IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC05-1732
Lower Tribunal No.: 16-1999-CF-1156-AXXX

JAMES BELCHER,

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of a trial Court order denying Appellant's Rule 3.851, Fla.

R. Crim. P. Initial Motion for Post-Conviction Relief in a death penalty case. For ease of reading, that denied motion is referred to simply as the "subject motion." This appeal contains references to the record on appeal created for the subject post-conviction motion proceedings. They are designated by the letter "R" followed by the applicable record volume number, followed by the applicable record page numbers which are stamped at the bottom of each page of the record on appeal.

The appeal also contains references to the prior record of the original jury trial proceedings. They are designated by the letters "TR" followed by the applicable record volume number, followed by either the Court reporter's trial transcript page numbers (top of page) or the clerk's record on appeal page numbers (bottom of page) for non-transcript record documents.

The Defendant James Bernard Belcher is referred to herein primarily by "Defendant, " but sometimes also by "Appellant" and "Belcher." The trial Court conducted an evidentiary hearing on the subject motion. R2, p. 268-397. That hearing will be referred to simply as the "evidentiary hearing" in this brief. The trial Court order denying the subject motion (R2, p. 249-266) which is appealed here, is formally titled Order Denying Defendant's Motion for Post Conviction Relief but is hereafter also referred to as simply the subject "denial Order."

STATEMENT OF THE CASE AND FACTS

The basic facts of the underlying, first-degree murder case are set forth in this Court's direct appeal Opinion in Belcher v. State, 851 So.2d 678 (Fla. 2003) , as follows:

> The evidence presented at trial indicated that some time after 10:30 p.m. on January 8, 1996, but before 9 p.m. on January 9, 1996, James Belcher (Belcher) gained access to the victim's townhouse, where she lived alone.(footnote in original). Belcher sexually battered victim Jennifer Embry (Embry) and then killed her by placing his hands around her neck and holding her head under water in the bathtub until she could no longer breathe. At 2 a.m. on January 9, 1996, Maxine Phillips, Embry's next door neighbor, was awakened by loud noises, which came from the common wall she shared with Embry. Phillips described the noises as three hard knocks, as if someone was knocking against the wall.
>
> Medical Examiner Bonifacio Floro testified that the cause of Embry's death was both manual strangulation and drowning. White foam, a product of the mixture of air, water, and mucous in the trachea and bronchial tree, was discovered coming out of Embry's nose and mouth, which indicated to the medical examiner that she was alive and breathing when her head was submerged in the water. Linear bruising on Embry's neck and small internal hemorrhaging on her larynx and hyoid bone were consistent with her being manually strangled while she was still alive. Dr. Floro testified that Embry suffered from the following nonfatal injuries before her death: vaginal injuries consistent with forcible entry by a penis or object; a bruise above the right eyebrow; and a laceration to the right shoulder. He stated that the injuries

were "fresh," indicating that they had been inflicted within twenty-four hours of Embry's death. Dr. Floro found spermatozoa in Embry's vagina and opined that they were "fresh" due to the fact that they still had both heads and tails at the time of the autopsy. Dr. Floro stated that although he could not pinpoint the time of the placement of the sperm, he opined that the condition of the sperm indicated that they had been placed there probably during a sexual act some time between three and six days before the autopsy.2

Detective Robert Hinson, the lead detective assigned to the case, testified that in the bathroom where Embry's body was found, there were some things apparently out of place. He related the following observations of the bathroom: one of the two parallel shower curtain rods was askew and had been propped up against the wall with a towel; one of the two shower curtains was pulled over to one side of the rod; the plastic hook that held up the decorative shower curtain was missing from the wall and found in the bathroom trash can with a piece of wall board still attached; and a strip from the plastic shower curtain liner was found in
the bottom of the bathtub.

At the time of the murder, Belcher lived with his sister in a house that was close to the Florida Technical College, where Embry had attended classes until her death. Belcher had twice been observed at Florida Technical College in connection with Embry. Elaine Rowe, an employee at Florida Technical College, testified that in the winter of 1995, a man came into Rowe's office and asked for Embry by name, requesting that Embry be retrieved from her class. Rowe had someone retrieve Embry from her class and testified that to her knowledge, the man and Embry interacted that

day. From a police photo-lineup, Rowe identified Belcher as the man who came to her office, and she identified Belcher in court. Derrick Scott, a classmate of Embry's with whom she had a five-month affair, testified that one day before October of 1995, he walked out of class at Florida Technical College, and observed a man standing by Embry's car, talking with her. Scott identified Belcher from a side-shot photo, displaying a facial scar, as the man he saw talking with Embry by her car. Scott also identified Belcher in court.

On August 4, 1998, Detective Hinson questioned Belcher about Embry's murder. During that interview, Belcher denied (1) ever being at Embry's home, (2) ever having sex with Embry, and (3) ever meeting Embry. After Derrick Scott identified Belcher from a photo, Detective Hinson obtained a search warrant for a sample of Belcher's blood. At the time of the blood draw, Hinson observed that Belcher was nervous and holding a Bible, and that he had urinated on himself.

James Pollack, lab analyst for the Florida Department of Law Enforcement (FDLE), testified that the semen discovered in Embry's vagina and on a bedroom slipper found in the bathroom near her body contained DNA matching Belcher's DNA profile.

The jury found Belcher guilty of first-degree murder on the theory of both premeditation and felony murder, and guilty of sexual battery. After a penalty phase hearing, the jury voted nine to three, in favor of a death sentence. The trial court followed the jury's recommendation and imposed a death sentence for first degree murder and sentenced Belcher to twenty-five years imprisonment for sexual battery. The trial court found that the State proved beyond a reasonable doubt the following aggravators in support of Belcher's death

sentence: (1) the defendant has been previously convicted of a felony involving the use or threat of violence to some person (great weight); (2) the capital felony was committed while the defendant was engaged in the commission of the crime of sexual battery (great weight); and (3) the capital felony was especially heinous, atrocious, or cruel (HAC) (great weight). The trial court found that all of the mitigating factors that were presented were proven sufficiently for the Court to give them consideration.

The mitigating factors in this case, all of which were nonstatutory, were: (1) in his relationship with family members, Belcher is considerate, generous and concerned; (2) Belcher loves his parents, brother, sisters, cousins, aunts, and uncles, and they love him; (3) Belcher has not lured anyone else in his family into trouble with the law, he has actually discouraged family members from engaging in criminal behavior and used himself as an example as to why they should not get involved in criminal activity; (4) Belcher has done many kind things for his family; (5) in spite of personal problems, Belcher has encouraged his cousins to do well; (6) Belcher has often been a mentor and a role model of integrity to his relatives; (7) Belcher has maintained contact with relatives even while in prison and continues to provide them advice and counsel, sometimes over the phone; (8) Belcher was raised in a high crime area in New York and was evidently unable to resist the temptations of crime; (9) Belcher was sent to adult prison at an early age and it affected his development; (10) Belcher has never abused alcohol or drugs; (11) Belcher has shown concern for younger inmates at Appalachee Correctional Institute (ACI) and has had a positive effect on their lives by being a tutor, basketball coach, a good listener, a counselor to young inmates, and a peacemaker; (12) Belcher can continue to help other inmates in the future,

> as evidenced by those who testified at the penalty phase; (13) Belcher has not been a discipline problem either in prison or in the pretrial detention facility for the period of his recent incarceration; (14) Belcher displayed proper behavior during trial; and (15) Belcher displayed appropriate remorse and genuine concern for the distress caused to his family and the victim's family during the Spencer3 hearing. The sentencing order indicates that the trial court assigned "some weight" to all of the mitigators, except for (11) and (12), to which it assigned "greater weight."
>
> (Id., p. 678-684)

Following this Opinion, the Defendant filed his subject motion for post-conviction relief. R1, p. 7-56. This subject motion raised fourteen claims, thirteen of which were “ineffective assistance of counsel” claims. There was an additional claim brought pursuant to Brady v. Maryland, 373 U.S. 83 (1963) but it was abandoned after further investigation. Following a lengthy evidentiary hearing, the trial Court entered its order denying the subject motion (“denial order”). R2, p. 249-398. This appeal followed.

SUMMARY OF ARGUMENT

The Defendant suffered a great many types of ineffective assistance of counsel. These errors and oversights and omissions, considered both individually and cumulatively, denied the Defendant effective representation and violated Defendant's rights to a fair jury trial and due process of law. The trial Court erred in not granting the subject motion for post-conviction relief.

ARGUMENT FOR EACH ISSUE

Issue 1: The trial Court erred in not finding that the Defendant suffered from ineffective assistance of trial counsel in connection with trial counsel's failure to object and request a curative instruction in response to the State's voir dire comments to jurors misstating the State's burden of proof and misstating the Defendant's presumption of innocence

Standard of review: For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Preservation: This claim/issue was raised in the Defendant's subject motion. R1, p. 9-11. The trial Court heard testimony on this claim at the evidentiary hearing (R2, p. 345-346 and 372-373) but ultimately denied it. R2, p. 251.

Analysis: The prosecutor's statements to the jury which the Defendant complains of here appear in the record of prosecutor Bernardo De La Rionda's initial *en masse, voir dire* questioning of the entire panel of prospective jurors as follows:

> Mr De La Rionda: Do all of you understand that as we sit here today the defendant, Mr. Belcher, is presumed to be innocent? Do all of you understand that?
>
> (Affirmative response from prospective jurors)
>
> Mr. De La Rionda: Okay. Do you understand that does not mean he is innocent? It means he is presumed to be innocent *until you hear the evidence to the contrary*. Can all of you agree with that?
>
> Affirmative response from prospective jurors.
>
> (TR11, p. 81, emphasis Appellant's)

This indicated to the jurors that the state could overcome the presumption of innocence and meet its burden of proof of guilt merely by presenting *any* evidence of guilt, however weak. In other words, the prosecutor effectively

converted the heavy burden of proving guilt beyond a reasonable doubt into a much lighter burden of merely presenting some evidence of guilt. There was no objection and no request for a curative instruction by Defendant's trial counsel.

Defendant's two trial counsel were asked about this at the evidentiary hearing. Assistant Public Defender Alan Chipperfield was unsure of whether such comments by the State were objectionable. R2, p. 345-346. Assistant Public Defender Lewis Buzzell did not object because Mr. Chipperfield was handling this part of the trial. Mr. Buzzell felt that the above quote had been taken out of context and the entire context was a correct statement of the law. R2, p. 372-373.

Admittedly, the trial Court Judge did correctly instruct the jury on the Defendant's presumption of innocence and States burden of proving guilt beyond a reasonable doubt immediately after guilt-phase closing arguments. R18, p. 1382-1385. However, this correct statement of the Defendant's presumption of innocence and the State's burden of proving guilty beyond a reasonable doubt came too late. The jurors had already heard and evaluated all the evidence while they were under the influence of the false notion that the Defendant's presumption of innocence was lost the instant that the State produced *any* evidence of guilt, however, weak.

