IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC05-189
LOWER TRIBUNAL CASE NO.: 90-16062-CFA

CHADWICK WILLACY,

Defendant/Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

INITIAL BRIEF OF APPELLANT CHADWICK WILLACY

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY
THE HONORABL PRESTON SILVERNAIL PRESIDING

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STATEMENT OF THE CASE

On November 10, 1997, the Supreme Court of the United States denied Mr. Willacy certiorari review of this Court's decision upholding imposition of the death penalty. See Willacy v. Florida, 522 U.S. 970, 118 S.Ct. 419, 139 L.Ed.2d 321 (1997); Willacy v. State, 696 So. 2d 693 (Fla.), cert. denied, 522 U.S. 970, 118 S.Ct. 419, 139 L.Ed.2d 321 (1997). Thereafter, the Defendant's Motion for Post-Conviction Relief was filed on May 11, 1998. (R 2093-2122). An Amended Motion for Post-Conviction Relief was filed on March 18, 2002, following public records requests. (R 2171-2218). In his Amended Motion for Post-Conviction Relief, the Defendant raised thirty-one issues[1].

[1] The issues are, in short, as follows; 1) failure to consider all available defenses; 2) failure to investigate potentially exculpatory evidence; 3) state's failure to inform the trial court of juror Edward Clark's statutory ineligibility to serve as a juror; 4) waiver of the appointment of an independent counsel to litigate the issue of Juror Clark's pending felony charges; 5) failure to establish that Juror Clark was pending prosecution; 6) failure to object to an ineligible juror; 7) failure to inquire of Juror Clark regarding his eligibility;8) the trial court applied an incorrect standard of law in denying the defendant's motion for new trial; 9) juror misconduct; 10) failure to fully and adequately prepare for trial; 11) failure to move for a timely disqualification of judge; 12) a meaningful Spencer hearing was not conducted; 13) failure to seek disqualification of the trial court based on the trial court's use of a sentencing order which had been prepared prior to the Spencer hearing; 14 & 15) failure to swear jurors prior to voir dire; 16) lack of probable cause for the defendant's arrest and the search of his home; 17) failure to object to evidence introduced at trial; 18) failure to instruct the jury on felony murder and the law of principal; 19) failure to request a special

In its September 24, 2003 order following the Huff[2] hearing, the lower court denied relief on claims III, IV, V, VI, VIII, IX, XI, XII XIV, XV, XVI, XX, XXVI, XXVII, XXVIII, XXIX and XXX, and granted to an evidentiary hearing on the Defendant's remaining claims. (R 2294-2313).

An evidentiary hearing was held on December 3, 4, 5, 19, 2003 and February 16, 2004. The trial court denied all of the Defendant's remaining claims on November 19, 2004. (R 2545-4572). The Defendant filed a timely motion for rehearing, which was denied on December 17, 2004. (R 4573-4589; 4594-4595) This appeal timely followed.

STATEMENT OF THE FACTS

The underlying facts of the crime in this case are set forth in two prior opinions of this Court. See Willacy v. State, 640 So. 2d 1079 (Fla. 1994); Willacy v. State, 696 So. 2d 693 (Fla. 1997). In Willacy v. State, 640 So. 2d 1076 (Fla. 1994), this Court affirmed the Defendant's conviction for first-

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jury instruction and special verdict form pursuant to Edmunds v. Florida; 20) the 1995 penalty phase jury was not properly instructed on the law; 21 & 22) failure to present evidence of statutory mitigating circumstances; 23) failure to present non-statutory mitigating circumstances; 24) failure to present mental health testimony to rebut CCP aggravating factor; 25) waiver of pre-sentence investigation report; 26) the indictment violated the Sixth Amendment to the United States Constitution; 27, 28 & 29) constitutionality of Florida's death penalty statute; 30) constitutionality of death by lethal injection; 31) cumulative error.

[2] Huff v. State, 622 So. 2d 982 (Fla. 1993).

degree murder, arson, burglary, but reversed the Defendant's sentence of death based on the trial court's failure to allow the defense the opportunity to rehabilitate a death-scrupled venire person. A second penalty phase proceeding was conducted in 1995. A sentence of death was again imposed, and later affirmed by this Court in Willacy v. State, 696 So. 2d 693 (Fla. 1997).

During his 1991 trial, the Defendant was represented by attorney Kurt Erlenbach. At the evidentiary hearing Mr. Erlenbach testified that he had never conducted a first-degree murder case either as a prosecutor or a defense attorney. (R 634).

He testified that his theory of defense in this case was to eliminate any evidence he could through motions and then attempt to explain away the other evidence. (R 640). He characterized his defense as "try[ing] to shoot holes in the State's evidence." (R 652). Mr. Erlenbach acknowledged that he focused exclusively on eliminating evidence instead of looking for a plausible explanation for all the evidence. (R 743).

Mr. Erlenbach recognized that the Defendant's fingerprints on the gas can, fan and VCR rewinder were significant pieces of evidence for the State, as were the following; the Defendant's statement, the ATM photo, the victim's property and checkbook registry found in the Defendant's home,

the victim's blood-type found on the Defendant's clothing, and the school boy's identification of the Defendant. Specifically with regard to the ATM photo, he explained that he believed that to be "a fairly incriminating piece of evidence, stronger than much of the other State evidence." (R 639).

Mr. Erlenbach did not recall telling the Defendant that the State's case was strong or otherwise discussing the details of the case with the Defendant. (R 637). He explained that it was his general practice to avoid discussing the actual details of a crime with his clients. Rather he would review the discovery with the client and discuss with him ways to attack the evidence. (R 704).

With regard to the Defendant's videotaped statement to police, Mr. Erlenbach viewed the statement as the State's most damaging piece of evidence because, "it was largely a confession of at least felony murder." (R 640). He recalled only discussing with the Defendant having the statement suppressed. (R 645). Mr. Erlenbach did not recall discussing with the Defendant the option of allowing the statement to be introduced, thus offering an explanation to evidence which, if the statement were suppressed, would have remained unexplained.

In this regard, he acknowledged that the content of the Defendant's statement supported an independent act defense. (R 644). He also testified

that the Defendant's videotaped statement was consistent with the left-handed murderer theory and that the confidential informant's statement would have strongly supported an independent act defense.

He did not pursue an independent act defense because he was focused solely on suppressing the evidence. He maintained that it was vital to keep the statement out of evidence, and as a consequence accepted that there would be unexplained pieces of evidence. (R 651-652; 656). He did not recall offering an explanation for the defendant possessing the victim's property.

Mr. Erlenbach testified:

> ...The problem came, it was difficult to rebut many of those things and keep his statement out of evidence. It was a decision whether to keep the statement in, acknowledge he was involved and run the risk of felony murder.
>
> As I said, I believe his statement was tantamount to a confession of felony murder, go that route or the route of trying to suppress as much evidence as possible and poke holes at the rest.
>
> * * *
>
> Well, no, I think that it's—when you suppress his confession you're in a bit of a box in how to avoid dealing with the consequences of that. So the alternative would have been arguing that he was there, he was involved. I think in his statement he said he saw Ms. Sather tied up, I think. I can't argue he's not responsible for that which, under the felony murder theory is a harder sell than HL or some unexplained possession of property.

(R 654).

Mr. Erlenbach testified that he did not take the confidential informant's deposition at any time prior to trial. He felt that the confidential informant was not as important a witness as Alonzo Love, because the confidential informant's statement was hearsay. However, he acknowledged that confidential informant's statement constituted an admission and therefore, was admissible hearsay. He indicated that, in lieu of pursuing the confidential informant, he elected to take Mr. Love's deposition. (R 648-650).

At one point during voir dire the trial court refused Mr. Erlenbach the opportunity to rehabilitate a juror. Mr. Erlenbach testified that he believed that the trial court erred and he was confident he was going to receive a new trial. In this regard he stated, "I sat down after that and maybe even said to Susan the rest of this is practice, that was reversible error there. It turned out that it was for the penalty phase but not the guilt phase." (R 665). He further testified it was difficult to say exactly how this affected his presentation of the defense. He stated, "I cannot say that it did not affect things." (R 667).

Mr. Erlenbach testified that he considered the information he uncovered regarding Juror Clark's pending felony charges to be significant. He testified that he did not know about Juror Clark's pending charges at the time Juror Clark sat as a juror on the Defendant's case. He did not recall

knowing at the time of the Defendant's trial in 1991 that being under prosecution was a statutory disqualification. However he stated that, had he learned of the juror's pending charges during voir dire, he would have moved to strike Juror Clark for cause or would have used a peremptory challenge to remove him from the jury panel. He further stated that had he known of section 40.013, Florida Statutes, he would have challenged Juror Clark's eligibility to serve as a juror. (R 671-672).

He indicated that he would never have wanted Juror Clark to serve on the Defendant's jury. (R 673). He described Mr. Clark, a middle-class businessman entering PTI, as probably "the worst possible defense juror." (R 732-733). As to why he would strike a juror with pending charges, Mr. Erlenbach testified:

> Well, a juror who has pending charges is clearly in a position to be biased in favor of the State, particularly somebody in Mr. Clark's position.
>
> If I remember correctly he was a businessman and it was a business dispute that led to the criminal charges and a person in his position clearly has more to lose than many other folks who are charged with crimes and somebody in his position who is angling to get into a diversion program, a person who has not ever been charged with a felony before, perhaps never even been charged with a crime before. Certainly somebody in his position is very clearly—I wouldn't say clearly but likely very easily have a very strong bias for the State particularly in a case this serious. . . .

(R 692). He also stated:

> If a juror, any juror had said I am being prosecuted now, I'm about to go into PTI—if I remember this testimony right he had not had time to sit on the jury, he had not received his letter saying that he was going into PTI. But had he said I'm being prosecuted by this State Attorney's Office that would have made a very significant difference and I would have moved to challenge for cause and stricken him peremptorily had the opportunity arisen.

(R 684).

Mr. Erlenbach testified that while preparing the initial brief in the appeal of this case to the Florida Supreme Court, he decided to investigate the other jurors as a consequence of the Neil[3] issue involving the State's having struck Juror Payne. (R 676). With regard to Mr. Payne, Mr. Erlenbach explained the State's position:

> His argument was the jury questionnaire, the question is designed to elicit information on any prior charge against the defendant never made that known to us, he withheld that all along. He also offered in voir dire that he testified on behalf of the defendant on a drug charge.
>
> * * *
>
> He failed to share any of this information with us during the course of voir dire and the questionnaire the Court handed out, he indicated that person should relate to us any sort of connection they may have had with the law and certainly if any charges had been filed against him.

(R 679). He testified that the State had urged that anyone with any involvement with law enforcement, particularly those with charges filed against them, should be telling the lawyers during voir dire. (R 680).

[3] State v. Neil, 457 So. 2d 481 (Fla. 1984)

Despite this backdrop, Mr. Erlenbach failed to ask the jury panel questions regarding whether anyone had pending charges or had ever had charges filed against them. Mr. Erlenbach indicated that this question, if answered honestly, would have prompted jurors to relay this type of information. He acknowledged that he specifically did not ask Juror Clark if he had any pending charges. He therefore did not have any information regarding Juror Clark's pending felony charges and his referral to PTI at the time he was exercising challenges to the jury panel. (R 673; 680-681; 684).

Lastly Mr. Erlenbach testified that he did not retain any experts in this case. (R 618). Similarly he did not employ an investigator. (R 637). He further testified that he never considered the benefits of employing a fingerprint expert. (R 625). He agreed that experts can assist in developing cross-examination, suggesting areas that need further exploration and creating reasonable doubt. (R 685).

Susan Erlenbach testified that her involvement in this case was limited to assisting Mr. Erlenbach in the jury selection process. (R 753-754). According to Mrs. Erlenbach, Mr. Erlenbach questioned all the jurors during voir dire. She testified that had she learned of Juror Clark's status during voir dire, she would have strongly encouraged Mr. Erlenbach to strike him as a juror. She further stated that had she been the sole lawyer in this case,

she would have undoubtedly moved to strike Juror Clark from the jury panel. (R 757).

In this regard she testified that she absolutely would not have wanted a juror like Mr. Clark to sit as a juror on a criminal case. Specifically she stated:

> Well, because regardless of what Mr. White's mind-set is Mr. Clark is going to know that Mr. White is the one making the decision in his case and that any point in time Mr. White can decide not to go through with a PTI contract. So Mr. Clark had to know that, he had to feel beholden to the State or least consider him baring himself in the State's eyes and particularly Mr. White's eyes.

(R 758).

Terry Sirois was hired by collateral counsel in 2003 to identify and locate the confidential informant. Based on her investigation, she testified that the confidential informant was an individual named Earl Chance who died in 1994. (R 1357-1367).

