as to the timing of the gunshots. At trial, he said this was around 8:00 p.m. (R. 3390). He had made a sworn statement that he thought he heard the shots around 10:30 or 11 (R. 3401). He also made a sworn statement that the shooting occurred as it was just getting dark – around 6:30 (R. 3402-3403). Also, the State's argument ignores the requirement that the favorable evidence must be considered cumulatively with the evidence not investigated by defense counsel in assessing the reliability of the outcome. *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996). Because the State withheld iformation that Mr.

[8] In violation of probation cases defendants are commonly held without bond in the Nineteenth Judicial Circuit (PC-R. 245).

Cordary was favorable treated at his bond hearing, 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).

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.

The State asserts that it is Mr. Evans' position that trial counsel "should have used different experts" during the penalty phase of trial. (Answer Brief at 70). Rather, Mr. Evans argued that trial counsel was ineffective for failing to use competent experts that could adequately explain Mr. Evans mental health history. In fact, Mr. Evans has a long history of psychological instability. Trial counsel ignored Mr. Evans' psychological history and the effects of institutionalization on Mr. Evans.

The State argues that trial counsel's strategy of limiting the presentation of evidence at trial was reasonable because by limiting the mental health testimony, trial counsel precluded the State from presenting the most damaging evidenc from Mr. Evans' hospitalization records. This propostion is refuted by the record. 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). Despite her testimony on cross-examination, Ms. Litty had to concede that all the issues regarding violence or threats of violence in Mr. Evans' childhood had actually been brought out by the State's cross-examination of both Dr. Landrum and Dr. Levine (Id.). The State's argument ignores the record and therefore, as the circuit court did, the State does not consider that the jury heard this "damaging" evidence.

As a result, the jury was left with the most negative aspects of Mr. Evans history with no rebuttal evidence to explain the significance of his history in the context of the complete abandonment by his family, the medications he was taking from as early as 3 years old and his brain damage. Trial 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).

While the State asserts that trial counsel testified that she presented experts to testify regarding Mr. Evans' medications, his ADHD, and the effect of his brother's death on him, this is untrue. 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 specifics of Attention Deficit Hyperactivity Disorder,[9] and didn't have the experts address the impact on Mr. Evans of the death of 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). In fact, Ms. Litty could not recall speaking to any other family members other than Mr. Evans' parents (PC-R. 369). Therefore, the two family members she

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

relied on were the very same that had repeatedly abandoned Mr. Evans emotionally and physically.

It is important to note that trial counsel had an expert who opined that Mr. Evans' suffered from frontal lobe damage, but failed to present him under the same flawed logic that it would keep out any "negative" or "damaging" behavior. 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. Although the State asserts that trial counsel considered that Dr. Rifkin diagnosed Mr. Evans with conduct disorder, this is inaccurate. 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). The evidence in postconviction demonstrates that 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.

The evidence presented in postcinviction, and which counsel should have adequately explored and presented, demonstrates that 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.

In this regard, the State misunderstands the testimony of Mr. Evans' mental health experts. Mr. Evans' experts at the evidentiary hearing were not refuting the diagnosis of conduct disorder, the hospital records contain just that diagnosis. However, the 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 thereby weakening any "damaging"[10] evidence.

Despite the State's assertions, both experts presented at the evidentiary hearing testified to abundant mitigation. 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

[10] While the State lists at length many of the "negative" behaviors recited in Mr. Evans hospital records, the State ignores that there are contradictory references in the hospital records as well. For example, there were several notations in the hospital records indicating that Mr. Evans was remorseful over his brother's death. Additionally, 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).

had no life skills and no meaningful relationships. The State's assertion that Dr. Harvey did not opine as to any mitigator he would have offered is inaccurate. 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).

As Mr. Evans argued in his initial brief, if evidence of these nonstatutory mitigating factors had been presented to the jury, 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, the jury recommendation was only 9-3 for death.

CONCLUSION

As to the remaining arguments argued in Mr. Evans' brief, he relies on the arguments and authority cited therein. Based

on the forgoing arguments and those in his initial brief, Mr. Evans requests that this Court reverse the lower court grant his request for a new trial and/or sentencing proceeding. 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 15th day of October, 2007.

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CERTIFICATE OF FONT

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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