In denying Defendant's "ineffective assistance of counsel" claim on this

ground, the trial Court indicated that it had found that the two defense lawyers' explanations were more credible than the Defendant's allegations. The trial Court also found that "the statement actually made by the State was in itself not objectionable." R2, p. 251. For the reasons stated in this argument for this issue, such findings are not supported by the record evidence.

Proof beyond a reasonable doubt of each element of the offenses charged is required by the "due process" clauses of the 5th and 14th Amendments to the U.S. Constitution and is required by Article 1, Section 9 of the Florida Constitution. As noted by the United States Supreme Court in In re Winship, 397 U.S. 358 (1970) the reasonable doubt standard of criminal law has constitutional stature; due process protects accused against conviction except upon proof beyond reasonable doubt of every fact necessary to constitute the crime charged" *accord,* Parker v. State, 795 So.2d 1096 (Fla. 4th DCA 2001).

A direction to the jury which has effectively lessens this burden of proof is unconstitutional. Schad v. Arizona, 501 U.S. 624 (1990). The State has the burden of proving each and every element of an offense to the exclusion of and beyond a reasonable doubt. Fla. Std. Jury Instr. (Crim) 3.7. Jurors are required to be instructed that " . . . if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction,

it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable." Id. Jurors are also instructed that "A reasonable doubt as to the guilt of the defendant may arise from the evidence, conflict in the evidence or the lack of evidence. Id. *See also* State v. Wilson, 686 So.2d 569 (Fla. 1996).

There is a presumption that a person charged with a crime is innocent. That presumption follows the accused through each step of trial until the presumption is overcome by evidence establishing guilt beyond a reasonable doubt. Pinder v. State, 53 So.2d 639 (Fla. 1951). The jury must *weigh* the evidence against the defendant to determine whether the presumption of innocence has been overcome. Oglesby v. State, 235 So.2d 558 (Fla. 1945) *emphasis Defendant's*. Care must be taken to assure that the presumption of innocence follows the accused through trial and is overcome only by the evidence and not the improper remarks of counsel. Sanchez v. State, 182 So.2d 645 (Fla. 1938). Although Defendants asserting certain defenses like the entrapment defense have the "burden of producing evidence" of such defense, (*See,* U.S. v. Brown, 43 F.3d 618 (3rd Cir. 1995)), the State's burden of proving guilt of the offense beyond a reasonable doubt never shifts away from the state. Boling v. State, 297 So.2d 317 (Fla. 3d DCA 1974).

By failing the assure that the jury was properly instructed, and by failing to assure that the jury followed the law correctly, trial counsel was ineffective and the Defendant was denied a fair jury trial in violation of the 6th and 14th Amendments to the U.S. Constitution and in violation of the Article 1, Sections 16 and 22 of the Florida Constitution. The trial Court erred in not finding ineffective assistance of counsel on this ground.

Issue 2: The Trial Court Erred in Not Finding that the Defendant Received Ineffective Assistance of Counsel in Connection With Allowing Comments Denigrating the Role of Jury

Standard of review: For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Preservation: This claim/issue was raised in the Defendant's subject motion. R1, p. 11-12. The trial Court held, at the hearing conducted pursuant to

Huff v. State, 622 So.2d 982 (Fla. 1993), and without any opposition by any counsel, that this issue could be resolved exclusively from the record, without additional evidence. In its subject denial Order, the trial Court analyzed the record of earlier jury trial proceedings and gave its reasons for not finding ineffectiveness on this ground. R2, p. 252.

Analysis: During voir dire, the prosecutor informed prospective jurors that a jury death recommendation carries "great weight" but Judge Dearing actually imposes the death penalty. (TR11, p. 126)

Awhile later in voir dire, the prosecutor told the jury that, although judge imposes sentence, jury's death/life recommendation carries "great weight." The prosecutor further told the prospective jurors that "the death penalty is the law" rather than telling the prospective that they would decide between alternate sentences of life or death. (TR11, p.146)

The prosecutor further minimized the sentencing role of the jury later on, by saying that the "judge actually does the imposition of the sentence . . . but you do

tender to the Court a recommendation and that recommendation does carry great weight." (TR13, p.451)

Again, in closing argument, the State improperly diminished the

responsibility of the jury in this death-penalty case by telling them "I look forward to you – to speaking to you again in that second part, the death penalty part. We're not there yet. This part deals with the guilt of this defendant. (TR18, p. 1355).

Defendant's trial counsel did not object or request curative instructions for any of these improper prosecutor statements.

In its subject denial order, the trial Court found that there had been no ineffectiveness of counsel because the trial Court announced to the prospective jurors at the beginning of voir dire that the Court was required to assign great weight to the jury life/death recommendation, and could not override it unless reasonable men would not differ on the need to depart from the jury recommendation. R2, p. 252, citing TR 6, p. 36 and TR8, p. 411. The trial Court also explained in its subject denial Order that the penalty phase instruction was the Florida standard jury instruction, approved by the Courts in Thomas v. State, 838 So.2d 535 (Fla. 2003) and Combs v. State, 525 So.2d 853 (Fla. 1988) as complying with the requirements of Caldwell, infra. R2, p. 252. Defendant candidly admits, in this appeal brief, that the trial Court also told the jury in final, penalty phase, pre-deliberation instructions that the Court gives their recommendation "great weight." TR22, p. 1828-1829. However, the Defendant's contends that such correct statement of the law came too late, after the jury had already heard all

of the guilt-phase and penalty-phase evidence under the influence of the incorrect descriptions of the law.

In jurisdictions like Florida, where the Judge is the ultimate sentencer, the jury cannot be told that their recommendation is only advisory and that the judge is the ultimate sentencer. The jury must know that their recommendation must be given great weight and that their recommendation can be overturned only in very limited sentences. Caldwell v. Mississippi, 472 U.S. 320 (1988) , Mann v. Dugger, 844 F. 2d 1446 (11th Cir. 1988).

The State may not indicate to the jury, that their life/death decision is a mere recommendation which the judge is free to accept or reject. Caldwell v. Mississippi, 472 U.S. 320 (1988), Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988). By failing the assure that the jury was properly instructed, and by failing to assure that the jury followed the law correctly, trial counsel was ineffective. Defendant was denied a fair jury trial in violation of the 6th and 14th Amendments to the U.S. Constitution and in violation of the Article 1, Sections 16 and 22 of the Florida Constitution. The trial Court erred in not finding ineffectiveness on this ground.

Issue 3: The trial Court erred in not finding ineffective assistance of counsel in connection with trial counsel's failure to object and request a curative instruction for the State's voir dire comment which failed to distinguish defense's lesser burden of proof to establish mitigating circumstances

Standard of review: For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999).

The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Preservation: This claim/issue was raised in the Defendant's subject motion. R1, p. 12-13. The trial Court heard testimony on this claim at the evidentiary hearing (R2, p. 347-348 and 374-376) but ultimately denied it. R2, p. 253-254.

Analysis: During voir dire, the prosecutor told the jury that the trial has two parts: guilt and penalty. (TR11, p. 144-145). The prosecutor told the jury that the State must prove guilt beyond a reasonable doubt. However, the prosecutor failed to tell the jury about the lesser burden of proof that the defense has in establishing mitigating circumstances in the penalty phase of the trial. There was no objection and no request for a curative instruction by the Defendant's trial counsel. (TR11, p. 144-145)

In fact, the Defendant's own defense counsel, Mr. Alan Chipperfield, added to the problem by indicating to the prospective jurors that both the aggravating circumstances and the mitigating circumstances must be proven beyond a

reasonable doubt as follows:

> Mr. Chipperfield: Mr. De La Rionda mentioned that if we get to a penalty phase, if there's a conviction of first degree murder and we have this penalty phase that the purpose of that penalty phase is for the jurors to consider aggravating circumstances and mitigating circumstances. Aggravating circumstances are certain facts about the crime or about the person who's convicted that under Florida law suggest that death might be an appropriate penalty. And they're all defined by statute and they have to be proven beyond a reasonable doubt. Mitigating –do you all understand that? (Affirmative response from the prospective jurors).
>
> (TR12, p.220-221).

Admittedly, the trial Court did later correctly instruct the jury in final, penalty phase, pre-deliberation jury instructions that they need only be "reasonably convinced" that a mitigating circumstance exists and that mitigating circumstances need not be proved beyond a reasonable doubt. TR22, p. 1834. However, such correct statement of the law came too late, after the jury had already heard all of the penalty-phase and guilt-phase evidence under the influence of the incorrect statements of the law.

At the evidentiary hearing, Defendant's trial counsel, Mr. Alan Chipperfield, testified that the prosecutor comment in question here was made while the prosecutor was talking about the two phases of a death-penalty trial and that the

defense could not force the prosecutor to talk about the lesser burden of proving mitigating circumstances until the State addressed the penalty phase of trial. R2, p. 347-348. Defendant's second trial counsel, Mr. Lewis Buzzell, explained that he himself was not involved in this portion of the Defendant's jury trial (R2, p. 374-276) but felt that the questioned prosecutor statement had been quoted out of context. R2, p. 376.

In its subject denial Order, the trial Court held that the prosecutor's failure to explain the Defense's lesser burden of proving mitigating circumstances was not objectionable. R2, p. 253. The trial Court further held that "Mr. Chipperfield's comment during voir dire was not improper." R2, p 253. The Defendant contends in this appeal that this holding was erroneous.

The jury need only be "reasonably convinced" of mitigating circumstances. Florida Standard Jury Instructions in Criminal Cases, Instruction 7.11. The United States Supreme Court has validated sentencing schemes which require a lesser "preponderance of evidence" burden of proof for proving mitigating circumstances. Walton v. Arizona, 497 U.S. 639 (1990). In a capital sentencing hearing, the defendant is only required to prove mitigating circumstances by a preponderance of evidence. Walls v. State, 641 So.2d 381 (Fla. 1994). *Accord*, Niber v. State, 574 So.2d 1059 (Fla. 1990). Mitigating circumstances, unlike

aggravating circumstances, do *not* have to be proved beyond a reasonable doubt. Henry v. State, 613 So.2d 429 (Fla. 1992). If there is reasonable doubt that a mitigating circumstance exists, it is considered established. Ford v. State, 802 So.2d 1121 (Fla. 2001).

By failing the assure that the jury was properly instructed, and by failing to assure that the jury followed the law correctly, trial counsel was ineffective and the Defendant was denied a fair jury trial in violation of the 6th and 14th Amendments to the U.S. Constitution and in violation of the Article 1, Sections 16 and 22 of the Florida Constitution. The trial Court erred in not finding ineffective assistance of counsel on this ground.