The Florida Supreme Court affirmed the Defendant's conviction but reversed the sentence of death and remanded the case for a new penalty phase proceeding in 1994.

Attorney Dan Ciener represented the Defendant from mid-January 1995 until April 13, 1995 at which time James Kontos was retained by the Defendant. (R 980-981). Mr. Kontos had previously worked for Mr.

Ciener's law firm. In January 1995 Mr. Kontos opened his own law practice. Mr. Kontos testified that this was his first big case. (R 999).

In the five years Mr. Kontos worked at Mr. Ciener's office, Mr. Ciener had not conducted any death penalty proceedings. However, Mr. Kontos along with Mr. Ciener had tried one first-degree murder case. (R 1086). While involved in preparing various motions in death penalty cases, Mr. Kontos had never litigated a penalty phase proceeding. (R 976). Mr. Kontos had never observed any lawyer conduct a penalty phase proceeding, nor had he attended any death penalty seminars. (R 978; 1000). Mr. Kontos also testified that his co-counsel, Jeffrey Thompson, had no prior experience litigating a death penalty case. (R 977).

With regard to his educational preparation for this case, he stated:

> A. I would say my preparation which would include reading case law regarding the death penalty, conversations with Mr. Ciener's office about the plan of attack that he was going to use in defending Mr. Willacy and a conversation at some point with Mr. Erlenbach regarding how he was going to represent Mr. Willacy and also a review of the trial transcript and death penalty phase that Mr. Erlenbach conducted.
>
> I think I had—I know I had the Susan Schaeffer book at some point, I don't remember when I got that and I think I probably—
>
> Q. And that's Judge Schaeffer?
>
> A. Yes. And I think I probably had access to one of the death penalty seminar books although I can't tell you how much of that I

> reviewed. I'm sure I reviewed some portion of it but I don't think I read it page by page, or not every page.

(R 978).

Upon taking over the case Mr. Kontos did not speak to Mr. Ciener, but rather spoke to Mr. Andy Fouche, an associate lawyer working for Mr. Ciener. Mr. Kontos testified that he asked Mr. Fouche "how they were going to defend Mr. Willacy." In this regard, Mr. Kontos testified:

> [a]s best I can recollect and I don't remember all of the conversation but they were going to stipulate to the majority of the facts in what was originally the trial phase and present essentially the same or something similar to what Mr. Erlenbach did at his penalty phase.

(R 981-982). Mr. Kontos was unaware whether Mr. Fouche had reviewed the discovery or read the trial transcripts in this case at the time of this conversation. Mr. Kontos explained that he believed that Mr. Ciener's office had a defense plan, but stated that he did not "know how much they knew before they came up with a plan." (R 982). Mr. Kontos did not speak with Mr. Erlenbach until a short time before the penalty phase proceeding. He indicated that by that time he had already developed his defense, and this conversation would have had little impact on his trial preparation. (R 985-986).

Mr. Kontos testified that he was not very familiar with the use of experts. He indicated that he was influenced by Mr. Ciener's methodology

of not employing experts in that "there was not a great deal of comfort using experts because I just haven't done it." (R 998-999).

Mr. Kontos testified that his defense plan consisted of four parts:

1. factual mitigation which was essentially the mitigation previously presented by Mr. Erlenbach;
2. legally and/or factually attack the aggravating circumstances sought by the State;
3. preserved any and all error; and
4. residual doubt.

(R 987-988). As to residual doubt, Mr. Kontos testified:

> . . .also wanted to aggressively cross examine the witnesses regarding the facts of the murder in order to try and create this perception that there might be, maybe he didn't do it or maybe there's this little glimmer of doubt in their mind as to whether he did do it and therefore even though you couldn't necessarily argue residual doubt a jury might think we're not 100 percent positive so we're not going to execute this individual or suggest that he be executed.

(R 988). Mr. Kontos testified that he hoped that he could convince the jury that maybe the Defendant had not committed the murder. He acknowledged that residual doubt was not a lawful argument. In this regard, he stated:

> . . .I think I attempted to argue it in a way that I was legally allowed to argue it by trying to bring it in under the theory that he was a minor participant.

(R 988-989).

He explained that he did not approach this case from the premise that the Defendant had already been found guilty. Rather he stated that the

"whole purpose of cross-examining the [state's] witnesses" was to attempt to create an impression in the jury that "maybe this guy didn't do it. Whether legally they could presume that or not, factually they might." (R 991). In this regard, he hoped that the jury would disregard the jury instructions. (R 1090).

As to his strategy to preserve error, Mr. Kontos explained that as an attorney you can "look for areas of potential error and foster them" and try to "make sure" to "do everything you can to see that they are sufficient to be reversible or be as close to being reversible as possible." (R 993). He acknowledged that to plan on an ineffective judge[4] was not a legitimate legal strategy, but yet stated "there was certainly that hope, okay? I don't know if that was necessarily a strategy but it is certainly hope." (R 993; 995).

With regard to employing Dr. Riebsame, Mr. Kontos indicated that he contacted Dr. Riebsame because, "someone who I respect told me to but I really [didn't] think there's going to be anything that comes out of it" and that "it was probably going to be a waste of time." (R 1005; 1076). He acknowledged that today the first thing he would do in preparing a death penalty case is hire a mental health expert. (R 1076-1077).

[4] During this line of questioning, the trial court interjected, stating, "You might want to consider your oath as a lawyer as well in answering your questions." (R 994).

He testified that he did not send Dr. Riebsame any articles, case law or sufficient background information in order to fully investigate potential mitigating circumstances. (R 1006; 1009). He denied that there was any strategy involved in this decision. (R 1010). He also did not discuss the Defendant's drug use with Dr. Riebsame or in any way attempt to have Dr. Riebsame relate the Defendant's drug usage to the homicide. In this regard, he stated:

> I did not specifically not do it, it wasn't a strategic decision, it wasn't a thought-out decision, I don't think I ever considered it.

(R 1023).

Mr. Kontos testified that an attorney has an obligation to provide an expert with whatever the expert may need. With regard to Dr. Riebsame, he stated, "I . . . probably assumed Dr. Riebsame would tell me whatever he needed if he needed anything more and that was probably an incorrect assumption or my part." (R 1012).

He testified that he believed that he had explained to Dr. Riebsame that he wanted Dr. Riebsame to focus on mitigation. In this regard he further stated:

> . . . and I remember Dr. Riebsame asking me whether he wanted me to have him do a competency exam also and I said yes so there may have been some miscommunication, it's certainly possible.

(R 1013).

Mr. Kontos testified that following his examination of the Defendant, Dr. Riebsame mentioned that the testing showed indicators that the Defendant might be a sociopath or psychopath, and he then "closed" and "locked" the door on employing Dr. Riebsame. He did not authorize Dr. Riebsame to conduct any further testing to confirm the possible diagnosis. He did not research the meaning of antisocial personality or sociopath. He failed to tell Dr. Riebsame any information regarding good deeds by the Defendant. Importantly Mr. Kontos testified that this decision was not a strategic decision. (R 1026-1027).

He indicated that his decision to not use an investigator was not necessarily a strategic one, but rather he did not realize the value of an investigator. He stated that today he would certainly employ an investigator in a death penalty case. (R 1013-1014). Mr. Kontos did not obtain any school or medical records. He testified that there was no strategy involved in not obtaining these records, rather he simply "did not do it." (R 1014).

With regard to presenting factual mitigation, Mr. Kontos sought to "paint a picture of Chad Willacy as a life worth saving" and hoped the jury would see him as "a regular person" and not as "a cold-blooded murderer." (R 1021).

Mr. Kontos had no knowledge of alcohol abuse by the Defendant's father. (R 1016). Similarly he had no knowledge of the Defendant being physically abused by his father. He did not recall asking the Defendant's family members about any physical or alcohol abuse in their household. He acknowledged that most people do not volunteer that they abuse their child. (R 1020; 1100). Mr. Kontos also did not know that the Defendant had been homeless for a period due to his drug use. (R 1022).

Similarly he did not know the Defendant had Attention Deficient Hyperactivity Disorder (ADHD). In this regard, he stated that had he known this, he would have sought jurors who had children with ADHD because they would have readily understood that children with ADHD are impulsive and lose control. He further indicated that he would not have been dissuaded by Dr. Danziger's, the State's mental health expert, opinions on ADHD because he believed that a jury who understood ADHD would not accept Dr. Danziger's opinion that people with ADHD are not impulsive and not prone to violent outbursts. (R 1028; 1031).

He further explained that "one of the main problems I had was not explaining why what happened happened." (R 1024). He acknowledged that the Defendant's drug use was a potential explanation for the murder.

As to establishing the minor participant mitigator, Mr. Kontos recalled presenting only evidence of the left-handedness of the assailant. He did not recall considering introducing the Defendant's videotaped statement to the jury. (R 1038; 1046). He acknowledged that the Defendant's statement supported the minor participant mitigating circumstance, and could have also supported additional mitigation. (R 1048). He did not introduce the confidential informant's statement regarding Mr. Love. He did not recall introducing any evidence that someone else was involved in the murder. (R 1044-1045). He testified that he sought on cross-examination to elicit whatever facts supported the mitigator. However he acknowledged that his cross-examination, which was very similar to Mr. Erlenbach's cross-examination, focused on the idea that only one person was involved in the crime. He was unable to recall any evidence elicited on cross-examination that supported the mitigator. He further acknowledged that in order for the jury to have found that there was another participant, evidence would have had to have been introduced. (R 1040-1041).

Mr. Kontos testified that he learned sometime during the 1995 Spencer hearing that Judge Yawn had come into the courtroom with a prepared sentencing order. (R 1052; 1061). Despite knowing this, Mr.

Kontos testified that he never thought of moving to disqualify Judge Yawn. (R 1053). He denied any strategy involved in that decision.

At the conclusion of the evidence in the 1995 penalty phase proceedings, Mr. Kontos failed to request the felony murder instruction. In this regard Mr. Kontos testified that there was no strategy involved in his failure to request the felony murder instruction. He stated, "No, in fact I would think I would have wanted to . . . ." (R 1061).

Similarly, at the conclusion of the 1995 penalty phase proceeding, Mr. Kontos did not request a special jury instruction pursuant to Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed. 2d 1140 (1982). In this regard, Mr. Kontos stated he had "never even thought of requesting an instruction based on [Enmund]." (R 1063). Again his failure to request an Enmund instruction did not involve any strategy.

Dr. William Riebsame, a licensed psychologist, testified that he was contacted by Mr. Kontos on September 7, 1995. At that time, Mr. Kontos informed Dr. Riebsame that he was conducting a death penalty proceeding within the week and that he wanted Dr. Riebsame to see the Defendant at the Brevard County jail. Dr. Riebsame testified that Mr. Kontos requested only a competency evaluation of the Defendant and forwarded a two-page arrest affidavit to Dr. Riebsame on September 8, 1995. (R 1112-1114).

According to Dr. Riebsame, he met with the Defendant on September 8, 1995. At that time, he gathered background information from the Defendant. His interview of the Defendant took approximately one hour, and the psychological testing of the Defendant also took approximately one hour. (R 1115-1120).

Dr. Riebsame testified that based on his examination of the Defendant, he found the Defendant aware of the charges against him and able to communicate with his attorneys. He concluded that the Defendant was competent and promptly conveyed his findings to Mr. Kontos. He also testified that in reviewing the test results with Mr. Kontos, he told Mr. Kontos that a portion of the testing revealed some indicators of antisocial personality characteristics in the Defendant. (R 1124-1125). He estimated that his conversation with Mr. Kontos lasted twenty minutes. (R 1130).

Dr. Riebsame stated that an eleven-day period of time is an insufficient amount of time to conduct a thorough mental health evaluation for a penalty phase proceeding. As a general practice in a penalty phase evaluation, he would conduct a thorough review of all academic, medical and prior mental health treatment records relating to a defendant. He would speak to relatives of the Defendant and would meet with the Defendant on several occasions. He would also conduct a battery of psychological and

neuropsychological testing to ascertain any existing mental disorders in the Defendant. He testified that he would not have been unable to complete such an evaluation in the time period provided by Mr. Kontos. (R 1112-1113).

He also stated the two-page arrest affidavit, the sole document, faxed to him by Mr. Kontos would have been insufficient or inadequate for preparation of mitigation evidence. He stated that based on the materials provided he did not understand that he was to evaluate potential mitigation evidence. (R 1115-1116).

In 2000, Dr. Riebsame was contacted by collateral counsel regarding mitigation in this case. At that time, he was furnished with the following material: the Defendant's videotaped statement to police, a transcript of the statement, a transcript of confidential informant's statement to police, a transcript of Alonzo Love's statement to police, prior psychological testing of the Defendant conducted by Dr. James Brown, a personal history of the Defendant gathered by a defense investigator, arrest reports from Freeport and Nassau Police Departments, elementary, high school and college records of Defendant, results of a psychological evaluation from Hofstra University, medical records, prison records, and an evaluation performed by the State's expert, Dr. Jeffrey Danziger. He was asked to review the testing performed

by Dr. Brown and to perform an evaluation of any potential death penalty mitigation. He testified that he reviewed all the material provided, met with the Defendant on a number of occasions, and performed a thorough battery of psychological and neuropsychological tests. (R 1131-1132).

Based on his examinations, he diagnosed the Defendant with the following: cocaine abuse, cannabis abuse, alcohol abuse, Attention Deficit Hyperactivity Disorder (ADHD), antisocial personality disorder, and cocaine intoxication and cocaine withdrawal. (R 1172-1173). In addition Dr. Riebsame found the presence of one statutory mitigating circumstance, namely, the Defendant was under the extreme mental or emotional disturbance. (R 1189-1190).

With regard to the cocaine abuse and alcohol abuse, Dr. Riebsame testified that a cocaine abuse diagnosis would include the Defendant was ingesting crack cocaine in a binge-like manner to the level of intoxication, across a three to four-day period. (R 1279). He explained that this diagnosis is confirmed by third-party sources such as Alonzo Love, Carlton Chance and the confidential informant, all of whom confirm the Defendant's drug abuse around the time of the homicide. (R 1173-1174).

As to his diagnosis of ADHD, Dr. Riebsame explained that ADHD is a mental disorder that reflects impulsivity and poor judgment, rather than

reasoned decision-making. According to Dr. Riebsame, individuals with ADHD have problems making decisions that require them to focus on a number of different factors at the same time. In summary ADHD individuals are easily distracted, get off task, have difficulty completing projects, appear forgetful and have difficulty making effective decisions. (R 1219; 1225). He testified that evidence of ADHD is found in the Defendant's school records, which reflect behavioral problems, attentional problems, and a lack of achievement consistent with his intellectual ability. He also testified that there is evidence of a conduct disorder in the Defendant's childhood history, noting that a child with ADHD often receives an accompanying conduct disorder diagnosis. (R 1175; 1177). He further noted that often children diagnosed with ADHD come from physically abusive homes where the abuse is regular and severe.

Dr. Riebsame testified that typically ADHD continues into adulthood. (R 1174). Specifically he explained that by age 21, the hyperactivity component has usually subsided, but the attentional and impulsivity components remain present. (R 1221). Importantly he testified that drug addiction intensifies the impulsivity component of ADHD. (R 1271).

With regard to his diagnosis of antisocial personality disorder, Dr. Riebsame testified that the Defendant meets the criteria for the disorder.

However, Dr. Riebsame noted that there are aspects of the Defendant's personality that are not consistent with the diagnosis such as the Defendant having maintained extended relationships, helped others for no personal gain, attempted to stop abusing drugs, and having adopted the Islamic religion solely for spiritual reasons. (R 1177-1178). He explained that there exists a significant correlation between adult males diagnosed with antisocial personality disorder having a history of chronic and severe physical abuse. (R 1271). He also testified that when one has ADHD combined with cocaine intoxication, the characteristics of antisocial personality disorder are intensified or worsened. (R 1277).

Lastly as to his diagnosis of cocaine intoxication and cocaine withdrawal, Dr. Riebsame testified that the Defendant's appearance on the videotaped statement to police offers markers of cocaine withdrawal. (R 1179). He explained that a cocaine-intoxicated individual would show very poor judgment, remain sleepless for several days, be talkative and may be agitated and disagreeable. Further his thinking may be confused and his impression of himself may be grandiose. (R 1196). Specifically as to the Defendant, Dr. Riebsame noted that based on third-party reports, the Defendant had been sleepless for several nights and doing crack cocaine for

several days beforehand, including the morning and afternoon of the murder. (R 1208).

As to the statutory mitigating circumstance of extreme mental or emotional disturbance, Dr. Riebsame testified:

> Yes, I would suggest that there are very extreme mental or emotional disturbances in this case given the crack cocaine intoxication at the time and symptoms of the other mental disorder.
>
> * * *
>
> ...he was amidst of a crack cocaine binge and was very much likely intoxicated on crack cocaine at the time of the offense. Symptoms associated with this particular disorder would surely impair his judgment and affect his behavior substantially. I think it's also a diagnosis of Attention Deficit Hyperactivity Disorder in this case that would lay the foundation for someone who is going to act impulsively, show poor judgment and not recognizing the consequences of their behavior anyway. In combination with the cocaine intoxication you have an individual who is extremely mentally disturbed. If you look at the circumstances surrounding Ms. Sather's death, I think the way the offense was carried out reflects extreme mental disturbance simply on the facts of the evidence.

(R 1189-1190).

He further testified:

> I think the cocaine intoxication in particular lends itself towards the extreme emotional disturbance, in my opinion what was going on in his life or around that period of time in terms of the cocaine use. I think that the actual facts of the murder itself, how it was carried out, what was done to Ms. Sather also reflects extreme emotional disturbance.
>
> * * *

> We have now in this circumstance where he's behaving as if he has a very limited IQ, his actions are disorganized, ineffective and he doesn't even recognize his lack of success.
>
> Then he leaves the scene in a rather ignorant manner being observed by others, immediately proceeds to an ATM machine where he's observed there. These are not the actions of someone with an IQ of I think it was 120 or something like that. It doesn't make sense unless we see the symptoms of mental disorder or cocaine intoxication. There is something else going on with Mr. Willacy at the time of this crime. That's how I come to answer your question.

(R 1223-1224).

He described the Defendant's actions during the homicide, not as a rage but rather as impulsive, haphazard and ineffective. He opined that the Defendant's decision to kill the victim was impulsive in that he failed to consider the consequences of his actions as well as other available options such as fleeing, stopping what he was doing, or knocking the victim out and running away. (R 1225; 1228).

Dr. Riebsame opined that it was not the Defendant's antisocial personality disorder that caused the murder. Rather Dr. Riebsame opined that it was merely one factor. (R 1241). He explained that he believed the murder to directly reflect a crack cocaine binge and to have been driven for the sake of obtaining crack cocaine. (R 1187).

He stated that he would have had these opinions in 1995 regarding mitigation. He specifically explained that the diagnoses were present in the

Defendant at the time of the murder, and the Defendant was under the influence of the symptoms associated with these diagnoses. (R 1182; 1191). Regarding his involvement in 1995, Dr. Riebsame testified:

> Yes, if I was aware at the time of my conversation with Mr. Kontos of that crack cocaine involvement, via the other source of information that I now have, I would have commented on how crack cocaine and the addiction on Mr. Willacy's part could explain much of what occurred.

(R 1188).

As to the presence of non-statutory mitigating circumstances, Dr. Riebsame testified that the Defendant had a history of physical abuse, substance abuse and the diagnosis of a mental disorder. (R 1182). He further testified that the Defendant's ability to appreciate the criminality of his conduct was impaired, although not substantially, stating:

> ...There's some impairment, given what occurred and given that he was intoxicated on crack cocaine and associated with this mental disorder but not substantial in nature.

(R 1186).

Heather Willacy, the Defendant's sister, testified that her father began physically abusing her brother when her brother was between eight and ten years old. (R 1319). She described the abuse as a constant occurrence in their home, occurring several times a week for six to seven years. Ms.

Willacy testified that the abuse of her brother stopped when he was 16 or 17 years of age. (R 1339).

She classified these beatings as severe, such that "where I thought he was really like going to hurt him bad." (R 1322). Their father left bruises and welts on the Defendant. She indicated that her father would use a thick leather belt and that once, her father broke a chair leg and beat the Defendant with the leg. (R 1323-1324). According to Ms. Willacy her father would hit the Defendant "wherever he could get him." She testified that the Defendant would become frightened and try to run away, but her father would run after him. (R 1326).

Ms. Willacy also testified that her father physically abused her mother. She testified that her father would attack her mother, hitting, slapping or pushing her mother. She stated that during these attacks she and the Defendant would be present in the home, huddled together crying. She recounted an incident when the Defendant was 14 or 15 years old, in which he tried to stop his father from beating his mother. Ms. Willacy testified her father then turned on the Defendant and beat him. (R 1319-1320; 1322).

Ms. Willacy testified regarding alcohol abuse by her father, stating that her father would drink to intoxication three times a week. (R 1330). She also testified that the Defendant became involved in drugs at the age of

16 and that at 18, his parents kicked him out of the house because of his drug use. (R 1334-1336).

She indicated that the attorneys representing her brother never asked her about any physical abuse or alcohol abuse by their father. (R 1330). In fact, Ms. Willacy testified that she never spoke to Mr. Erlenbach. (R 1338). As to Mr. Kontos, she stated, "He wanted to know, he wanted me to tell good things about my brother which is what I did." (R 1343).

Colin Willacy, the Defendant's father, testified that drinking half a quart of rum was a daily pastime for him. He described his drinking as steady and excessive, resulting in irrational behavior. He testified that "very often things got so heated that I have many times got physical with [his wife]." He stated he would slap or punch her with his fist "anywhere from six to ten blows depending on however resistant she became." He described these blows as "really hard punches." (R 1418; 1417-1418).

He also testified that he began beating the Defendant when the Defendant was about 7 or 8 years old, and that the beatings, while regular, got more brutal as the Defendant got older. With regard to the Defendant, he stated, "I would go frantic. . . I would use anything. If there was a chair there, anything, because I was in a state really that I got very abusive." (R 1420).

He stated that he would "really, really let him have it for disobeying me." (R 1421). He explained that, in Jamaica corporal punishment is practiced, but "what I did, I gave that and more . . . what I inflicted as corporal punishment was brutal." (R 1449). He described the blows to the Defendant as "oh, to the full extent of whatever power that I had, very hard." He would strike the Defendant with his belt on "any part of his body, 15 to 20 times." (R 1428; 1429). Mr. Willacy recounted a specific incident where he beat the Defendant with a chair leg:

> Well, I don't remember when it was but I went in his room and I confronted him. And the closest thing, they had a chair in his room and I grabbed the chair because I was so frantic and mad at his disobeying me and I just broke the chair on him.

(R 1422). He stated that during this incident he struck the Defendant four to six times with the chair leg. Mr. Willacy testified that he stopped beating the Defendant when the Defendant was in high school. (R 1421; 1423).

He also testified that due to the Defendant's drug use he and his wife kicked the Defendant out of their home. During that time, the Defendant was homeless, living on a rooftop. (R 1449).

During the 1995 penalty phase proceedings, testimony was presented the Mr. Willacy had been a strict disciplinarian. He testified that at no time did the defense attorneys inquire further or ask him to provide any details

regarding his being a strict disciplinarian. Thus, he never told the attorneys about the physical abuse or his alcohol abuse. He indicated that while he was ashamed of his conduct, he would have told the lawyers if he had been asked. (R 1426). In this regard, he explained that he had no idea that this information was so critical in the penalty phase proceeding. Mr. Willacy testified:

> When the penalty phase came up I was not told that I should, I was told that what counted is his good behavior, the good deeds that he had done.

(R 1434-1435).

The Defendant's mother, Audrey Willacy, testified that she married the Defendant's father in 1966. She stated that Mr. Willacy began drinking prior to their marriage, and it continued following their marriage. She described her husband as unsteady, easily irritated, and unapproachable when he was drinking. According to Mrs. Willacy, he drank at least two to three times a week and especially on the weekends. (R 1369). She stated that when he drank, they would have heated arguments that would progress into physical confrontations. She testified that Mr. Willacy began abusing her in the third year of their marriage while she was pregnant with their second child. She explained that during this incident Mr. Willacy pushed her down a flight of stairs, and she received an injury over her eye. Mrs.

Willacy stated that he would slap her or punch her in the back with his fist, often striking her eight to ten times. She testified that while the abuse was sporadic, it was extensive. She further testified that the abuse lasted over a ten-year period, occurring approximately 25 times. (R 1372; 1374-1376).

Mrs. Willacy testified that the physical abuse of her son occurred much more frequently, at least four times a week. She testified that almost every time Mr. Willacy was drunk there was a physical attack on the Defendant. Mrs. Willacy related that the abuse began when the Defendant was approximately 8 years old and ended when he was 15 or 16 years old. (R 1379).