Issue 4: The trial Court erred in not finding that the Defendant received ineffective assistance of counsel in connection with trial counsel's failure to object and request curative instruction for the state's voir dire comment indicating that the defendant has burden of proving mitigating circumstances must outweigh the aggravating circumstances, rather than vice-versa

Standard of review: For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999).

The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Preservation: This claim/issue was raised in the Defendant's subject motion. R1, p. 13-15. The trial Court held, at the hearing conducted pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993), and without any opposition by any counsel, that this issue would be resolved exclusively from the record, without additional evidence. R3, p. 417.

In its subject denial order, the trial gave its reasons for not finding ineffectiveness on this ground. R2, p. 254. The trial Court explained that the standard penalty phase jury instructions were given and that the Florida Supreme Court has consistently held such burden-shifting arguments to be without merit. R2, p. 254. The trial Court also declined to find the prosecutor comments complained of to be objectionable. R2, p. 254.

Analysis: During jury selection, the prosecutor told the prospective jurors that State must first prove the existence of aggravating circumstances, followed by the jury determining whether the mitigating circumstances outweigh the

aggravating circumstances, and basing its recommendation on such. (TR11, p. 149). Initially, it is noted that this statement incorrectly informs the prospective jurors that they shall be jumping directly from finding aggravating circumstances to weighing mitigation-versus-aggravation. This wrongfully skips over the interim step of determining whether the aggravating circumstances alone are of sufficient magnitude to justify a sentence of death. Fla. Std. Jury Instr. (Crim.) 7.11 (2).

Such a misstatement of the advisory sentence procedure denied jurors the right to exercise discretion in favor of recommending a life sentence where aggravating circumstances have been shown to exist. Zant v. Stephens, 462 U.S. 862 (1983), Peek v. Kemp, 784 F.2d 1479 (11th Cir. 1986). A jury instruction which creates a presumption that death is the correct sentence once aggravating circumstances are found violates the individualized sentencing required in death penalty cases. Jackson v. Dugger, 837 F.2d 1467 (11th Cir. 1988), Summer v. Shuman, 483 U.S. 66 (1987). Where, as here, the unremedied jury instruction taints the jury's sentence recommendation, the Court must vacate the death sentence and remand for a new sentencing hearing before a properly instructed jury. Thompson v. Dugger, 515 So.2d 173 (Fla. 1987), Downs v. Dugger, 514 So.2d 1069 (Fla. 1987).

Also during jury selection, a prospective juror named Ms. Oldring said that she would consider aggravating circumstances as well as mitigating circumstances, but added "If the defense can make the mitigating circumstances outweigh the aggravating circumstances, then I would have no problem recommending life." (TR12, p. 299) Again, there was no objection and no request for a curative instruction or an other curative effort by Defendant's trial counsel. This reinforced the false notion that the defense has the burden of proving that mitigating circumstances outweigh aggravating circumstances.

Admittedly, the Trial Court did later instruct the jurors --just prior to penalty phase deliberations– that they must determine whether aggravating circumstances in themselves justify death before weighing mitigating circumstances. TR22, p. 1828-1829. Nevertheless, this information did not come until the end of Defendant's penalty phase, after the jurors had heard all of the guilt and penalty phase evidence while under the influence of incorrect descriptions of the law.

Jury instructions which shift the burden of proof onto criminal defendants are generally improper. *See, e.g.* Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1998). Although the Florida Supreme Court deemed a Florida jury instruction asking jurors to determine if mitigating factors outweigh aggravating factor to be

acceptable, *see, e.g.*, Stewart v. State, 549 So.2d 171 (Fla. 1989), this is an issue that the Court should revisit in the circumstances of the present case. Proof beyond a reasonable doubt of each element of the offenses charged is required by the "due process" clauses of the 5th and 14th Amendments to the U.S. Constitution and is required by Article 1, Section 9 of the Florida Constitution.

As noted by the United States Supreme Court in In re Winship, 397 U.S. 358 (1970), the reasonable doubt standard of criminal law has constitutional stature; due process protects accused against conviction except upon proof beyond reasonable doubt of every fact necessary to constitute the crime charged" *accord*, Parker v. State, 795 So.2d 1096 (Fla. 4th DCA 2001).

By failing the assure that the jury was properly instructed, and by failing to assure that the jury followed the law correctly, trial counsel was ineffective and the Defendant was denied a fair jury trial in violation of the 6th and 14th Amendments to the U.S. Constitution and in violation of the Article 1, Sections 16 and 22 of the Florida Constitution. The trial Court erred in failing to find ineffective assistance of counsel on this ground.

Issue 5: The trial Court erred in not finding that the Defendant received ineffective assistance of counsel in connection with trial counsel's failure to

object and request a curative instruction for the State's comments indicating that a killing done instantly after deciding to kill is premeditated, first-degree murder

Standard of review: For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Preservation: This claim/issue was raised in the Defendant's subject motion. R1, p. 15-16. The trial Court heard testimony on this claim at the evidentiary hearing (R2, p. 349-355 and 377-378) but ultimately denied it. R2, p. 254-255.

Analysis: The prosecutor told the jury during voir dire that they could find first-degree murder in either of two ways: premeditated 1-degree murder and felony 1-degree murder. The prosecutor further explained to the jurors that killing with premeditation consisted of killing after consciously deciding to do so.

The prosecutor added that "The law does not fix the exact period of time that must pass between the formation in the mind of the intent to kill and the actual killing. "It can be a matter of seconds." TR11, p. 166-167. These comments indicated that a killing done instantly after deciding to do so is, in and of itself, "premeditation." There was no objection or request for a curative instruction from defense counsel.

Farther along in jury selection, the prosecutor explained that for first degree, premeditated murder, the "premeditation" doesn't have to be for any specific length of time. Rather, "Just time to reflect on it." and "It can be a matter of seconds. TR13, p. 467-468.

In closing argument, the State argued that the occurrence of the victim's death was in itself proof beyond a reasonable doubt of first degree murder as follows:

> The State is required to prove for premeditated murder the following: There's two ways, first of all, of proving murder in the first degree. One is what's called premeditated murder and the other one is known as felony murder. And the bottom line in terms of proving beyond a reasonable doubt is that she is dead. There's no dispute about that."
>
> (TR 18, p. 1345)

In other words, the prosecutor indicated that the mere fact of the victim's death was, in and of itself, sufficient proof of premeditated, first-degree murder.

Of course, nothing could be further from the truth. The "killing with premeditation" element of first degree premeditated murder is described in Fla. Std. Jury Instr. (Crim) 7.2 as follows:

> "Killing with premeditation" is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The *period of time must be long enough to allow <u>reflection</u> by the defendant.* The premeditated intent to kill must be formed before the killing. (Italics and underlining added now by Defendant for emphasis)

At the evidentiary hearing, the Defendant's first trial counsel, Mr. Alan Chipperfield, was asked why he did not object to the State's explanations of the law of premeditation. In particular, Mr. Chipperfield was asked if the prosecutor's comments caused concern that the jurors might consider an instantaneous, almost reflexive type of killing –a second degree murder– to be "premeditated" first-degree murder. Mr. Chipperfield responded, in essence, that he felt that the State's comments to the jurors did correctly convey the notion that time to reflect is required for premeditated, first degree murder. R2, p. 351-352. Mr. Chipperfield also testified that the prosecutor's comment that there was no dispute over the victim being dead was, in fact, a true statement. R2, p. 355. However, Mr. Chipperfield also admitted that he himself does, on occasion, object to the state describing premeditation in less than all of the terms used in the standard jury

instruction. R2, p. 350-351.

The Defendant's second trial counsel, Mr. Lewis Buzzell, conceded that the prosecutor's failure to tell the jurors that premeditation requires reflection amounts to an "incomplete" statement of the law, insofar as premeditation does require reflection. R2, p. 378.

The Defendant concedes in this appeal that the trial Court did inform the jury during the final, guilt-phase, pre-deliberation jury instructions, that premeditation requires enough time to allow for reflection by the defendant. R18, p. 1376. However, the jury did not hear this correct statement of the law, which is contained in Florida Standard Jury Instruction (Crim.) 7.2, until after jury had already heard all of the guilt-phase evidence under the influence of the prosecutor's incorrect statements of the law. Furthermore, this admittedly correct description of "premeditation" as requiring time for *reflection*, came after the following two misleading sentences in the same Florida Standard Jury Instruction 7.2: "Killing with premeditation is killing after consciously deciding to do so." and " The decision must be present in the mind at the time of the killing." TR18, p. 1375-1376.

It is error to give jury instructions that are confusing, contradictory or misleading. Bedoya v. State, 634 So.2d 203 (Fla. 3d DCA 1994). It is reversible

error to give inconsistent jury instructions. Williams v. U.S., 179 F. 2d 644 (5th Cir. 1950). *See also* Shannon v. State, 463 So.2d 589 (Fla. 4th DCA 1985) regarding how it is error to instruct the jury that force can be used in certain circumstances to resist an unlawful arrest and, in the next breath, instruct the jury that a person is never justified in the use of force to resist arrest. Even if a jury instruction is ambiguous and not necessarily erroneous, it violates the Constitution if there is a reasonable likelihood that the jury applied the instruction improperly. Miller-Bey v. Stine, 159 F. Supp. 2d 657 (E.D. Mich. 2001).

Furthermore, where one of two conflicting jury instruction is good and one is bad, the entire jury instructions are defective as a whole because there is no way for a reviewing Court to determine which of the two irreconcilable instructions the jury followed. U.S. v. De Masi, 40 F. 3d 1306 (1st Cir. 1994). Where two jury instructions are in conflict, giving the conflicting charges is reversible error because the jury might have followed the erroneous one. U.S. v. Varner, 748 F.2d 925 (4th Cir. 1984).

A conviction cannot stand on jury instructions that are ambiguous or equivocal on a basic issue. U.S. v. Washington, 819 F. 2d 221 (9th Cir. 1997). A jury instruction must clearly articulate the relevant legal standard. It must, therefore, avoid confusing or misleading the jury. U.S. v. Johnstone, 107 F. 3d

200 (3rd Cir. 1997).

Fla. Stat 782.04(1)(a) describes premeditated, first degree murder as the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being.

"Premeditated" first degree murder is a specific intent crime. Gurganus v. State, 451 So.2d 817 (Fla. 1984) (diverged from on other grounds in Chestnut v. State 538 So.2d 820 (Fla. 1989) In other words, premeditated, first degree murder does not occur through culpable negligence; It requires a fully formed, Conscious purpose to kill. Boyd v. State, 910 So.2d 167 (Fla. 2005), Arnold v. State, 892 So.2d 1172 (Fla. 5th DCA 2005).

In the present case, allowing prosecutor to define "premeditation" *in jury selection* as "killing after consciously deciding to do so" and not requiring the inclusion of the "reflection" aspect of premeditation in such definition is reversible error. Waters v. State, 486 So.2d 614 (Fla. 5th DCA 1986) rev. den. 494 So.2d 1153 (Fla. 1986). As noted by the Court in Waters:

> The prosecutor attempted to elicit from the prospective jurors whether they had any preconceived notions as to premeditation and the time required to form the design to kill. The prosecutor defined premeditation as "killing after consciously deciding to do so" and "operation of the

> mind." The definition failed to include reflection, the integral second requirement for premeditation. *Sireci v. State* 399 So.2d 964 (Fla. 1981), *cert. Den.* 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). The trial court erred by allowing the prosecutor to follow this line of questioning over defense counsel's objection and permitted an improper definition to form in the jury's mind.

In State v. Williams, 797 So.2d 1235 (Fla. 2001) the Florida Supreme Court was confronted with a situation in which, during *closing* argument the prosecutor argued to the jurors, "Anytime anybody takes a gun, a .38 caliber gun and shoots another person in the head, that is premeditated. That Is intent to kill . . . Mr. Jones can argue to you until he is blue in the face, but shooting somebody in the head is about as solid and convincing evidence of intent to kill as there can be." However, the Florida Supreme Court pointed out that later on in *closing* argument the prosecutor added, "Now, this premeditation we are talking about is the intent to kill. That is all it is, a conscious intent or decision to do so. There is no instruction that will tell you that it is a fixed period of time on which this must occur. It just says there must be a reflection. That is all it is, a moment."

The Florida Supreme Court also pointed out in Williams, that this subsequent *closing* argument comment about reflection was immediately followed by the Court's own, correct jury on premeditation. Accordingly, the Florida

Supreme Court in Williams found as a matter of law that William's trial counsel was not ineffective in failing to object to the State's initial definition of premeditation which excluded the concept of reflection. However, Williams dealt with *closing* argument. Waters v. State, supra, like the subject case, dealt with a prosecutor's incomplete description of premeditation omitting *reflection* during jury selection at the beginning of the case. The Waters Court noted that this allowed the improper definition of premeditation to form in the jury's mind. Consequently, the Waters case is more analogous to the present case. Under the Waters rule, the present Defendant's judgment of guilt and sentence of death cannot stand.

In its subject denial order, the trial Court found the testimony of Defendant's trial attorneys to be more credible than the allegations of the Defendant. The trial Court also found the questioned prosecutor comments to be non-objectionable. R2, p. 255. Lastly, the trial Court held that "Defendant has failed to establish error on the part of counsel for failing to object to the state's alleged comments indicating that a killing done instantly after deciding to kill is premeditated first degree murder. R2, p. 255. In so holding, the trial Court erred.

By failing the assure that the jury was properly instructed, and by failing to assure that the jury followed the law correctly, trial counsel was ineffective and the

Defendant was denied a fair jury trial in violation of the 6th and 14th Amendments to the U.S. Constitution and in violation of the Article 1, Sections 16 and 22 of the Florida Constitution

Issue 6: The trial Court erred in not finding that the Defendant received ineffective assistance of counsel in connection with the prosecutor's comments which suggested to the jury that the State need not prove intent for first degree murder

Standard of review: For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Preservation: This claim/issue was raised in the subject motion. R1, p. 16-17. At the hearing conducted pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993) the trial Court ruled –without objection– that this issue could be adjudicated on the existing, record evidence alone. R3, p. 426 and R2, p. 245 footnote 1.

In its subject denial Order, the trial Court explained why it did not find

ineffective assistance on this ground. R2, p. 256. The trial Court, citing Bedoya v. State, 779 So.2d 574, 578 (Fla. 5th DCA 2001) and Daniels v. State, 108 So.2d 755 (Fla. 1959) essentially agreed with the State that "Motive for murder 'is not an essential element of the crime of first degree murder and a person may be convicted of this crime even if no motive is established.'" and "The lack of motive does not prevent proof of premeditation. R2, p. 256.

Analysis: During jury selection, the prosecution twice told the prospective jurors that state does not have to prove *motive.* On both occasions, no one clarified that the State must nonetheless prove *intent* to kill in order for it to prevail on its "premeditated" first degree murder theory.

This occurred very early in the jury selection process as follows:

> Mr. De La Rionda: Do all of you understand that the State doesn't have to prove motive? You know sometimes in books or on TV everybody is talking about what was the motive. The State does not have to prove motive. Do all of you understand that?
>
> (Affirmative response from the prospective jurors)
>
> (TR11, p. 169)

The was no objection by the Defense.

Again, near the end of his *voir dire* questions, the prosecutor did it again as follows:

> Do you all understand that sometimes on TV or in books, you know, they've got motive. Here was the motive. That the State doesn't have to prove motive in any murder. Do all of you understand that?
>
> (Affirmative response from the prospective jurors)
>
> (TR13, p. 469)

This incomplete description of the state-of-mind aspect of the charged crimes created a grave danger that the Defendant would be convicted of premeditated first degree murder without proof beyond a reasonable doubt of mental (premeditated intent) element of such offense. There was no objection and no request for a curative instruction from defense counsel.

As noted by this Florida Supreme Court in its opinion for the original, direct appeal of this case, " The jury found Belcher guilty of first-degree murder on the theory of both premeditation and felony murder, and guilty of sexual battery." Belcher v. State, 851 So.2d 678 (Fla. 2003). Premeditated, first-degree murder is a specific intent crime. The perpetrator must intend both the injurious act and the result: killing of another human being. Linehan v. State, 442 So.2d 244 (Fla. 2d DCA 1983), Edwards v. State, 428 So.2d 357 (Fla. 3d DCA 1983).

Admittedly, after the presentation of all guilt-phase evidence, the trial Court did correctly instruct on accidental, "excusable" homicide (TR18, p. 1374) and the on the elements of the lesser offense of second-degree "depraved mind" murder (TR18, p. 1379) and on the need for premeditation to support a conviction for "premeditated first-degree murder (TR18, p. 1375) and on the requirement of *non-consensual* sex for the sexual battery charge (TR18, p. 1380). However, such instructions came after the jury had already finished listening to and evaluating all of the guilt-phase evidence under the influence of the incorrect descriptions of the law. For the reasons given here and in the argument for Issue 5 above (which is incorporated here by this reference) the Defendant's jurors were already too confused and were already too fixed in their views for such correct, Judge-given jury instructions to do any good.

It is error to give jury instructions that are confusing, contradictory or misleading. Bedoya v. State, 634 So.2d 203 (Fla. 3d DCA 1994). It is reversible error to give inconsistent jury instructions. Williams v. U.S., 179 F. 2d 644 (5th Cir. 1950). *See also* Shannon v. State, 463 So.2d 589 (Fla. 4th DCA 1985) regarding how it is error to instruct the jury that force can be used in certain circumstances to resist an unlawful arrest and, in the next breath, instruct the jury that a person is never justified in the use of force to resist arrest. Even if a jury

instruction is ambiguous and not necessarily erroneous, it violates the Constitution if there is a reasonable likelihood that the jury applied the instruction improperly. Miller-Bey v. Stine, 159 F. Supp. 2d 657 (E.D. Mich. 2001).

Furthermore, where one of two conflicting jury instructions is good and one is bad, the entire jury instructions are defective as a whole because there is no way for a reviewing Court to determine which of the two irreconcilable instructions the jury followed. U.S. v. De Masi, 40 F. 3d 1306 (1st Cir. 1994). Where two jury instructions are in conflict, giving the conflicting charges is reversible error because the jury might have followed the erroneous one. U.S. v. Varner, 748 F.2d 925 (4th Cir. 1984).

A conviction cannot stand on jury instructions that are ambiguous or equivocal on a basic issue. U.S. v. Washington, 819 F. 2d 221 (9th Cir. 1997). A jury instruction must clearly articulate the relevant legal standard. It must, therefore, avoid confusing or misleading the jury. U.S. v. Johnstone, 107 F. 3d 200 (3rd Cir. 1997).

Admittedly there are Florida appellate opinions which hold that "motive" is not an essential element of premeditated, first degree murder. *e.g.* Matthews v. State, 177 So. 321 (Fla. 1937), Dino v. State, 405 So. 2d 213 (Fla. 3d DCA 1981, rev. den. 413 So.2d 875. However, there is little doubt that "motive"

and "intent" are the same thing in the average person's mind. Even the Courts have indicated in their opinions that the terms are easily confused. For example, in Bedoya v. State, 779 So.2d 574 (Fla. 5th DCA 2001) the Court explained that while "motive" is not an essential element of premeditated, first degree murder, motive may nonetheless be *probative* of premeditation, which, in turn, *is* an essential element of premeditated, first degree murder.

In the present case, the prosecutor's comments that the State does not have to prove motive was likely construed by the jurors as an instruction that a killing which is accidental, or done out of unpremeditated, anger or passion suffices for premeditated first degree murder. Ironically, provocation can dominate volition and suspend judgment to the point of excluding premeditation, reducing premeditated, first degree murder down to a lesser degree of murder even if the passion does not entirely dethrone the actor's reason. Vinella v. State, 833 So.2d 192 (Fla. 5th DCA 2002). Similarly, the prosecutor's comment that there does not have to be proof of motive is contrary to the rule that premeditated, first degree murder, requires at least sufficient time, under the circumstance, for the slayer to form a conscious and distinct intent to kill. Davis v. State, 190 So. 2d 159 (Fla. 1939). The prosecutor's comment that proof of motive also runs counter to the rule that there must be sufficient time for the killer to reflect and deliberate and

form a settled and fixed purpose to take a life. McCutchen v. State, 96 So.2d 152 (Fla. 1957).

Attorneys understand that the word "motive," when used to denote the specific reason or purpose for doing something , is *not* an element of premeditated, first-degree murder. Dino v. State, 405 So.2d 213 (Fla. 3d DCA 1981) rev. den. 413 So.2d 875, Bedoya v. State, 779 So.2d 574 (Fla. 5th DCA 2001). However, when the word "motive" is construed the way most laypersons probably construe it, to denote an act done with intent to produce a specific result (the victim's death) then "motive" can truly be said to be a required element of premeditated, first degree murder. *See, e.g.* Boyd v. State, 910 So.2d 167 (Fla. 2005).

The prosecutor's unopposed comment to the jurors the State need not prove motive creates a similar problem with the felony sexual battery charge upon which Defendant's felony first degree murder guilty verdict is based. Although the prosecutor instructed the jurors that the State need not prove motive, the State was nonetheless required to prove that the Defendant intended to commit the underlying felony. *See,* Worden v. State, 603 So.2d 581 (1992), State v. Williams, 254 So.2d 548 (1971).