Mrs. Willacy described these beatings as extreme with the Defendant being beaten with a belt, fists, furniture, or whatever was available or handy at the moment. She recounted that when the Defendant was as young as 8 years old, Mr. Willacy would beat the Defendant with his fist or a belt in the head, back or "anywhere he could get the blow." (R 1379). She stated the abuse usually occurred over trivial things like the Defendant failing to walk the dog or to do his homework. (R 1381).

She testified specifically about an incident involving a chair leg:

> He came home and he was as I say drunk. And he was, he was talking to Chad. And there was the chair and he broke the chair, took the foot of the chair and beat Chad with it. I tried to intervene and I got hit, not seriously but I got hit during the

> time that I was trying to get in-between him and the chair and Chad.

(R 1380). She recounted a second incident when a friend witnessed Mr. Willacy beating the Defendant, and the friend, concerned over the intensity of the blows, stated, "You're going to kill him." (R 1390).

In the 1991 or 1995 penalty phase proceedings, Mrs. Willacy did not testify about any abuse. She explained that she was never asked specifically about abuse, and therefore, she did not volunteer or otherwise detail any abuse witnessed or suffered by the Defendant. She related that the defense attorneys never discussed with her any potential significance of abuse. She indicated that she met with Mr. Kontos three or four times, but he never pressed her for any such information. (R 1389). Rather:

> . . . , Mr. Kontos and Mr. Erlenbach told me that I should get people who can tell of Chad's good behavior and good conduct and good things that he had done in the penalty phase.

(R 1385). According to Mrs. Willacy, Mr. Kontos instructed her to focus on the good things about the Defendant. (R 1412). She testified that had someone asked about the abuse, she would have told them. (R 1384-1385).

Mrs. Willacy also did not tell the defense attorneys about the Defendant's mental health counseling as a child at Hofstra University. She did not discuss with the defense attorneys that she and Mr. Willacy kicked the Defendant out of their home when the Defendant was approximately

twenty years old due to his drug abuse. Mrs. Willacy testified that the Defendant was gone from their home for about one month, and during this time he was living on a rooftop and without any food. (R 1386; 1387; 1392).

SUMMARY OF THE ARGUMENT

The Defendant contends that the trial court erred in summarily denying a number of claims raised in the motion for post-conviction relief. The record does not conclusively refute the allegations in claims IV, VI, XV. Therefore, the Defendant was entitled to an evidentiary hearing on those claims.

The Defendant also maintains that the trial court erred in denying him relief based on trial counsel's failure to assert an independent act defense. Trial counsel pursued an evidence elimination defense, without considering all other potential defenses. In doing so, trial counsel was unable to explain a plethora of incriminating evidence against the Defendant. Trial counsel acknowledged that the independent act defense would have explained all the State's evidence and yet, he failed to consider it. Trial counsel was ineffective in failing to consider a defense that would have resulted in the Defendant being acquitted of the homicide and would have resulted in a lesser prison sentence for the Defendant.

The Defendant asserts that trial counsel was ineffective for failing to move to disqualify the trial judge upon learning that the trial judge had already prepared its sentencing order prior to introduction of mitigating evidence at the Spencer hearing. During the Spencer hearing, trial counsel introduced testimony of the Defendant's father, letters from the Defendant's family and friends and the Defendant's videotaped statement to law enforcement. Most significantly the Defendant addressed the trial court. Upon learning of the trial court's prepared order, trial counsel took no action, and thus, deprived the Defendant of his right to a fair and impartial trial.

The Defendant then contends that the trial court erred in denying him relief based on trial counsel's failure to investigate and present substantial mitigating evidence. This was trial counsel's first penalty phase proceedings and he lacked the educational background to efficiently perform the task. No records of any kind were obtained. A psychologist was retained only days before the penalty phase proceeding began. The psychologist was unaware of the extent and purpose of his employment, thinking he was merely to conduct a competency evaluation. The psychologist was completely ill-prepared to conduct a thorough mental health evaluation for mitigation purposes. Upon subsequent evaluation, the same psychologist

found the existence of a statutory mitigating circumstance as well as substantial other mental health mitigation. Trial counsel told the Defendant's family to focus on the good things about the Defendant. This inquiry left uncovered crucial information of extensive physical abuse of the Defendant and his mother by his alcoholic father. No jury or trial court was ever told the true facts behind the Defendant's background. If such facts as are now known were presented during the Defendant's penalty phase proceeding, the Defendant would have received a life sentence.

The Defendant asserts that the trial court erred in denying relief based on trial counsel's failure to uncover during voir dire Juror Clark's criminal status. Juror Clark, who had pending criminal charges, was selected to serve as the foreman of the Defendant's jury. Even in the 1993 order denying Defendant's motion for new trial, the trial court noted trial counsel's failure to inquire at all during voir dire of information which could have been readily discovered and formed the basis of a challenge.

The Defendant asserts that the trial court failed to apply Lowrey v. State, 705 So. 2d 1367 (Fla. 1998) retroactively. The Lowrey case is factually indistinguishable from the Defendant's case in that an inherently prejudiced juror, who had felony charges and was pending admission into PTI, deliberated and rendered a verdict.

Lastly, the trial court erred in denying the Defendant's Motion for Post-Conviction DNA Testing. The Defendant's motion alleged with specificity the requirements of rule 3.853, Florida Rules of Criminal Procedure. Testimony was presented which demonstrated the necessity of conducting DNA testing as the DNA evidence would have resulted in an acquittal of the Defendant or a sentence less than death.

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT AN EVIDENTIARY HEARING ON CLAIMS IV, VI, AND XV OF HIS AMENDED MOTION FOR POST-CONVICTION RELIEF.

> Claim IV- Defense counsel was ineffective for waiving the appointment of an independent counsel to litigate the facts and circumstances regarding Juror Clark's pending felony charges.

The trial court denied claim IV, stating that, "no conflict of interest existed requiring appointment of an independent counsel at the evidentiary hearing." In this regard, the trial court noted that this was a post-trial proceeding and therefore, under Rule 4-3.7 of the Rules of Professional Conduct, no conflict of interest existed. The trial court also found that the Defendant had failed to demonstrate how the use of an independent counsel would have produced a different result. In this regard, the trial court stated, "[t]he facts would not have changed so how the outcome would have

changed with the use of independent counsel at the motion for new trial who may have used a different strategy is inconceivable and pure speculation at best." (R 2298-2301). In so ruling the trial court erred.

At the October 12, 1992 hearing, the following exchange occurred between the parties and the trial court:

> Defense Counsel: Judge, I would like to testify next, and Susan will be asking the questions.
> Court: Just a minute, Mr. Erlenbach. Are you familiar with what the Code of Professional Conduct has to say about this?
>
> Defense Counsel: Yes, I am, and I believe it pertains to matters in which testimony needs to be rendered, matters that would be adverse to the client.
>
> Court: It's not that broad is my understanding of it. It relates to any matters, doesn't it?
>
> Defense Counsel: No, I don't believe it does.
>
> Court: In other words you can't be a lawyer and a witness in a case.
>
> Defense Counsel: I don't believe it's quite that broad especially in a matter like this where we're talking about specific events that occurred during the course of a trial in which –
>
> Obviously, I was the lawyer for the defendant at the time, remain the lawyer for the defendant on this appeal and also have factual matters, I believe, with which the record needs to be supplemented for the purposes of arguing this issue. I see no other way of doing it. I don't believe there's any way of –
>
> Court: The other way of doing it is for some other lawyer to handle the case. You can't be a lawyer and a witness, too.

Defense Counsel: Your Honor, I believe that – Well, I believe that the State also, Mr. White, and perhaps others seated at the State's table, likewise are going to be witnesses in this, and I don't believe it's quite so exclusionary.

Court: Do you recall the –

Defense Counsel: I don't think it's in there.

Court: --the particular –

State: Your Honor, I believe it would be Rule 4.

***

Judge, I don't know if it would assist this dilemma, but Mr. Erlenbach is right, and the State has the same dilemma they do. We have a luxury. Mr. Craig doesn't have any recollection of any of this so he doesn't really need to be a witness so he can handle our case from this point forward. I don't think that Mr. and Mrs. Erlenbach are quite so fortunate. I think both of them are going to need to testify. Certainly we would mutually agree to allow that to happened, but I don't know if that solves our problem or not.

Court: I don't think it does. You can't mutually or otherwise agree to depart from the code.

***

As I was saying, that doesn't solve your problem because you cannot mutually or otherwise excuse the application of any of the Rules of Professional Conduct. You can't waive them by agreement any more than you can waive jurisdiction or any other such thing. . . .

* * *

Will Mrs. Erlenbach be a witness in the trial as well?

Defense Counsel: Not for us. I think the State had subpoenaed her.

State: We have, your Honor, and I believe we have to call her. Based on what Mr. Erlenbach told me I think she has some things that are relevant to say.

Defense Counsel: Judge, if you'd like, maybe what we could do is we could [suspend] these proceedings – the Court could appoint the Public Defender to continue this and take it up at a later time at which the two of us could testify.

Court: The purpose of the rule is to protect a party against conflict between that party and his counsel. That seems to be the basis for the rule.

Does you client have any objection to you occupying the dual role of lawyer and witness, Mr. Erlenbach?

Defense Counsel: I don't believe he does. I'll be glad to –

Court: You may ask him.

Defense Counsel: He has no objection. If you'd like to inquire of Mr. Willacy, then –

Court: I'll accept your representation, Mr. Erlenbach. Does the same apply to Mrs. Erlenbach?

Defendant: Yes.

Court: Counsel, it sure would have been helpful if you all would have anticipated this. This is so obvious that I'm shocked that you didn't anticipate it. I really am. Lawyers don't go around in this dual role.

Defense Counsel: Judge, while I don't believe it is improper, if the Court does have difficulties with it, then the solution would be to appoint the Public Defender for the purposes of continuing this proceeding. It's a fairly simple procedure. If that's what the Court wishes.

It's obvious in matters of this magnitude that questions of ineffective assistance frequently are raised, and if we were not to prevail on appeal, I have no doubt the 3.850 would be coming, and as I indicated, while I don't believe it to be a problem, if the Court believes that it is, then I think we should

fix it now rather than fixing it a couple of years from now on a 3.850.

Court: In the absence of an objection on the part of the defendant, and he having waived the benefit of this rule which is designed as I understand to protect him from prejudice, I'm going to permit you to proceed, but, Counsel, please try to anticipate matters such as this before you get involved in a situation somewhere….

Defense Counsel: Judge, with all due respect there's no way to avoid this.

Court: There was, too. All you had to do was invoke the rule, Mr. Erlenbach.

(R 55-63).

Rule 4-3.7, Rules of Professional Conduct, states in full:

Rule 4-3.7 Lawyer as witness

a. **When Lawyer May Testify**: A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client except where:

(1) the testimony relates to an uncontested issued;

(2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to testimony;

(3) the testimony relates to the nature and value of legal services rendered in the case; or

(4) disqualification of the lawyer would work substantial hardship on the client.

b. **Other Members of Law Firm as Witnesses**. A lawyer may act

> as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by rule 4-1.7 or 4-1.9.

See also Scott v. State, 717 So. 2d 908, 910 (Fla. 1998) (the purpose of rule 4-3.7 is to prevent the evils that arise when a lawyer dons the hats of both an advocate and witness for his or her own client. Such a role can prejudice the opposing side or create a conflict of interest).

Here, as noted by the trial court in 1992, the conflict was obvious. Both Mr. and Mrs. Erlenbach were testifying regarding a hotly contested issue, that being the State's disclosure of Juror Clark's status, for which there was "substantial evidence . . .offered in opposition." In fact the testimonies of Mr. and Mrs. Erlenbach went to the very crux of the issue presented by the motion for new trial. More importantly, the testimony of Mr. and Mrs. Erlenbach were to a large extent in conflict with each other. Quite clearly the testimony of Mrs. Erlenbach and the testimonies of Mr. White and Mr. Rappel regarding Mrs. Erlenbach proved adverse to the Defendant. Therefore Rule 4-3.7 precluded the Erlenbachs from acting as both witness and lawyer in this matter. This actual conflict of interest deprived the Defendant of effective representation and violated his right to counsel guaranteed by the 6th and 14th Amendments.

The trial court's finding that "no conflict of interest existed" because this was a post-trial proceeding is simply disingenuous. While there are cases which do not preclude counsel's participation in pre-trial proceedings even if it was likely that counsel would be called to testify at trial, see Cerillo v. Highley, 797 So. 2d 1288 (Fla. 4th DCA 2001) and Columbo v. Puig, 745 So. 2d 1106 (Fla. 3rd DCA 1999), conflict-free counsel is regularly appointed in post-trial collateral proceedings. See Karg v. State, 706 So. 2d 124 (Fla. 1st DCA 1998); Garcia v. State, 846 So. 2d 660 (Fla. 2nd DCA 2003); Roberts v. State, 670 So. 2d 1042 (Fla. 4th DCA 1996); Lopez v. State, 688 So. 2d 948 (Fla. 5th DCA 1997). Thus the trial court erred in denying the Defendant relief based on this ground.