By failing the assure that the jury was properly instructed, and by failing to assure that the jury followed the law correctly, trial counsel was ineffective and the

Defendant was denied a fair jury trial in violation of the 6th and 14th Amendments to the U.S. Constitution and in violation of the Article 1, Sections 16 and 22 of the Florida Constitution. The trial Court erred in not finding ineffective representation on this ground.

Issue 7: The trial Court erred in not finding that the Defendant received ineffective assistance of counsel in connection with his trial lawyer's concession that the victim suffered a sexual battery, the predicate offense for the felony first-degree murder conviction in this case

Standard of review: For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Preservation: This issue was raised in the subject motion. R1, p. 17-19. Evidence was presented in support of it at the evidentiary hearing for the subject motion. R2, p. 355-358 and p. 379-391. In its subject denial Order, the trial

Court gave its reasons for not finding ineffective assistance of counsel on this ground. R2, p. 256-257.

Defendant's trial counsel's concession that a sexual battery occurred appears in the record of the original jury trial proceedings. During opening argument, Defendant's trial counsel conceded this and almost every other issue in this case by telling the jurors in guilt-phase opening argument that the only real issue is the identity of perpetrator as follows:

> Obviously, and quite tragically, Ms. Embry is dead. There's no dispute about that, and there's really no dispute about the things that the State went over in great detail with your about, such as she lived at home alone, that her brother found her when she didn't show up for school and work that day. Those kind of things. And so a lot of the evidence that you'll be hearing will be important for your consideration. But the evidence, that kind of evidence, will not show you what the ultimate question is. It won't answer the ultimate question for you, which is who did it. And that's what you need to be concerned with.
>
> (TR13, p. 565-566, 567)

This statement effectively conceded that the victim suffered a sexual battery and almost everything else claimed by the State in connection with the subject homicide. This statement notified the jurors that the only real question for them to answer was whether the Defendant or someone else did it.

Paradoxically, defense counsel did other things later that were contrary to the State's argument that the victim was forcibly raped. For example, Defendant's trial counsel succeeded in getting Jacksonville Sheriff's Office Detective Hinson to admit that in interviewing "the usual suspects," he (Detective Hinson) determined that the victim had been with a certain Michael Randall as recently as the Monday before the victim's death. (TR15, p. 937) Defendant's trial counsel also elicited an admission from Detective Hinson that there was no blood at any of the 6 sites in the victim's home where semen samples had been found. (TR16, p.1005). Defense counsel also got Detective Hinson to admit that the only semen sample submitted for DNA testing came from the victim's slippers. (TR16, p. 1006).

Police evidence technicians also testified at trial. This testimony indicated that a sheet removed from the victim's bed contained fresh, " intact" spermatozoa (TR 16, p. 976-978 and 1005-1010) suggesting that the victim's final coitus was consensual, "bedroom" sex, not forcible sexual battery. This semen sample was not preserved for DNA testing (TR16, p. 977-978). Defendant also refers to and incorporates his argument and authority set forth in Claim 9 below, regarding ineffectiveness in failing to use a defense gynecologist, support this argument for this issue.

The important point is that there was strong evidence that the victim's last vaginal penetration before death was routine, consensual, non-injurious sexual intercourse, not sexual battery.

The underlying, "predicate" felony for this Defendant's felony murder conviction was sexual battery. By claiming that the only real issue was the identity of the perpetrator, and by failing to challenge the State's proof of sexual battery, the Defendant's conviction for sexual battery and first degree murder became certain. The trial Court Judge did instruct the jury on the elements of the offense of sexual battery. TR18, p. 1380. However, given defense counsel's indication that the only real issue was the identity of the perpetrator, it is doubtful that the jury seriously thought about any sexual battery issues.

Defendant's two trial lawyers were questioned about this at the evidentiary hearing for the subject motion. Defendant's first trial attorney, Mr. Alan Chipperfield, explained that the theory of defense was that the Defendant had consensual sex with the victim and that someone else murdered her, possibly along with committing a sexual battery. R7, p. 355-358. Defendant's other trial attorney, Mr. Lewis Buzzell, felt that his above-quoted statement did not admit that the victim suffered a sexual battery. Mr. Buzzell explained that the "Defendant didn't do it" theory of defense encompassed both the sexual battery *and* the

murder. R7, p. 390-391. Mr. Buzzell explained that, although the DNA evidence established that the Defendant did have sex with the victim, the defense strategy was to disassociate the time of the placement of Defendant's DNA from the time of the murder in the minds of the jurors. R7, p. 391.

In its subject denial Order, the trial Court found that Defendant's trial counsel did *not* concede a sexual battery or any other crime. R2, p. 257. Defendant contends in this brief that this finding is contrary to the above-summarized, record evidence. Defendant contends that this finding is not supported by substantial competent evidence and is therefore reversible error.

Conceding guilt is a form of "ineffective assistance of counsel." Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983). Indeed, conceding key, disputed factual issues is *per se* ineffective assistance of counsel. U.S. v. Swanson, 943 F.2d 1070 (9th Cir. 1991). *Accord*, Mills v. State, 714 So2d 1198 (Fla. 4th DCA 1998), Nixon v. Singletary, 758 So.2d 618 (Fla. 2000).

Defendant's trial counsel's acts of conceding guilt to such an all-important issue denied the Defendant his right to effective assistance of counsel guaranteed by the 6th and 14th Amendments to the U.S. Constitution and by Article 1, Section 16 of the Florida Constitution. The misfeasance and nonfeasance of trial counsel reaches a magnitude that undermines confidence in the results of Defendant's trial,

warranting new trial. Strickland v. Washington, 466 U.S. 668 (1984). The trial Court erred in not finding ineffective assistance of counsel on this ground.

Issue 8: The trial Court erred in not finding that the Defendant received ineffective assistance of counsel in connection with impermissible appeals to the jurors' emotions and sympathy

Standard of review: For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Preservation: This issue was raised in the subject motion. R1, p. 19-22. At the hearing conducted pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993) the trial court held –without objection – that this issue would be resolved based on the

record evidence alone, without the need for any new evidence on it at the evidentiary hearing. R3, p. 426-427. Ultimately, the trial Court gave its reasons for declining to find ineffectiveness on this ground in its subject denial Order. R2, p. 257-259. In a nutshell, the trial Court found legitimate, non-emotion-arousing prosecutorial uses the victim's brother's testimony. R2, p. 257-258. The trial Court also found that the questioned photographs of the victim's nude body were admitted against the objections of defendant's trial counsel. R2, p. 258. With regard to the prosecutor's inflammatory, guilt-phase closing argument, the trial Court cited Cobb v. State, 376 So.2d 230 (Fla. 1979) and Jones v. State, 612 So.2d 1370 (Fla. 1993) and State v. Murray, 443 So.2d 955 (Fla. 1984) in support of its finding that such comments "did not rise to the level of vitiating the entire trial." R2, p. 258.

Analysis: During the guilt phase of defendant's trial, the victim's older brother, Ricky Embry, testified that he was "very close" to the victim, and that he played the part of "big brother" and that he "looked out" for her. TR13, p. 571-573. He testified that the victim was a hard worker, holding two jobs and attending classes at Florida Technical College, all at the same time. TR13, p. 574-576. He affirmed that the victim had good housekeeping habits, "was very neat." TR13, p. 578. Defendant's trial counsel failed to object until after this

testimony was given. TR13, p. 576-578. There was no request for a curative instruction.

The prosecutor also managed to have the victim's brother to testify about how he his had to "touch" his sister's dead body, and how he observed that "rigor mortis kind of had set in." TR13, p. 583.

The prosecutor also had photographs of the victim's dead, naked body laying in bathtub (TR13, p. 584, 615-616, 620) entered into evidence, and published to jury. Admittedly, Defendant's trial counsel did object to some photographs of the victim's body in bathtub as "emotional" and "cumulative." TR13, p. 588-593. The objection was overruled. Photos of the victim's body being lifted out of the bathtub that she was found dead in were also admitted into evidence and published to the jury. TR 14, p. 627-628. Defendant's trial counsel objected to the gruesome photographs of the victim's body being "published" to jury but only after State described what they depict (which jurors heard) during the authentication process. TR14, p. 629-630.

There was other testimony which appeared calculated to stir the emotions of the jurors. The victim's brother testified about what a dedicated, hard worker the victim was, how she worked there after school, 4-5 days a week, from 4:00 to about 10:00, and had been attending school during the day as well as working full

time. TR15, p. 746

A more flagrant appeal to the emotions of the jurors came during closing argument, when the prosecutor argued that, "In the last minutes of Jennifer Embry's life she was staring at her killer. She was looking right at him. That's the man she was staring at." TR18, p. 1318. There was no objection nor request for a curative instruction. The State further argued at the close of the guilt phase of the jury trial that " . . . Ms. Embry lived alone and besides working two jobs, she went to school, Florida Technical College. She, as best she could, was trying to make it in this world." TR 18, p. 1330. No objection was made by defense counsel.

The State further stated, in closing argument, that " . . . Jennifer Embry was 29 years old, minding her own business, working several jobs, going to school, trying to make it in this world. Her life came to an abrupt end on January 8th, January 9th of 1996." TR20, p. 1553. There was no objection by the defense.

During the penalty phase of the Defendant's jury trial, the prosecution got one prison-inmate mitigation witness to testify on cross-examination about how prison inmates get to watch television, eat a variety of foods, work outside of prison walls, and even prepare their own legal pleadings. TR21, p. 1654-1655. This entire line of questioning would appear calculated to inflame and arouse fear of prison escape and an overall sense of indignation in the minds of the jurors.

There was no objection or request for a curative instruction, although Defendant's trial counsel may have slightly reduced the impact of this testimony by getting this same prison inmate to testify on redirect examination regarding the harshness of prison life. (TR21, p.1665-1660) and fact that "life sentence" inmates remain incarcerated until they die, irrespective of any "tentative release date" assigned to them. Still, the damage was done.

Admittedly, the trial Court did instruct the jury at the conclusion of the guilt-phase evidence that "This case must not be decided for or against anyone because you feel sorry for anyone or are angry at anyone." TR18, p. 1387. However such instruction was too little, too late. The sentiments of the Defendant's jury had already been hopelessly turned against the Defendant by all of the above-described, inflammatory, anger-arousing, and completely unnecessary evidence.

Appeals to jury sympathy or emotions or fear are impermissible. Taylor v. State, 583 So.2d 323 (Fla. 1991), Rhodes v. State, 547 So.2d 1201 (Fla. 1989), King v. State, 623 So.2d 486 (Fla. 1993). The failure to object to emotional appeals to jurors supports a claim for post-conviction relief. Rachael v. State, 714 So.2d 192 (Fla. 2d DCA 2001). A combination of unopposed and opposed appeals to jurors motions can have the cumulative effect of depriving the Defendant of a fair penalty phase. Brooks v. State, 762 So.2d 879 (Fla. 2000).