An actual conflict of interest can impair the performance of a lawyer and ultimately result in a finding that the defendant did not receive effective assistance of counsel. Cuyler v. Sullivan, 446 U.S. 335, 345, 100 S.Ct. 1708, 64 L.Ed. 2d 333 (1980). See also Holloway v. Arkansas, 435 U.S. 475, 481, 98 S.Ct. 1173, 55 L.Ed. 2d 426 (1978). When defense counsel makes a disclosure of a possible conflict of interest with the defendant, the trial court must either conduct an inquiry to determine whether the asserted conflict will impair the defendant's right to effective assistance of counsel or

appoint separate counsel. Holloway, 435 U.S. at 484. No such inquiry was done here.

In order to establish a waiver of the right to conflict-free counsel, such waiver must be shown by "clear, unequivocal and unambiguous language." United States v. Rodriquez, 982 F.2d 474, 477 (11th Cir. 1993), cert. denied, 510 U.S. 901, 114 S.Ct. 275, 126 L.Ed. 2d 226 (1993). See also Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 2d 1461 (1938). In Larzelere v. State, 676 So. 2d 394, 403 (Fla. 1996), this Court held that for a waiver to be valid, the record must show that the defendant was aware of the conflict of interest, the defendant realized the conflict would affect the defense, and the defendant knew of the right to obtain other counsel. Each of these requirements is independent of each other and each is essential to finding that a defendant's waiver of his right to conflict-free counsel was voluntary. Lee v. State, 690 So. 2d 664, 667 (Fla. 1st DCA 1997).

Here there is nothing in the record to establish that the Defendant was fully advised and knowingly understood the extent of the conflict of interest, and realized the extent to which the conflict would affect his defense. The conclusively record establishes that Mr. Erlenbach failed to recognize the obvious conflict, and utterly failed in any manner to appreciate how the conflict would affect the defense. Therefore there is nothing in the record to

demonstrate that Mr. Erlenbach could have adequately advised the Defendant. Thus the Defendant could not have made a knowing and intelligent waiver of his right to conflict-free counsel. See Teffeteller v. Dugger, 734 So. 2d 1009 (Fla. 1999).

In Lee the state acknowledged that the trial court's inquiry did not satisfy the test in Larzelere, but argued the error was not prejudicial. The district court rejected this argument, noting that "the assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Id. at 668 (quoting Chapman v. California, 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed. 2d 795 (1967)). The court explained that this principle applies to cases in which the deprivation of counsel is the result of conflict of interest between a lawyer and client. In Glasser v. United States, 315 U.S. 60, 75-76 62 S.Ct. 457, 86 L.Ed. 2d 680 (1942), the court held that it was not necessary for a reviewing court to determine the degree of prejudice resulting from an actual conflict of interest because the conflict itself demonstrated a denial of the right to counsel.

Appellate courts have declined to apply the harmless error analysis to cases in which a defendant is deprived of his right to conflict-free counsel because any action the lawyer refrained from taking because of the conflict would not be apparent from the record. Lee v. State, 690 So. 2d at 668. See

also Holloway v. Arkansas, 435 U.S. at 490. Thus the trial court's statement that "[t]he facts would not have changed so how the outcome would have changed with the use of independent counsel at the motion for new trial who may have used a different strategy is inconceivable and pure speculation at best." is flawed. Accordingly the Defendant was denied his 5th and 6th Amendment rights, and is entitled to relief.

> Claim VI- Defense counsel was ineffective for failing to object to Juror Clark's ineligibility to serve on the Defendant's jury**.**

The trial court summarily denied this claim concluding that the Defendant had failed to establish any prejudice entitling him to post-conviction relief. Specifically the trial court stated that, even if trial counsel had objected to the Juror Clark's alleged ineligibility to serve as a juror, the Florida Supreme Court examined the issue of Juror Clark's eligibility and specifically determined that Juror Clark was not under prosecution. (R 2302-2303).

In Willacy, this Court found that, "during the trial the State informed Willacy's counsel of Clark's status and his counsel voiced no objection." 640 So. 2d at 1083. Thus squarely at issue is defense counsel's failure to object [5] to Juror Clark's service on the Defendant's jury. Such requires an

[5] Similarly in its 1993 order, the trial court found that defense counsel had been informed of Juror Clark's criminal status and defense counsel took "no

evidentiary hearing. See Teffeteller v. Dugger, 734 So. 2d 1009 (Fla. 1999).

Accepting as fact that Mr. Erlenbach was told of Juror Clark's PTI status, had Mr. Erlenbach objected, Juror Clark's service on the jury would have been subject to attack either under section 40.013, Florida Statutes, as statutorily ineligible, or under De La Rosa v. Zequeira, 659 So. 2d 236 (Fla. 1995), as juror misconduct. Without question at the time the Erlenbachs are alleged to have been informed of Juror Clark's status, they would have known Juror Clark had failed to answer fully and truthfully questions during voir dire which bore on relevant matters. While generally an attorney's actions during voir dire are considered to be matters of trial strategy, see Nguyen v. Reynolds, 131 F.3d 1340, 1349 (10th Cir. 1997), counsel's decision not to challenge a biased venire person cannot constitute sound trial strategy. A finding of sound trial strategy clearly could not include counsel's waiver of a defendant's right to an impartial jury. Hughes v. United States, 258 F. 3d at 462.

Juror Clark's conduct caused actual harm to the Defendant in that the defense's right to challenge Juror Clark was substantially impaired by his failure to answer fully and truthfully. As such, the Defendant's 5th and

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action" and "has waived any right to challenge the verdict on the basis of the juror's disqualification." (R 1993-1997).

6th Amendment rights were violated because he was deprived the opportunity to fully access Juror Clark's impartiality and suitability for jury service. Accordingly, defense counsels' failure to object to Juror Clark's misconduct fell below any range of reasonable professional assistance, and thus, the Defendant is entitled to relief. Mansfield v. State, 2005 WL 1577910 (Fla. 2005).

Furthermore, this Court's decision in Willacy regarding Juror Clark's eligibility was wrongly decided. The record establishes that at the time of his selection as a juror, Juror Clark had not been informed[6] that he had been approved for admission into PTI and importantly had not signed the PTI contract.

Section 944.025, Florida Statutes (1990), defines the pretrial intervention program. In this regard, subsection (4) provides,

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[6] The trial court's 1993 order providing that Juror Clark "reasonably believed his case was disposed" lacks any record support. To the contrary, Juror Clark's case was scheduled for docket sounding on October 21, 1992. Jury selection began on October 7, 1992. He testified that the Department of Corrections received notice from the State approving Juror Clark into PTI on October 4, 1991. On October 7, 1991, Joe Brand of the Department of Corrections wrote Juror Clark informing him of the State's approval. After Juror Clark was selected as a juror and after the State began presenting evidence, he received Mr. Brand's letter. Juror Clark contacted Mr. Brand, informed him he was on jury duty, and rescheduled his PTI contract signing for October 29, 1991. (R 28; 78; 98). Moreover, Mr. Brand explained the contract signing date is the starting date for the PTI program, which is just like probation, at which point the rules and conditions of the program become binding. (R 78; 86).

> [r]esumption of *pending criminal proceedings* shall be undertaken at any time if the program administrator or state attorney finds such individual is not fulfilling his obligation under this plan or if the public interest so requires.

(emphasis added). Therefore, the statute specifically notes that criminal charges diverted into PTI remain pending criminal proceedings and may be resumed at any time. Accordingly, this Court's conclusion that Juror Clark was not under prosecution is belied by the statute.

Moreover this Court's reliance on Cleveland v. State, 417 So. 2d 653 (Fla. 1982) is misplaced. In Cleveland, the defendant was arrested for welfare fraud and subsequently sought admission into the pretrial intervention program. Despite the defendant satisfying all the prerequisites for admission into the program, the state refused to consider her application based on a rule from the Department of Offender Rehabilitation which denied individuals charged with welfare fraud admission into the program. Id. at 654. The trial court then ordered that she be accepted into the program, stating that the withholding of consent by the state was subjective and contrary to the legislative intent of the PTI program. Id.

On appeal, this Court concluded that "pretrial diversion is essentially a conditional decision not to prosecute." Specifically, this Court stated:

> It is a pretrial decision and does not divest the state attorney of the right to institute proceedings if the conditions are not

> met. The pretrial intervention program is merely an alternative to prosecution and should remain in the prosecutor's discretion.

Cleveland, 417 So. 2d at 654. This Court further noted:

> Two factors in the statutory scheme which create the pretrial intervention program support the determination that each party concerned has total discretion to refuse to consent. First, section 944.025(2) requires consent of the administrator of the program, victim, judge, and state attorney, but fails to provide *any* form of review. In addition, section 944.025(4), Florida Statues, allows the state attorney to *continue prosecution* if defendant is not fulfilling his obligations under the program or if the public interest requires. The fact that the state attorney has this discretion to reinstate prosecution is consistent with the view that the pretrial diversion consent by the state attorney is a prosecutorial function.

Id. (emphasis added). Therefore, Cleveland, a prosecutorial discretion case, addressed the prosecutor's authority under section 944.025, and specifically noted the prosecutor's authority to continue forward with the prosecution if the conditions of the program are not satisfied. In this regard, Cleveland did not hold that charges accepted into PTI were no longer pending prosecution.

Thus under the specific language of section 944.025(4), Juror Clark had pending criminal charges. Accordingly there was an inherently biased juror on the Defendant's jury. See Lowrey v. State, 705 So. 2d 1367 (Fla. 1998); Massey v. State, 760 So. 2d 956 (Fla. 3rd DCA 2000); Young v. State. 720 So. 2d 1101 (Fla. 1st DCA 1998).

To allow a biased juror to sit, which is exactly what occurred in this case, is a structural defect which does not require a showing of prejudice under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). Hughes v. United States, 258 F. 3d 453 (6th Cir. 2001). The seating of a biased juror who should have been dismissed for cause taints the entire trial, and thus, requires reversal of the conviction. United States v. Martinez-Salazar, 528 U.S. 304, 316, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000); Wolfe v. Brigano, 232 F.3d 499, 503(6th Cir. 2000). See also Hughes v. United States, 258 F.3d at 462 (the presence of a biased juror defies the harmless error analysis). Accordingly the Defendant's 5th and 6th Amendment rights were violated by this structural defect.

Claim XV- Defense counsel was ineffective for not objecting to the trial court's failure to swear the venire prior to voir dire.

The trial court denied this claim finding that the Defendant had failed to satisfy both prongs of the Strickland analysis. In so ruling the trial court relied on the testimony of jury clerk, Ms. Rich. (R 2308). However, the record demonstrates that the jurors were not specifically sworn for the Defendant's trial, and there was a lack of objection by trial counsel.

The only record evidence of any swearing of jurors indicates that the jury pool was sworn collectively in the jury waiting room. In this regard, the record demonstrates that the jury clerk outside the presence of the judge,

Defendant or attorneys administered the oath. Prior to voir dire, the trial court clerk stated, "Judge, the jurors have been qualified by our clerk. I don't know if you want to do it again or that's enough." (1991R at 57).

In Lott v. State, the Second District Court of Appeal noted that in "many Florida courts, the preliminary oath is administered to the venire in a jury assembly room, before the jurors are questioned about their legal qualifications and before they are divided into smaller groups for questioning in individual cases." 826 So. 2d 457, 458 (Fla. 2nd DCA), rev. denied, 845 So. 2d 891 (Fla. 2003). . The court further stated, "[r]ule 3.330(a) does not require that the preliminary oath be given at a particular time or that it be given more than once. If the jurors have taken the oath in the jury assembly room, they need not take it again in the courtroom." Id. Similarly, the Fifth District Court of Appeal recognized the common practice in Florida of obtaining oaths from the venire outside the courtroom. Martin v. State, 898 So. 2d 1036 (Fla. 5th DCA 2005).

This Court has not addressed the appropriateness of obtaining oaths from veniremen outside of the courtroom. See Smith v. State, 866 So. 2d 51 (Fla. 2004)(holding only that where there is no record one way or the other regarding whether the jury was sworn, no error has been shown).

The Second District and the Fifth District analyses are short-sighted for two reasons. First, both courts failed to consider rule 3.191(c), Florida Rule of Criminal Procedure.[7] While it may be common practice for weekly jury panels to be qualified outside the courtroom, it is not until a specific jury panel is sworn to answer voir dire questions for a specific trial that the trial has actually commenced and speedy trial concerns are fulfilled. See Moore v. State, 368 So. 2d 1291 (Fla. 1979); Stuart v. State, 360 So. 2d 406 (Fla. 1978); State v. May, 332 So. 2d 1456 (Fla. 3rd DCA), cert. denied, 339 So. 2d 1172 (Fla. 1976).

Secondly, the courts failed to consider the practicalities of swearing the jury pool, which quite often consists of a large number of people unfamiliar with the court system, and the procedures failure to convey the seriousness of the procedure. This is evident in Mr. Willacy's case.

Juror Clark testified that he had no memory of being in the jury room, or the jury clerk administering the oath and asking questions regarding the juror qualifications. In this regard, he stated, "it just wasn't significant enough to put in the memory bank." (R 1836-1842). At the hearing on the

[7] Florida Rule of Criminal Procedure 3.191(c) states "… The trial is considered to have commenced when the trial jury panel for that **specific** trial is sworn for voir dire examination or …" (emphasis added).

motion for new trial in October 1992, he testified regarding the jury clerk's questioning stating, "[t]here was so many of us in the room it seemed like just a formality, something that had to be done at that time for whatever reason." (R 28). He could not recall any questioning regarding whether any one was under prosecution for any crime. He testified that there was a lot of people in the room, he had no idea who the jury clerk was or her affiliation with the trial court, and that while people were listening, not intently so. (R 30).

The record conclusively establishes that Juror Clark failed to disclose his pending felony charges. He gave little or no regard to the oath administered by the jury clerk and the subsequent questioning by the jury clerk. In fact, he testified that this was of little significance to him. This highlights the deficiencies in the position taken by the district courts of appeal that an oath administered outside the courtroom conveys the magnitude of the occasion to a prospective juror. Here Juror Clark continued this deliberate and cavalier pattern of nondisclosure by failing to respond to pointed questions regarding his involvement in the court system by the State and purposefully withheld relevant information. Had a trial court administered the oath, Juror Clark would not have perceived the questioning as a "formality" but would have clearly known the importance

of the jury selection process. The Defendant's 5th and 6th Amendment rights were violated and thus, he is entitled to relief.

ARGUMENT II

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S CLAIM FOR POST-CONVICTION RELIEF BASED ON TRIAL COUNSEL'S FAILURE TO ASSERT THE INDEPENDENT ACT DEFENSE.

In Claim I of his rule 3.850 motion, the Defendant asserted that he was denied effective representation when his guilt phase counsel, Mr. Erlenbach, failed to fully consider all available defenses to the crimes charged. In this regard, the Defendant maintains that his videotaped statement to law enforcement contained all the elements of the independent act defense. In short, the Defendant stated to police that he along with an un-indicted co-felon entered the victim's home on the morning of the homicide. According to the Defendant, he left the victim's home and the un-indicted co-felon remained in the home. At the time he left, the victim was tied up, but alive and unharmed.

At the evidentiary hearing, Mr. Erlenbach testified that his defense theory was evidence elimination coupled with an attempt to explain away the remaining evidence. He stated that while focused on eliminating evidence he failed to consider other viable defenses that would have

provided plausible explanations for all the State's evidence. In evaluating the State's case, Mr. Erlenbach noted that the ATM photograph[8] was a "fairly incriminating piece of evidence, stronger than much of the other State evidence." (R 639). Mr. Erlenbach offered the jury no explanation for this piece of evidence or the victim's property uncovered inside the Defendant's home.

As to an independent act defense, Mr. Erlenbach acknowledged that the Defendant's videotaped statement to police contained all the elements of an independent act defense. He also acknowledged that the confidential informant's statement strongly supported an independent act defense. Yet, without any valid justification, Mr. Erlenbach failed to investigate the confidential informant in any manner. In fact, he declined to depose the confidential informant, whose statement directly implicated Lonzo Love, and elected to pursue Lonzo Love's involvement by deposing Mr. Love. Not surprisingly, Mr. Love did not confess to any involvement in the homicide. Mr. Erlenbach's conduct essentially deprived the Defendant of crucial evidence supporting an independent act defense.

The trial court denied the Defendant post-conviction relief, concluding that Mr. Erlenbach's evidence elimination strategy constituted

[8] The trial court in denying the Defendant post-conviction relief specifically found that it was the Defendant in the ATM photograph. (R 2558).

sound trial strategy. The trial court further noted that, "[t]here was no competent evidence presented by the defense at the evidentiary hearing or in the record that anyone other than the Defendant participated in the crimes in this case. The evidence of the Defendant's guilt and that he alone committed the crimes is overwhelming." (R 2555-2558).

The trial court's conclusion ignores the record evidence supporting the involvement of a second person. As already noted, the confidential informant's statement clearly implicated a second person. In addition, the medical examiner testified that the victim was struck by a left-handed assailant. Lastly, Ms. Pullar testified that the evidence could easily point to another person being involved. (R 958).

The trial court also noted:

> Even if the defense succeeded in acquitting the Defendant of the homicide on the independent act defense, the Defendant would have convictions for armed burglary with an assault, robbery with a deadly weapon, and first degree arson. [citation omitted]. Consequently, the independent act defense would have been extremely risky compared to the strategy employed by Mr. Erlenbach. It is all too easy in hindsight after the Defendant has been convicted to concluded that since the strategy employed by Mr. Erlenbach at the Defendant's trial ultimately was unsuccessful, he should have considered and employed a more risky defense.

(R 2557). This conclusion is flawed. First, had an independent act defense been properly presented to the jury, it would have provided the basis upon

which the jury could have acquitted the Defendant of the charges of first-degree murder, robbery with a deadly weapon, and first-degree arson. Under the scenario established in the Defendant's videotaped statement, he could only have been found guilty of burglary. Moreover, the trial court's assessment of the risk to the Defendant is preposterous. Without question, a potential guidelines sentence of probation (for the offense of burglary) is worthy of the risk when faced with the death penalty.[9] Accordingly, the Defendant's 6th Amendment right to counsel was violated and therefore, he is entitled to relief.

ARGUMENT III

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S CLAIM FOR POST-CONVICTION RELIEF BASED ON TRIAL COUNSEL'S FAILURE TO MOVE TO DISQUALIFY THE TRIAL JUDGE AT THE SENTENCING PROCEEDING.

In Claim XIII of his rule 3.850 motion, the Defendant asserted that he was denied effective representation when Mr. Kontos failed to move to disqualify Judge Yawn upon learning that Judge Yawn had an order prepared prior to the Spencer hearing. In this regard, during the 1995 sentencing, the trial court stated:

[9] Even if the Defendant had been convicted of burglary, robbery with a deadly weapon and first-degree arson, any potential guidelines sentence would be immeasurably preferred over a death sentence.

> . . . Gentlemen, along with you the court has spent three weeks or thereabouts listening to evidence presented in this case. I spent three days last week researching this matter, studying your respective memoranda and working on this case preparatory to these sentencing proceedings. There's nothing that I've heard here that is any different from what I've already considered and heard throughout the preparation for this sentencing. So I don't know if any contribution would be made in any further delay in imposing sentence in this case.
>
> I'll ask you if you have any serious problems with regard to that that you wish me to hear and consider before I proceed to impose sentence.
>
> * * *
>
> I have a tentative written order. These are always tentative. I have made some changes in it here today, but the order is prepared.
>
> * * *
>
> I came here with a tentative order, and some changes have been made in it as this case was proceeding.[10]

(R 240-241). When asked by Mr. Kontos to reschedule the sentencing to afford the trial court an opportunity to consider all the evidence and arguments presented, the trial court responded, "What is it that I have heard that I have not considered? What do you think I've been doing as I sat here listening to it?" (R 242). The State and Mr. Kontos then both discussed with the trial court the need for adequate time to reflect on all additional evidence and argument presented. The trial court then responded, "I don't know how much more consideration I can consider," and "I've heard it time and time and time again," and finally,

[10] Review of the sentencing order reflects that only grammatical changes were made. (R 2081-2092).

> I heard this evidence here today and I have considered it. How much more can I consider it? How much more can I consider it? There comes a point where you cease to consider, and I don't know what else you're doing except to sit on it.

(R 246). Judge Yawn indicated that he in fact had a previously prepared order and knew of no "other way you can approach these things." (R 246).

At the post-conviction evidentiary hearing, Mr. Kontos testified that at the Spencer hearing he presented the Defendant's videotaped statement to the trial court. He testified that he believed that Judge Yawn had come into the courtroom with a sentencing order already prepared. Specifically, he stated, ". . . I don't specifically remember when I learned but I believe I learned at some point during the hearing that he had prepared the sentencing [order] but I don't remember exactly when." (R 1061). Following his presentation of evidence, a lunch recess was taken, and thereafter, the trial court sentenced the Defendant to death. (R1053-1060). Mr. Kontos testified that, "no, never even thought of [moving to disqualify Judge Yawn]," and denied any strategy being involved in his failure to recuse Judge Yawn. (R 1061).

The trial court denied the Defendant relief, stating:

> The Defendant has shown no prejudice under the Strickland standard. On direct appeal from the penalty phase in 1995, one of the issues specifically raised was "whether the trial court erred in refusing to continue the final sentencing after additional evidence was presented." (See Exhibit "J,"

> paragraph 10). This claim was denied by the Supreme Court of Florida. [citation omitted.] Judge Yawn indicated on the record that he did not have a final order, and that he made changes to his tentative order as he heard evidence and testimony presented at the Spencer hearing. The Supreme Court of Florida ruled that Judge Yawn did not err. Counsel cannot be deemed ineffective for failure to do a futile act.

(R 2566-2567). In so ruling, the trial court erred.

Surprisingly, at the time of sentencing in 1995, neither the State, defense counsel nor the trial court seemed aware of the requirements of Spencer v. State, 615 So. 2d 688 (Fla. 1993) which had been decided by this Court two years prior. In Spencer, this Court specifically addressed the "other way [to] approach these things," stating:

> . . . In Grossman, we directed that written orders imposing the death sentence be prepared prior to the oral pronouncement of sentence. However, we did not perceive that our decision would be used in such a way that the trial judge would formulate his decision prior to giving the defendant an opportunity to be heard. We contemplated that the following procedure be used in sentencing phase proceedings: First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, it appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both side to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. . . Third, the trial judge should set a hearing to impose sentence and contemporaneously file the sentencing order.

Id. at 690-691.

Despite this very precise procedure, the trial court had a previously prepared sentencing order and seemed insistent that he could not "consider" the matters presented any more than the half hour[11] he gave it during the lunch recess. (R 242). Importantly, the trial court incorrectly stated that he and the jury had already heard the evidence presented at the sentencing proceeding, that being the Defendant's videotaped statement to law enforcement. Without question, no jury has ever heard this statement. Moreover, the trial court heard the statement only once during the 1991 trial when Judge Yawn found the statement voluntary and thus admissible for impeachment. Interestingly, Judge Yawn indicated that he did not recall having previously watched the Defendant's videotaped statement or having read the transcript of the statement. (R 146-147). Nevertheless, Judge Yawn certainly had never been asked to consider the statement in support of mitigation. Telling is the order's failure to mention in any manner the Defendant's statement with regard to the mitigating circumstance of minor participant.[12] Even more troubling is the fact that the trial court heard from

[11] The record indicates that a recess was taken at 12:40 p.m. following the State's argument. Court reconvened at 1:10 p.m. for the Defendant's argument. The trial court then immediately proceeded to sentencing following defense objection. (R 234; 247).

[12] The sentencing order states:

the Defendant's father who introduced letters written on behalf of the Defendant. (R 172-183). Of uppermost concern is the fact that the trial court had prepared a tentative order without ever having allowed the Defendant, himself, the opportunity to address the court. (R 197-198). These matters were clearly never presented before and deserved the attention dictated in Spencer.

Thus, in this context, the Defendant's 5th and 6th Amendment rights were violated as Mr. Kontos denied the Defendant effective representation by failing to request disqualification of Judge Yawn. Undoubtedly Mr. Kontos would not have allowed a juror who possessed a predisposed verdict prior to the conclusion of the evidence to remain seated on the jury. Thus, it is unreasonable for Mr. Kontos not to have moved to disqualify a predisposed jurist who had determined the sentence to be imposed prior to

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> The defendant's claim that he ". . . was a relatively minor participant in a murder committed by another person" is not supported by the evidence. An expert witness for the state opined that one of the blows of the victim's head was struck with someone's left hand. The witness did not say that the person striking the blow was left-handed. The defendant conjectures that the assailant was left-handed. He is right-handed and therefore could not be the murderer. The evidence points directly toward the defendant as the sole participant in and perpetrator of the murder. This statutory mitigator is not available to him.