Argument which asks jurors to imagine an injured victim's anguish is improper; Allowing it is reversible error. Cohen v. Pollack, 674 So.2d 805 (Fla. 3d DCA 1996). Similarly, arguments which cause jurors to fear for their own welfare are improper. Norman v. Gloria Farms, Inc., 668 So.2d 1016 (Fla. 4th DCA 1996), U.S. v. Gainey, 111 F. 3d 834 (3rd Cir. 1997).

In the present case, the prosecutor told Defendant's jurors that the last thing the victim saw was the defendant's eyes staring down at her. This was nothing but a thinly veiled"golden rule" argument which asked the jurors to put themselves in the victim's place. "Golden rule" arguments are impermissible because they encourage jurors to decide a case based on their own, personal interest and bias rather than on the evidence. Goutis v. Express Transport, 699 So.2d 757 (Fla. 4th DCA 1997). "Golden rule" arguments are ordinarily reversible error. Metropolitan Dade County v. Zapata, 601 So.2d 239 (Fla. 3d DCA 1992).

In a nutshell, Defendant's trial counsel was ineffective in failing to object to such appeals to juror emotions and this failure deprived the Defendant of the right to a fair jury trial guaranteed by the 6th and 14th Amendments to the U.S. Constitution and by Article 1, Sections 16 and 22 of the Florida Constitution. This failure also denied the Defendant due process of law as guaranteed by the 5th and 14th Amendments to the U.S. Constitution and by Article 1, Section 9 of the

Florida Constitution. The trial Court erred in not finding ineffective assistance of counsel on this ground.

Defendant also refers to and Incorporates by reference all of the argument and authority provided for Issue 10 below in support of this Argument.

Issue 9: The trial Court erred in not finding ineffective assistance of counsel in connection with not using a defense gynecologist to counter the state's expert's opinions that the physical evidence indicated that the Defendant committed forcible, sexual battery

Standard of review: For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Preservation: This issue was raised in the subject motion. R1, p. 22. At the evidentiary hearing for the subject motion, the defense presented the testimony

of a Board-Certified Obstetrician /Gynecologist named Dr. John Bordelin, M.D., to demonstrate the kinds of things a Medical Doctor could have done for the defense, if one had been retained and utilized. R2, p. 275-280. At the conclusion of the evidentiary hearing, the trial Court entered its Order finding that there had been no ineffectiveness on this ground. R2, p. 259-260. In essence, the trial Court noted that Dr. Bordelin testified that the subject victim's vaginal injuries could have occurred during rough, consensual sex, but that injuries found elsewhere on the victim's body led him to concur with the conclusion of the State Medical Examiner that the victim experienced forced sex prior to being murdered. R2, p. 259-260.

Analysis: Dr. Bonifio Floro was the State Medical Examiner who conducted the victim's autopsy. He testified during the guilt phase of the Defendant's trial. Dr. Floro examined the victim's vagina and observed a hymen bruise at the 10:00 position and a laceration on the labia minora. TR14, p. 657. Dr. Floro explained that all of the evidence indicated the cause of death was strangulation and drowning. However, the injuries to the vaginal area only "most probably" indicate that the victim was "raped or a sexual battery (victim) prior to her death." TR14, p. 666.

To his credit, the Defendant's trial counsel succeeded in getting Dr. Floro to admit that it is possible for a woman to sustain such vaginal injuries in vigorous,

consensual intercourse which the woman vocally agrees to, even though she is not physically ready for sexual intercourse. TR14, p. 674.

Also, Defendant's trial counsel got Jacksonville Sheriff's Office Detective Hinson to testify that as a result of interviewing "the usual suspects," he determined that the victim had been with a man named Michael Randall as recently as the Monday prior to her death. TR15, p. 937. This raised the possibility that the victim's vaginal injuries were sustained during consensual, "rough sex" with someone other than the Defendant. TR15, p. 937. Defendant's trial counsel also elicited Detective Hinson's admission that there was no blood at any of the 6 incident site areas in which semen samples were found and collected. This further suggesting that the victim's vaginal injuries were not caused by any forcible, sexual battery by the Defendant. TR16, p. 1005.

Defendant's trial counsel also got Detective Hinson to admit that the only semen sample submitted for DNA testing was that which came from the victim's slippers. TR16, p. 1006. This gave the jurors reason to question the thoroughness of the police investigation and wonder if someone else caused the Plaintiff's injuries.

There was a semen stain on a sheet removed from the victim's bed. It had intact spermatozoa. TR16, p. 976-978 and 1005-1010. This suggested that there

was consensual "bedroom" sex, not sexual battery. This semen sample had not been preserved for DNA testing (TR16, p. 977-978), raising doubts about whether the Defendant truly was the cause of the victim's injuries.

On cross-examination, Detective Hinson admitted seeing condoms, birth control pills and lubrication jelly in V's chest of drawers. Detective Hinson did not know whether such items had been collected as evidence. TR16, p. 933. This is further reason for jurors to wonder about the fairness of the investigation and wonder if the victim's vaginal injuries could have been incurred in some sort of consensual intercourse, possibly involving a condom and perhaps lubrication jelly.

Defendant's trial counsel did a laudable job in getting State Medical Examiner to admit that the sperm swabbed from the victim's vagina could have been deposited in the victim's body over a fairly large period of time, anywhere from 3 to 6 days prior to the victim's death up to just six hours prior to the victim's death. TR14, p. 675. This was important because the victim was last seen entering her apartment at 8:00 a.m. on January 8, 1996 (TR14, p. 692), followed by a neighbor hearing loud, knocking noises coming from her apartment at 2:00 a.m. on January 9, 1996 (TR14, p. 694), followed by the victim's brother discovering the victim's dead body six to seven hours later, between 8:00 and 9:00 a.m. on

that same January 9, 1996 (TR 13, p. 571), followed by State Medical Examiner Bonifacio Floro performing an autopsy on the victim's body fourteen hours later, at 10:00 a.m. on January 10, 1996. TR 14, p. 643-667. All of this information allowed plenty of room to argue that someone other than the Defendant had ample time to have sex with the victim, perhaps consensual and perhaps at some location other than the scene of the murder. Indeed, in his penalty-phase closing argument, Defendant's trial counsel *did* recall Dr. Floro's testimony and *did* point out the lack of any solid evidence that the Defendant's sperm was deposited at the time of the murder. TR18, p. 1309-1312. However, because that the State had already presented the expert, scientific testimony of Dr. Bonifacio Floro indicating that the victim was raped just before her death (TR 14, p. 666) any such argument by Defendant's trial lawyer was comparatively unpersuasive.

If the Defendant had retained the assistance of a Defense medical doctor for trial, such a doctor –most likely a gynecologist– could have stressed that the comparatively minimal injuries found in the victim's vagina could have been caused by a great many things besides sexual battery. Such a defense medical doctor could have also assisted defense counsel in better understanding and addressing the expert, medical testimony and evidence presented by the State.

Defendant's two trial counsel testified at the evidentiary hearing on the

subject motion that the State's medical expert, Dr. Bonifacio Floro, provided what was the defense needed at trial. R1, p. 358-359 & 382-383. However, only a *defense* medical expert could persuasively counter Dr. Bonifacio Floro's testimony and convince the jury that the victim's vaginal bruises and lacerations could have been caused by a number of innocent ways. Defendant's trial counsel was ineffective in failing to utilize the services of a defense gynecologist.

Dr. John Bordelin, M.D., a board-certified obstetrician / gynecologist, testified at the evidentiary hearing on the subject motion. He was called to demonstrate how a defense Medical Doctor like himself could have assisted the defense. Initially, Dr. Bordelin admitted that his expertise is with living women, and that his competence to testify about forensic matters like how long sperm might live or stay intact is limited to questions about *living* women. R2, p. 277, 278. However, Dr Bordelin also testified that there should be *no* evidence of sperm 24 hours after its deposit in a living woman's vagina, although sperm can live in the uterus and fallopian tubes for up to six days. R2, p. 279.

At a minimum, such information could have been used to more effectively cross-examine Dr. Bonifacio Floro about the longevity and intactness of sperm in other, forensically more important parts of the female reproductive system.

Like Dr. Bonifacio Floro, Dr. Bordelin agreed that the kinds of injuries

found in the victim's vaginal area could have been caused by rough, consensual sex. R2, p. 275A, 277. Dr. Bordelin also concurred with Dr. Bonifacio Floro that the trauma to the victim's vagina, *together with* the other injuries to other parts of the victim's body, pointed to forced sexual intercourse. R2, p. 280. However, a medical expert like Dr. Bordelin could have given *defense* expert medical testimony explaining why there is no conclusive, scientific proof that the Defendant's semen was forcefully placed in the victim's body on the day of the murder.

Depriving a defendant of expert assistance where expert subject matter is a significant factor in both the guilt and penalty phase of trial constitutes a denial of due process. Ake v. Oklahoma, 470 U.S. 68 (1985). The failure to utilize experts warrants reversing a conviction where it results in counsel failing to adequately investigate, prepare and otherwise function as the government adversary. Osborne v. Shillinger, 861 F.2d 612 (10th Cir. 1988). Ineffective assistance of trial counsel claims which are based on trial counsel's failure to utilize expert witnesses are properly asserted in post-conviction, collateral relief proceedings. Lawrence v. State, 831 So.2d 121 (Fla. 2002).

Trial Counsel's deficient performance in this area deprived the Defendant of the right to a fair jury trial guaranteed by the 6th and 14th Amendments to the U.S.

Constitution and by Article 1, Sections 16 and 22 of the Florida Constitution. This failure also denied the Defendant due process of law as guaranteed by the 5th and 14th Amendments to the U.S. Constitution and by Article 1, Section 9 of the Florida Constitution. The trial Court erred in not finding ineffective assistance of counsel on this ground.

Issue 10: The trial Court erred in not finding that Defendant's trial counsel was ineffective in failing to object to the nonstatutory aggravating circumstances of the nutritious food, diversions, risk of escape, and incurrence of additional taxpayer expenses of prisoners who do not receive death sentences

Standard of review: For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Preservation: This issue was raised in the subject motion. R1, p. 24-26.

Testimony on this issue was presented at the evidentiary hearing on the subject motion. R2, p. 360, 383-384. The trial Court specifically addressed this issue in its subject denial Order. R2, p. 260-261.

Analysis: During the penalty phase of the Defendant's jury trial, the prosecutor got a prison inmate mitigation witness to describe on cross-examination how inmates get to watch television, eat a variety of foods, work outside the prison walls, and prepare legal pleadings. TR21, p. 1654-1655. Defendant's trial counsel counteracted the damage of this testimony somewhat by eliciting testify on redirect examination regarding the harshness of prison life. and fact that "life sentence" inmates remain incarcerated until they die, irrespective of any "tentative release date" assigned to them. TR21, p. 1655-1660. The prosecution, on cross examination, got another prison inmate mitigation witness to testify that prison inmates occasionally write their own appeals, play basketball and watch television. TR21, p. 1697-1698.