(R 2086).

the presentation of all the defense evidence. A timely motion for disqualification, asserting these facts would have been legally sufficient and therefore would have been granted. Mr. Kontos' failure to do so constituted ineffective representation and deprived the Defendant of an impartial sentencing. Judge Yawn's predisposition is evident on the record. Accordingly, the Defendant has satisfied both prongs of the Strickland analysis, and is entitled to post-conviction relief.

ARGUMENT IV

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S CLAIM FOR POST-CONVICTION RELIEF BASED ON TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT EVIDENCE OF STATUTORY AND NON-STATUTORY MITIGATING FACTORS.

In claims XXI through XXIII, the Defendant alleged that defense counsel failed to properly investigate and present significant mitigating evidence which was available at the time of the Defendant's 1995 penalty phase proceeding. In summary, Dr. Riebsame diagnosed the Defendant as having the following: cocaine abuse, cannabis abuse, alcohol abuse, Attention Deficit Hyperactivity Disorder (ADHD), antisocial personality disorder, and cocaine intoxication and cocaine withdrawal. (R 1172-1173). In addition, Dr. Riebsame found the presence of one statutory mitigating circumstance, namely that the Defendant was under an extreme mental or emotional disturbance. Lastly, Dr. Riebsame found that the Defendant's

ability to conform his conduct to the requirements of law was impaired, although not substantially. (R 1185-1189).

The Defendant's family testified regarding extensive, severe and near daily abuse of the Defendant throughout a ten-year period of the Defendant's childhood. The Defendant's father regularly abused alcohol, daily consuming a quart of rum. According to the Defendant's father, he physically brutalized[13] the Defendant. The family also testified regarding the Defendant's drug abuse.

Shockingly, Mr. Kontos testified that he obtained no medical or school records of the Defendant. In this regard, Mr. Kontos testified that he was unaware of the incident[14] with the Defendant and a school teacher which resulted in the Defendant being referred to a psychologist for evaluation. Mr. Kontos denied any strategy, stating simply "didn't do it." (R 1015-1016). He had no knowledge of any alcohol abuse by the Defendant's father or any physical abuse of the Defendant by the father.[15] He wasalso unaware that as a result of his drug abuse, the Defendant had been homeless. (R 1023).

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[13] See R 1428-1429 for details regarding the nature of the beatings.

[14] When the Defendant was twelve years old, he wrote anonymous love letters to his teacher, she rebuked him and he deflated her tires. The letters contained threats to her and her husband. As a consequence, he was suspended from school. (R 1147; 1234).

[15] Mr. Kontos testified that he knew the father was "a strict disciplinarian" however, he failed to pursue this any further. (R 1017).

He did not tell Dr. Riebsame of the Defendant's drug history, nor did he have available any medical, school or prison records to forward to Dr. Riebsame. (R 1025; 1117-1118; 1128). Mr. Kontos, eleven days before commencement of the Defendant's trial, faxed Dr. Riebsame the arrest report and asked the doctor to evaluate the Defendant[16]. Importantly, Dr. Riebsame believed he was there to perform a competency evaluation.[17] Dr.

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[16] Dr. Riebsame met with the Defendant for approximately one hour and administered two psychological tests. However, according to Dr. Riebsame he did not focus entirely on competency but rather "I wanted to make sure that there were –and this was in my own mind, I wanted to make sure that there was no possible insanity defense issue here." (R 1121).

[17] In this regard, Dr. Riebsame recalled

> He told me that he was preparing for a death penalty sentencing within a week's time and he wanted me to see Mr. Willacy at the Detention Center and asked if that was possible. He wanted to make sure that Mr. Willacy was competent to proceed to trial and I agreed to do that type of evaluation for him. He forwarded to me a one-page or two-page arrest report.

(R 1113-1114). He further stated:

> I didn't assume that it was my job to prepare mitigation evidence in this case given what I was provided.
>
> I knew that as I carried out the competency evaluation that information regarding Mr. Willacy's mental health would be collected and that Mr. Kontos might apply that information in a mitigation setting by a competency evaluation seeking information about a person's possible history of psychological problems so I knew I was going to gather any information that might be applicable by Mr. Kontos.

(R 1116). In this regard, Dr. Riebsame believed he was acting according to Mr. Kontos' directions. (R 1123).

Riebsame noted that eleven days was an insufficient period[18] of time to conduct a thorough mental health evaluation for mitigation purposes. Dr. Riebsame emphatically stated that he had not done the evaluation necessary to focus on mitigation issues in a thorough manner. (R 1122).

Mr. Kontos stated that he never considered trying to relate the Defendant's drug abuse to the homicide. (R 1023). He did not know that the Defendant had ADHD. (R 1028). Particularly troubling was Mr. Kontos' attitude toward a psychological examination of the Defendant:

> I didn't feel it was necessary at that time. And even after Mr. Onek suggested to me I felt pretty confident that I thought it was probably going to be a waste of time.

(R 1076).

The trial court denied the Defendant's claim for relief, concluding that "Mr. Kontos made a sound strategic decision not to further pursue the mental mitigation evidence described under claims XXI and XXII in the Defendant's post-conviction motion. This evidence would have conflicted

[18] Dr. Riebsame testified that had he been preparing for mitigation, he would have done additional testing of the Defendant and would have requested additional information from Mr. Kontos. (R 1117). Specifically he noted that he would have wanted a more thorough record of the offenses such as interview statements and police reports. He would also have carried out a comprehensive psychological and neuropsychological battery of tests. (R 1117). He also would have conducted interviews of treating physicians and counselors, relatives, and "anyone that might have some insight into history." (R 1118).

with Mr. Kontos's strategy during the penalty phase." (R 2573-2574). The trial court further stated:

> After speaking with Dr. Riebsame, Mr. Kontos made a strategic decision not to pursue mental health mitigation further because of the potential diagnosis of anti-social personality disorder, a mental health condition that Mr. Kontos believed would be devastating to the defense. The Court finds this was a sound strategic decision because the conclusion that the Defendant was a sociopath, psychopath, or had antisocial behavior would have conflicted with 1995 penalty phase counsel's strategy of presenting the Defendant as an ordinary person whose life was worth saving. . . .
>
> * * *
>
> Mr. Kontos also was not ineffective for his failure to present mitigation evidence regarding the physical abuse the Defendant suffered as a child and adolescent. . . Mr. Kontos interviewed the Defendant and his family members and friends, but there was no indication from them that the Defendant had suffered an abusive or dysfunctional family life.

(R 2577-2580).

The trial court concluded that the Defendant had failed to demonstrate any prejudice from defense counsel's failure to present the mitigation evidence. In this regard, the trial court noted that there was overwhelming evidence of the Defendant's guilt of first-degree premeditated murder, and there was substantial, compelling aggravation found by the jury and the trial court. The trial court concluded that the outcome of the penalty phase would not have been different, stating, "[t]here were five aggravating factors in this case, and even if all of the mitigators had been proven as the Defendant

contends, they would not have outweighed any one of the aggravators." (R 2581-2582).

When evaluating claims that counsel was ineffective for failing to present mitigating evidence, the defendant must show that counsel's ineffectiveness "deprived the defendant of a reliable penalty phase proceeding." Asay v. State, 769 So. 2d 974, 985 (Fla. 2000). In determining whether the penalty phase proceedings are reliable "[t]he failure [of counsel] to investigate and present available mitigating evidence is a relevant concern along with the reasons for not doing so." Id. at 985 (quoting Rose v. State, 675 So. 2d 567, 571 (Fla. 1996)).

This Court has recognized that "the obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated." State v. Lewis, 838 So. 2d 1102, 1103 (Fla. 2002). "An attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." Ragsdale v. State, 798 So. 2d 713, 716 (Fla. 2001)(quoting State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000)). See also Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984)(counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary).

The United States Supreme Court noted in Wiggins v. State, 539 U.S. 510, 522-523, 123 S.Ct. 2527, 156 L.Ed. 2d 471 (2003)

> [The] principal concern in deciding whether [counsel] exercised "reasonable professional judgmen[t]" is not whether counsel should have presented a mitigation case. Rather, [the] focus [is] on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background was itself reasonable. In assessing counsel's investigation, [the Court] must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time," [Strickland], at 689, 104 S.Ct. 2052 ("[E]very effort [must] be made to eliminate the distorting effects of hindsight").

The Wiggins court noted that efforts should be made to discover available mitigating evidence and evidence to rebut any aggravating evidence from such sources as "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influence." Id. at 524 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6, at 133 (1989)).

Thus, in assessing the reasonableness of an attorney's investigation, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Wiggins, 539 U.S. at 527. Importantly, the

court noted that "Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." Id. (citing Strickland, 466 U.S. at 691, 104 S.Ct. 2052).

In Orme v. State, 896 So. 2d 725 (Fla. 2005), this Court granted the defendant relief on his claim that his bipolar disorder was not thoroughly investigated and provided to the jury. In this regard, the record established that trial counsel was aware that the defendant had been diagnosed with bipolar disorder yet trial counsel failed to inform his experts of the diagnosis and failed to provide the experts with the defendant's prison medical records which would have shown medications prescribed to the defendant indicating the disorder. Id. at 733.

Specifically Drs. McClane and Warriner testified at both the defendant's trial and post-conviction hearing. Dr. McClane testified that he reviewed the defendant's 1980's hospital records, tapes and transcripts of interviews, records from drug treatment, psychological testing records, and the autopsy report of the victim. He visited the defendant once on the evening before trial. He testified that evaluating a patient once, on the eve of trial was not the normal procedure. Orme v. State, 896 So. 2d 734. At

trial he testified that the defendant suffered from "mixed personality disorder with chronic intermittent depression and addiction to cocaine." In preparation of the post-conviction hearing, Dr. McClane reviewed the defendant's prison medical records and the letter from Dr. Walker indicating the diagnosis of bipolar disorder. He was also given affidavits of the defendant's family and friends with anecdotal information about the defendant's prior behavior which was indicative of the disorder. He testified at the post-conviction hearing that if he had received this type of information prior to trial he would have diagnosed the defendant with bipolar disorder and would have been able to link the defendant's mental illness with his drug addiction. Id.

Dr. Warriner testified that he did not recall receiving any information indicating that the defendant was bipolar. He indicated that at trial he was not asked to diagnosis the defendant but rather merely describe his symptoms. He testified that had he been asked to diagnose the defendant he would have provided a diagnosis of bipolar disorder. Orme v. State, 896 So. at 734.

This court concluded in Orme that counsel's decision to conduct no further investigation of the defendant's bipolar diagnosis and forego presentation of this defense was deficient performance. In this regard, this

court held "[a] diagnosis of a major mental illness would reasonably require further investigation, and counsel should have realized that pursuing this lead was necessary to make an informed choice about whether to present evidence of [the defendant's] mental illness." Id. at 735.

The Defendant's case is a case where "counsel never attempted to meaningfully investigate mitigation. See Rose v. State, 675 So. 2d 567, 572 (Fla. 1996)(concluding that defendant was entitled to relief in case where trial court found no mitigating circumstances and counsel made practically no investigation of mitigation and presented little mitigation evidence in the sentencing proceedings despite the existence of substantial evidence that would have been revealed by reasonable investigation). See also Baxter v. Thomas, 45 F.3d 1501, 1515 (11th Cir. 1995)(petitioner was prejudiced "where defense counsel was deficient in failing to investigate and present psychiatric mitigating evidence").

Here, Mr. Kontos and Mr. Thompson had no experience in death penalty litigation. Neither had ever conducted a penalty phase proceeding, observed a penalty phase proceeding, or attended any death penalty seminars. Their preparation for the Defendant's case consisted of a review of

the 1991 trial transcript, a discussion with attorney Andy Fouche[19] regarding his plan of defense and a review of some unknown portions of Judge Schaeffer's manual. (R 976-978; 981-986; 999-1000; 1086).

As a result of this dearth of knowledge and experience, Mr. Kontos did not retain an investigator to assist him. He clearly was unaware of his responsibility and the urgent necessity to investigate and present mitigation evidence.