The prosecution also got still another of Defendant's prison-inmate mitigation witnesses to testify about how minimum-security facility inmates get to work outside prison walls, up to 32 at a time, supervised by an unarmed guard. TR21, p. 1701. There was no objection by Defendant's trial counsel. The prosecution had an additional inmate mitigation witness testify on cross-

examination about the good variety of prison food (TR21, p. 1701) and how his own appeal is progressing (TR21, p. 1721) and how he earned the right to work outside prison gates, unshackled. TR21, p. 1738-1752. There was no objection by the Defendant's trial counsel. TR21, p. 1701, 1721.

Defendant's trial counsel did lessen the damage caused by this testimony somewhat by getting one of the inmate mitigation witnesses admit, on redirect examination, that all such work "outside prison gates" is still done on prison property. TR21, p. 1738-1752.

At the evidentiary hearing on the subject motion, the Defendant's trial counsel were asked why they permitted such questions and answers. Defendant's first trial counsel, Mr. Alan Chipperfield, felt that the prosecution's attempt to glamorize prison life was "silly" and "the jury would see through it." He felt he adequately demonstrated the true harshness of prison life on redirect examination of the various inmate mitigation witnesses. R2, p. 360. Defendant's second trial counsel, Mr. Lewis Buzzell, essentially concurred with Mr. Alan Chipperfield on this. R2, p. 382. Mr. Buzzell also opined that this prosecution tactic did not work well. R2, p. 382. The trial Court essentially accepted and agreed with these explanations. R2, p. 260.

Jury argument regarding the conditions and costs of incarceration are

improper. Brooks v. Kemp, 762 F. 2d 1303 (11th Cir. 1985). The prosecutor's cross-examination elicited prison inmate testimony about how some prison inmates sometimes get to work outside prison gates. It is no secret that the average person fears prison escapees. In Simmons v. South Carolina, 114 S.Ct. 2187 (1994), the United States Supreme Court reversed the defendant's death sentence on due process grounds, holding that the trial court's failure to tell the jury the truth regarding a capital defendant's release ineligibility if sentenced to life imprisonment transgressed the Defendant's right of fair rebuttal, particularly in light of the fact that the prosecutor stressed the defendant's dangerousness in his sentencing phase argument. Similarly, in Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) the Court indicated that trial tactics which compare the costs of life imprisonment with death are impermissible. Additionally, the Brooks Court condemned prosecutor arguments that life sentences coddle Defendants and cost taxpayers more than death sentences.

Any prosecutor argument which indicates to jurors that life-sentenced convicts may get out of prison are *per se* impermissible. Zide v. State, 212 So.2d 788 (Fla. 3d DCA 1968), McMann v. State, 555 So.2d 538 (Fla. 1951). This is especially true in death penalty cases. People v. Morse, 60 Cal. 2d 631, 388 P.2d 33 (California, 1964). Similarly, arguing to the jurors that the criminal justice

system may exercise poor judgment and release a capital defendant on parole is *per se* reversible error. Tucker v. Kemp, 762 F.2d 1496 (11th Cir. 1985). Looking at the matter from a different perspective, the Court in People v. Brisbon, 106 Ill. 2d 342, 478 N.E. 2d 402, (Illinois 1982) found that mentioning the possibility that a capital case defendant might get out on parole actually functions as an improper, nonstatutory aggravating circumstance. In the present case, the prosecutor's comments and questions about prison inmates getting to work outside of prison violated these rules.

The manner in which the Prosecution elicited all of this improper, prison information for the jury to hear resulted in it functioning as a series of unlisted, "nonstatutory aggravating circumstances" outside of the very specific factors allowed to be considered as aggravation in Fla. Stat. Section 921.121. By failing to object to such questions and answers, Defendant's trial counsel was ineffective and Defendant's trial, especially during the sentencing phase, failed to properly narrow the class of persons subject to the death penalty as required by the 5th, 8th and 14th Amendments to the U.S. Constitution and by Article 1, Sections 9 and 17 of the Florida Constitution. *See*, Woodson v. North Carolina, 428 U.S. 280 (1976). The only factors that may be submitted to the jury to consider as aggravating circumstances are those few, specific, aggravating circumstances that are listed in

the statute. Pope v. State, 441 So.2d 1073 (Fla. 1983) and Shellito v. State, 701 So.2d 837 (Fla. 1997).

Defendant also refers to and incorporates all of the argument and authority he provided for Issue #8 above in support of Defendant's argue for this issue.

Trial Counsel's failure to oppose the State's efforts to glamorize the prison lifestyle to dissuade the jurors from recommending a life sentence inflamed the jury and deprived the Defendant of the right to a fair jury trial guaranteed by the 6th and 14th Amendments to the U.S. Constitution and by Article 1, Sections 16 and 22 of the Florida Constitution. This failure also denied the Defendant due process of law as guaranteed by the 5th and 14th Amendments to the U.S. Constitution and by Article 1, Section 9 of the Florida Constitution. The trial Court erred in not finding ineffective assistance of counsel on this ground.

Issue 11: The trial Court erred in not finding ineffective assistance of counsel in failing to call additional nonstatutory mitigation witnesses to testify at penalty phase of trial

Standard of review: For "ineffective assistance of counsel" claims like this

one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Preservation: This issue was raised in the subject motion. R1, p. 26-31. Witness testimony in support of it was presented at the evidentiary hearing on the subject motion. R2, p. 286-329. The trial Court specifically addressed this issue in its subject denial Order. R2, p. 261-263. In essence, the trial Court was persuaded by Defendant's trial counsel's evidentiary hearing testimony that the additional mitigation witnesses were not called because they would not make good witnesses for the defense, or because their testimony would be cumulative. R2, p. 262-263.

Analysis: Testimony adduced at the evidentiary hearing revealed that only one of the Defendant's two trial attorneys, Mr. Alan Chipperfield, handled most of the mitigation/sentencing aspects of the case. R2, p. 385. At the evidentiary hearing, six individuals who knew the Defendant but who did not testify at his jury

trial were called and questioned in order to show what they could have offered in the way of nonstatutory mitigation had Defendant's trial counsel investigated and chosen to utilize their testimony. A summary of each such evidentiary hearing witnesses' testimony, together with trial counsel's explanation for for not using their testimony, followed by the trial Court's rationale in not deeming their omission ineffective assistance of counsel, is presented on a witness-by-witness basis below.

A. Wanda Reddick, a Family Friend

Wanda Reddick was a "family friend" of Defendant's who was acquainted with the Defendant long before his subject jury trial. R2, p. 286. The Defendant had a child with her sister.

Defendant's trial attorney, Mr. Alan Chipperfield, testified at the evidentiary hearing that he did not even know Ms. Reddick existed. R2, p. 362. Defendant's other trial attorney, Mr. Lewis Buzzell vaguely recalled having a lengthy conversation with her, followed by both Alan Chipperfield and himself deciding against calling her as a mitigation witness. R2, p. 386.

In its subject denial Order, the trial court is not entirely clear why it determined that not calling Wanda Reddick was not ineffective assistance of counsel. The trial Court appears to have regarded Ms. Reddick's testimony as

either cumulative or else correctly omitted Defendant's trial counsel. R3, p. 263.

At the evidentiary hearing, however, Ms. Reddick testified to some additional mitigation that had not been presented to Defendant's jurors. In particular, the Defendant acted as a supportive, "big brother" figure to Ms. Reddick, even though she was not a member of his own family. R2, p. 284. He even assisted her financially in hard times. R2, p. 284. He served as a father figure, sports coach, and role model not only to his own son, but also to his two step sons and other neighborhood children. R2, p. 283-285 The Defendant was an active participant in his family's cookouts. R2, p. 284. Accordingly, the trial court's findings that Ms. Reddick's testimony would have been cumulative and that trial counsel correctly chose not to use Ms. Reddick as a mitigation witness are not supported by the evidence

B. Dedrick Baker, Defendant's Stepson

At the evidentiary hearing on the subject motion, Defendant's trial attorney, Mr. Alan Chipperfield, testified that he had determined that Dedrick Baker would not make a good mitigation witness (R2, p. 361), although he admitted that he himself had not interviewed Dedrick Baker. R2, p. 365.

In its subject denial Order, the trial court seems to indicate –in somewhat unclear terms– that Dedrick Baker's testimony would have been cumulative and

that trial counsel correctly chose not to use Dedrick Baker as a mitigation witness. R2, p. 263.

However, Dedrick Baker's evidentiary hearing testimony revealed additional, nonstatutory mitigation evidence that had not been presented to the jury. For example, although Dedrick Baker was not the Defendant's biological son, Dedrick Baker testified that the Defendant "was the only father I ever knew." R2, p. 291-292. When Dedrick Baker's family was struggling financially, the Defendant provided financial support. R2, p. 292-294. The Defendant taught Dedrick Baker "how to be a man," meaning that the Defendant taught Dedrick Baker that it is a man's duty to hold a job and financially support his household. R2, p. 292. The Defendant taught Dedrick Baker to be a leader, not a follower, and to work to buy nice things for himself rather than simply accepting what others handed down to him. R2, 292-293.

The Defendant served as a work-ethic role model; The Defendant was never unemployed. R2, p. 295. The Defendant provided similar guidance and parenting to Dedrick Baker's younger brother. R2, p. 294.

Accordingly, the trial court's findings that Mr. Dedrick Baker's testimony would have been cumulative and that trial counsel correctly chose not to use him as a mitigation witness are not supported by the evidence.

C. James Belcher Sr., the Defendant's Father

At the evidentiary hearing on the subject motion, Defendant's trial counsel, Mr. Alan Chipperfield explained why he did not call James Belcher Sr. as a mitigation witness. Mr. Chipperfield explained that he had talked to James Belcher, Sr. Twice and felt he would not make a good witness. R2, p. 362. "He had a real unrealistic attitude about his son. He did not know a lot about his son's life. . . . He wrote a letter which we presented at the *Spencer* hearing . . . but he didn't testify at the penalty phase." R2. P. 263

In its subject denial Order, the trial Court indicated that it found defense counsel Alan Chipperfield's testimony more credible than Defendant's allegations. R2, p. 262. The trial Court also appears to have found that James Belcher Sr.'s testimony would have been cumulative and that trial counsel correctly chose not to call him as a mitigation witness. R2, p. 263.

However, at the evidentiary hearing, James Belcher, Sr. revealed some additional, mitigation that had not been presented to Defendant's jurors. For example, the Defendant had been a good basketball player, potentially professional-level material. R2, p. 301. The ability to be a team player is a positive attribute that Defendant's jury should have heard about.

Although other jury trial mitigation witnesses had testified at trial that the

Defendant lived in New York housing projects, the significance of this did not become apparent until James Belcher, Sr. testified at the evidentiary hearing. James Belcher Sr. testified that he and the Defendant's mother divorced, necessitating the Defendant's mother raising the Defendant as a single mother in the notorious Tompkins public housing project of Brooklyn, New York, "where a crime occurs every five minutes." R2, p 302-305. Although the Defendant visited with James Belcher, Sr. on weekends. The senior Belcher felt helpless to do anything to stop the adverse effects that the crime-infested Tompkins public housing project seemed to be having on his son. R2, p. 305, 313.

Despite some deserved criminal convictions, the Defendant maintained gainful employment, serving as a chauffeur, a sanitation worker, and a department store employee. R2, p. 306-307.

Accordingly, the trial court's findings that James Belcher Sr.'s testimony would have been cumulative and that trial counsel correctly chose not to use him as a mitigation witness are not supported by the evidence.

D. Bernice Johnson, Defendant's Aunt

At the evidentiary hearing on the subject motion, Defendant's trial attorney, Mr. Alan Chipperfield, was asked why he did not call Ms. Bernice Johnson, the Defendant's New York aunt, to testify at Defendant's trial. Mr. Chipperfield

explained that he did interview Bernice Johnson and determined that she would be of no help to the defense. R2, p. 365.

In its subject denial Order, the trial Court seems to have found that Ms. Johnson's testimony would have been cumulative and that trial counsel correctly chose not to use her as a mitigation witness. R2, p. 263.

The testimony Ms. Johnson gave at the evidentiary hearing indicates that she could have contributed substantial new information to the penalty phase defense by completing the picture of how strong an impact the infamous Tompkins public housing project had upon the Defendant. The Defendant would periodically get away and stay with Ms. Johnson at her Bronx apartment for weeks at a time. R2, p. 316. Ms. Johnson never had any trouble with the Defendant. However, she got word of trouble once the Defendant returned to the Tompkins (Brooklyn) public housing project. R2, p. 315, 318.

The picture Ms. Johnson painted of the different New York neighborhoods was a study in contrasts. Ms. Johnson testified that the Defendant was a loving and caring child. R2, p. 317-318. She wanted to take him in and raise him herself, along with seven children she had been caring for. R2, p. 317. However, the Defendant's parents would not permit it. R2, p. 318. None of the other seven children raised by Ms. Johnson in her own, Bronx apartment got into any trouble

whatsoever. All now have good jobs and have done well for themselves. R2, p. 316-317. Ms. Johnson spoke proudly of how one son, Larry Seabrookes, is a City Councilman and was the first black man to hold three separate, elected, political offices in the area. R2, p. 316. Accordingly, the trial court's findings that Ms. Johnson's testimony would have been cumulative and trial counsel correctly chose not to use Ms. Johnson as a mitigation witness are not supported by the evidence.

E. Harriet Jarrett, Another Aunt

Defendant's trial counsel, Mr. Alan Chipperfield, was asked at the evidentiary hearing held for the subject motion why he did not call Harriet Jarrett, another one of Defendant's aunts, to testify at Defendant's trial. Mr. Chipperfield explained that Ms. Jarrett was interviewed and provided a lot of historical information about the Defendant. However, she "did not know a lot about Mr. Belcher's later life, specifically involvement in crimes and things like that." R2, p. 365.

Although the trial Court did not specifically address Ms. Jarrett's evidentiary hearing testimony in its subject denial Order, the trial Court appears to have concluded that her testimony would have been cumulative and that trial counsel correctly chose not to call her as a witness. R2, p. 263.

Ms. Jarrett provided mitigation information at the evidentiary hearing which had not been presented at Defendant's jury trial. For example, Ms. Jarrett revealed Defendant's peacemaking quality by describing how he would mediate arguments between her own two sons. R2. P. 322. She described how the Defendant took on a big brother role with her own two sons, as well as other, younger children. R2, p. 321-323. The Defendant assisted with yard work. R2, p. 323. He was kind, loving, helpful, and well-mannered to the point of being Ms. Jarrett's favorite nephew. R2, p. 322-323. Such information was not presented at Defendant's jury trial. Accordingly, the trial court's findings that Ms. Jarrett's testimony would have been cumulative and that trial counsel correctly chose not to use Ms. Jarrett as a mitigation witness are not supported by the evidence.

F. Helen Deas, Another Aunt

At the evidentiary hearing held for the subject motion, Defendant's trial counsel, Mr. Alan Chipperfield, was asked why he did not call Helen Deas, another aunt of Defendant's, to testify at his jury trial. Mr. Chipperfield answered that a conscious decision had been made not to call her as a witness because she was "not a good witness, not realistic about the defendant's record." R2, p. 365.

In its subject denial Order, the trial Court seems to include Ms. Deas among

those witnesses who trial counsel correctly chose not to call, or whose testimony would have been cumulative. R2, p. 263.

Ms. Deas did testify at the evidentiary hearing on the subject motion. Although her testimony arguably repeated what was said by other *evidentiary hearing* witnesses, it cannot be considered repetitive of the testimony of the *jury trial* mitigation witnesses. For example, Ms. Deas testified that the Defendant was a loving "family man" who helped his sisters and mother with shopping and other errands. R2, p. 326-328. The Defendant would lend a hand with home repairs and cleaning chores. R2, p. 328. He coached the neighborhood children in sports. R2, p. 327. He encouraged Ms. Deas' son to do well in school. R2, p. 327. He encouraged young men in general to stay on the "straight path" and "do the right thing" in life. R2, p. 328.

Ms. Deas testified that the Defendant was active in church. He ministered to church youth. R2, p. 328-329. The Defendant was reliable, someone who "could be counted on." R2, p. 329-330.

Review of the mitigation evidence that *was* presented during Defendant's jury trial (TR 20, p. 1559 to TR21, p. 1760) confirms that the mitigation testimony presented at the evidentiary hearing is additional and different from what was presented at Defendant's jury trial. Accordingly, this and all the other mitigation

evidence presented at the evidentiary hearing indicate that trial counsel was ineffective with regard to unused mitigation evidence. The trial Court's contrary finding is not supported by competent substantial evidence.

Defense counsel's highest duty is to investigate, prepare and present available mitigation. Where counsel unreasonably fails in that duty, the Defendant is denied a fair adversarial testing process and the results of the proceedings are rendered unreliable. State v. Lara, 581 So.2d 11288 (Fla. 1991), Stevens v. State, 552 So.2d 1082 (Fla. 1989), Bassett v. State, 451 So. 2d 596 (Fla. 1989), State v. Michael, 530 So.2d 929 (Fla. 1988), Middleton v. Dugger, 849 F. 2d 491 (11th Cir. 1988). Decisions limiting investigation "must flow from an informed judgment." Harris v. Dugger, 874 F. 2d 756, 763 (11th Cir. 1989). "An attorney has a duty to conduct a reasonable investigation." Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988). *See also*, Cunningham v. Sant, 928 F.2d 1006, 1016 (11th Cir. 1991) and Wiggins v. Smith, 537 U.S. 1231 (2003). No tactical motive can be ascribed to an attorney whose omissions are based on lack of knowledge, or on the failure to properly investigate and prepare. Kenley v. Armontrout, 937 F. 2d 298 (8th Cir. 1991), Kimmelman v. Morrison, 477 U.S. 365 (1986).

In the present case, Mr. Belcher's defense counsel was not prepared for the penalty phase. Defense counsel had not investigated or evaluated the available

mitigation witnesses of Defendant's extended family. A failure to pursue, develop and present adequate mitigation evidence denies the Defendant the individualized sentencing that the law requires. Blanco, Cunningham, and Middleton, supra. Given the above-summarized mitigation which was neglected or overlooked or purposefully not used by trial counsel, it cannot be said that failing to present this further mitigation testimony was harmless error. The trial Court erred in not finding ineffective assistance of counsel in connection with the failure to investigate, discover and use additional mitigation evidence.

Trial counsel's oversights and errors in developing and presenting mitigation evidence denied the Defendant a fair jury trial in violation of the 6th and 14th Amendments to the U.S. Constitution and in violation of the Article 1, Sections 16 and 22 of the Florida Constitution. The trial Court erred in not finding ineffective assistance of counsel on this ground.

Issue 14: The trial Court erred in not finding ineffective assistance of counsel in connection with the cumulative errors of trial counsel

Standard of Review: On appeals of a lower Court's rulings on "ineffective assistance of counsel" claims, the appellate Court reviews the record *de novo* and applies the double-pronged "substandard performance plus prejudice" test of Strickland v. Washington, 466 U.S. 668 (1984).

Preservation: This issue was raised in the subject motion. R1, p. 35-36. As noted in Defendant's Written Closing Argument submitted to the trial Court following the evidentiary hearing on the subject motion, this issue is resolvable based on the existing record and Court documents, without the need for any additional evidence at the evidentiary hearing. R2, p. 247-248. In its subject denial Order, the trial Court found that this "cumulative errors" claim lacked merit because all of the Defendant's individual ineffective assistance of counsel claims lacked merit. R 2, p. 266.

Analysis: For the reasons stated in Arguments for Issues 1 through 11 above, the Defendant respectfully disputes the trial Court's findings on all of his individual ineffectiveness claims as well as the trial Court's finding that he did not receive ineffective assistance as a result of the cumulative effect of all of the combined errors of his trial counsel.

The Court is required to also consider the cumulative effect of all of the combined errors of trial counsel. Strickland v. Washington, 466 U.S. 668 (1984),

State v. Gunsby, 670 So.2d 920 (Fla. 1996). Individual errors which may in themselves be insufficient to prejudice a defendant may, when combined with all of counsel's other errors, have the cumulative effect of rendering a defendant's trial unreliable. If so, the "prejudice" prong of the Strickland test is met and ineffective representation is established. Robinson v. State, 707 So.2d 688 (Fla. 1998). In the present case, trial counsel was ineffective and the Defendant was denied a fair jury trial in violation of the 6th and 14th Amendments to the U.S. Constitution and in violation of the Article 1, Sections 16 and 22 of the Florida Constitution as a result of the cumulative errors of his trial attorneys. The trial Court erred in not finding ineffective assistance of counsel as a result of the cumulative effect of all of the combined errors of defense counsel.

CONCLUSION

The trial Court erred in not finding ineffective assistance of counsel and in not reversing Defendant's judgment and sentence on this basis. The Florida Supreme Court is requested to enter its Opinion, Order and Mandate reversing the subject denial order and directing the lower Court to vacate Defendant's Judgment and Sentence of Death and set the matter for a new trial.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief is submitted in Times New Roman 14-point font and complies with the font requirements of Rule 9.210, Fla. R. App. P.

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