Mr. Kontos's ineffectiveness is evident in his securing the limited services of a mental health expert only eleven days prior to the start of the Defendant's trial. Compelling is his failure to provide the psychologist with any records or other information regarding the Defendant. Even more compelling is Mr. Kontos's limiting the psychologist's review to issues of competency. Dr. Riebsame plainly testified that he was unaware that he was tasked with investigating mitigation evidence. Dr. Riebsame emphasized that the records provided and the time allotted for mental health evaluation was woefully insufficient, and he did not conduct the necessary investigation to development mental health mitigation. Mr. Kontos boldly testified at the

[19] Mr. Fouche was one of "two young associates" with Mr. Ciener at the time of the February 17, 1995 motion for continuance filed by Mr. Ciener, in which he indicated that he had read less than ten percent of the record. Mr. Kontos testified that at the time he spoke with Mr. Fouche, he did not know whether Mr. Fouche had read the trial transcript or reviewed the discovery. (R 981-982).

evidentiary hearing that securing the assistance of a mental health expert was a "waste of time[20]," thus evidencing a "going through the motions[21]" approach to mitigation. Mr. Kontos's approach resulted in an eleventh-hour attempt to secure a mental health expert. He limited the psychologist to a competency evaluation and provided him only with the two-page arrest report. By no standard can this be deemed a competent investigation into mental health mitigation. Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed. 2d 53 (1985). In truth, investigation into mental health mitigation was non-existent here solely due to the inadequate representation of Mr. Kontos. As a consequence, an abundance of available mental health evidence was not presented to the jury.

This is not a situation where post-conviction counsel has merely secured a more favorable diagnosis based on substantially the same information available at the time of trial. Rather, Dr. Riebsame, the original

[20] Had Mr. Kontos done a thorough investigation of the Defendant's background, he would have uncovered a number of "red flags" that would have dictated the need for adequate mental health investigation. For example, review of the Defendant's school and medical records would have revealed symptoms of ADHD, drug usage and past psychological testing.

[21] Mr. Kontos' "going through the motions" approach conclusively demonstrates his fundamental lack of understanding of the role of mitigation. The need for some explanation for this homicide was paramount. Mr. Kontos acknowledged that "one of the biggest problems" was that the defense offered no explanation for the crime and that the jury needed to hear an explanation. Yet, he failed in any manner to attempt to develop an explanation. (R 1097-1098).

expert armed with the available information[22] has been able to formulate opinions regarding existing mitigation. Particularly compelling is the fact that had Dr. Riebsame had access to the information revealed during post-conviction proceedings, he would have provided mental health mitigation that could have helped establish at least one statutory mitigating factor as well as a sizeable amount of non-statutory mental health mitigation. Thus Dr. Riebsame's testimony would have allowed the jury, the trial court and this Court to consider the statutory and non-statutory mitigating evidence.

Pursuant to Wiggins, Mr. Kontos's decision not to present mitigation evidence was not reasonable because the investigation upon which this decision rested fell far below prevailing professional norms. Any meaningful analysis of ineffective representation must necessarily include the disparity between what counsel uncovered during the original investigation and what post-conviction counsel presented in the post-conviction hearing. The record conclusively establishes that Mr. Kontos presented little if any mitigation[23]. In contrast, a wealth of mitigation evidence was presented at

[22] See R 1130-1132 for a detailed list of records examined by Dr. Riebsame. In addition, Dr. Riebsame interviewed both of the Defendant's parents as well as met with the Defendant on a number of occasions. (R 1135; 1140-1141).

[23] The trial court rejected three statutory mitigating factors and six non-statutory mitigating factors. Of the remaining non-statutory factors, the trial court assigned them little weight. (R 2089-2090).

the evidentiary hearing. All of this evidence was available in 1995 and could have been readily uncovered with competent investigation.

Even the State's expert does not dispute that there is non-statutory mitigation of abuse and acknowledges a legitimate dispute over the existence of a diagnosis and a statutory mitigating circumstances. (R 1527-1528). Defense counsel deprived the Defendant of a thorough investigation into all available mitigating evidence and thus, an effective psychological expert. Presentation of this mitigation evidence coupled with an explanation of the significance of the mitigation would have established that life imprisonment and not death was the appropriate punishment for the Defendant. Thus the second-prong of Strickland is satisfied.

Equally egregious was Mr. Kontos's feeble effort to uncover non-statutory mitigation. The family was told, and Mr. Kontos confirmed, that the focus of the defense was on the Defendant's good deeds and character. (R 1021; 1343; 1434-1435). Understandably, in that context, the family would not understand to volunteer the details of weekly, brutal physical abuse of the Defendant throughout approximately one decade of the Defendant's childhood. Likewise, the family would not have known to volunteer incidents of spousal abuse and chronic and severe alcohol abuse by the father. The Defendant's mother testified that Mr. Kontos never asked

her about abuse[24] but rather told her to "get people who can tell of Chad's good behavior and good conduct and good things that he had done." (R 1385). She testified that she did not talk about the abuse because she "did not know it mattered." (R 1400).

When Mr. Kontos learned that the Defendant's father was a "strict disciplinarian," he failed to inquire further in any manner. Surely this mandated the simple follow up question of "how so" or "please explain." Yet, Mr. Kontos failed to make that necessary inquiry. Evidence of the father's alcoholism, spouse-abuse, and chronic and brutal child abuse was readily available upon competent inquiry. As such, Mr. Kontos's representation cannot be deemed effective.

The mitigation evidence presented during the post-conviction proceeding clearly "exceed[ed] the quality and quantity presented at trial." Hodges v. State, 885 So. 2d 338, 346, 362 (Fla. 2004). Mr. Kontos presented no mental health testimony in mitigation of a seemingly irrational crime committed by a person with no significant criminal history. The only means to develop a credible explanation for the Defendant's action would have been through a thorough mental health evaluation. As noted in Wiggins, "any reasonably competent attorney would have realized that

[24] The father also confirmed that he was never asked about abuse. (R 1334; 1425).

pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in [the defendant's] background." Id. at 525. Here, it is apparent that a competent background investigation would have led to compelling mitigating evidence. Defense counsel could then have placed that evidence in context, giving it greater mitigating force.

Although little mitigation was presented, the death recommendation was not unanimous. We now know that the Defendant's 5th and 6th Amendment rights were violated as substantial mitigation was never considered by the jury or the trial judge. Mr. Kontos failed to provide any credible reason for his failure to investigate mitigation evidence. In light of the nature of the aggravation, the substantial mitigation that should have been presented and the lack of a unanimous recommendation, the Defendant has demonstrated both deficient performance and prejudice. Thus, he is entitled to a new penalty phase pursuant to Wiggins, and Strickland. See also Rose v. State, 675 So. 2d 567 (Fla. 1996)("In light of the substantial mitigation evidence identified in the hearing below as compared to the sparseness of the evidence actually presented, we find that counsel's errors deprived Rose of a reliable penalty phase proceeding").

ARGUMENT V

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S CLAIM FOR POST-CONVICTION RELIEF BASED ON TRIAL COUNSEL'S FAILURE TO INQUIRE REGARDING JUROR CLARK'S STATUS RESULTING IN FUNDAMENTAL ERROR.

In claim VII of his rule 3.850 motion, the Defendant alleged that trial counsel failed to inquire of Juror Clark regarding his failure to respond to questions posed by the State. At the evidentiary hearing, Mr. Erlenbach testified that he did not know that Juror Clark had pending felony charges at the time of jury selection. He testified that he viewed this information as significant, and while he may not have known to move to strike Juror Clark as statutorily disqualified, he "certainly would move to strike him for cause or use a peremptory challenge had I learned it during voir dire." (R 672). Mr. Erlenbach indicated that he would not have wanted Juror Clark on the jury and "certainly not as the foreman," yet he acknowledged not asking Juror Clark any questions regarding his exposure to the judicial system. (R 673).

Mr. Erlenbach testified:

> If a juror, any juror had said I am being prosecuted now, I'm about to go into PTI – if I remember his testimony right he had not had time to sit on the jury, he had not received his letter saying that he was going into PTI. But had he said I'm being prosecuted by this State Attorney's Office that would have made a very significant

difference and I would have moved to challenged for cause and stricken him peremptorily had the opportunity arisen.

* * *

Well, a juror who has pending charges is clearly in a position to be biased in favor of the State, particularly someone in Mr. Clark's position.

If I remember correctly he was a businessman and it was a business dispute that led to the criminal charges and a person in his position clearly has much more to lose than many other folks who are charged with crimes and somebody in his position who is angling to get into a diversion program, a person who has not ever been charged with a felony before, perhaps never even been charged with a crime before. Certainly somebody in his position is very clearly - - I wouldn't say clearly but likely very easily have a very strong bias for the State particularly in a case this serious. . .

* * *

A circumstance of a person trying to sway a jury one way or the other for their own reasons rather than the way the evidence would lead them. And the circumstances of somebody being prosecuted by the same prosecutor and looking to get their felony charges diverted has a very strong opportunity.

* * *

That's probably one of the primary reasons based on what the State Attorney's - - in fact at the time I think dependent on Mr. White's approval, I think if I remember correctly how PTI was run then, not just the State Attorney's Office but the particular prosecutor prosecuting the case.

(R 684-694).

Following the evidentiary hearing, the trial court denied relief, stating:

> In the direct appeal to the Supreme Court of Florida, the Defendant asserted that Juror Clark was not qualified to sit as a juror because he was under prosecution. Id. The Defendant is improperly attempting to couch an issue raised on direct appeal and resolved adversely to him into an ineffective assistance of counsel claim. [citation omitted]. Even assuming arguendo that defense counsel's performance was deficient, the Defendant has failed to show any prejudice. The Supreme

> Court of Florida found that Clark was not under prosecution. Even if counsel had asked whether Clark was "under prosecution," Juror Clark had no obligation to answer in the affirmative.

(R 2561). In so ruling, the trial court erred.

The issue of whether defense counsel failed to inquire of Juror Clark and his failure to pursue Juror Clark's repeated lack of response cannot be deemed an attempt to re-couch an issue raised on direct appeal. In denying relief, the trial court conveniently and disingenuously limits its review of the issue to whether Juror Clark was pending prosecution. However, the issue posed by the Defendant concerns defense counsels'[25] utter failure to inquire and acquire relevant information as to the desirability of a particular juror. Even if one accepts that Juror Clark was not pending prosecution, the Erlenbachs' failure lead to Juror Clark, the "worst possible defense juror," remaining on the jury and not being peremptorily struck. If the State truly informed the defense of Juror Clark's criminal status and the defense waived any cause challenge, the Defendant's 5th and 6th Amendment rights were violated as it clearly cannot be strategy to let the "worst possible defense juror" sit on the Defendant's jury.

[25] The record indicates that Mrs. Erlenbach questioned Juror Clark and his neighboring jurors during voir dire. (1991R at 630-695).

At stake [in voir dire] is [defendant's] right guaranteed by the Sixth Amendment to an impartial jury; the principal way this right is implemented is through the system of challenges exercised during the voir dire of prospective jurors." United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976)(citing Swain v. Alabama, 380 U.S. 202 (1965)). The purpose of voir dire is to ensure a fair and impartial jury. In this regard, defense counsel must question prospective jurors so that counsel can reasonably conclude that "the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court." Mansfield v. State, 2005 WL 1577910 (Fla. 2005)(quoting Spencer v. State, 842 So. 2d 52, 68 (Fla. 2003)). Quite clearly, adequate voir dire is of the utmost importance in any first-degree murder trial in which the death penalty is sought. Johnson v. State, 903 So. 2d 888 (Fla. 2005).

Here, the Erlenbachs clearly shirked their obligation on voir dire, and in doing so, deprived the Defendant of his 5th and 6th Amendment right to an impartial jury. During voir dire, Juror Clark was directly asked by the State:

> Let me asked both of you [Juror Clark and Juror Giguere]. Have either of you had any prior experience in the courtroom before in any capacity at all?

There was no response from Juror Clark. (1991R 621). Juror Clark and Juror Giguere were then directly asked by the State:

> Have either of you had any sort of contact with a law enforcement agency or officer that left you with a particularly strong feeling about that contact in the way that you were treated or the way your matter was handled?

Again there was no response from Juror Clark. (1991R at 622). Juror Clark's misconduct is highlighted by the response of Juror Hayes, who upon questioning regarding his involvement in the court system, felt compelled to inform the parties of a traffic ticket. Yet, Juror Clark, who had been charged with grand theft, a third-degree felony punishable by up to five years imprisonment, failed to offer that information.

The record conclusively establishes that defense counsel failed to pursue in any fashion Juror Clark's failure to respond to direct questioning.[26] At no time did Juror Clark volunteer information regarding his criminal status or importantly, did defense counsel pursue a response from Juror Clark. Such conduct clearly meets the first-prong of the Strickland analysis.

[26] Thereafter, a number of prospective jurors seated in the jury box along with Juror Clark were asked a variety of questions by the State regarding their exposure to the judicial system. Specifically, Juror Bandini was asked, "Now have you had any prior experiences with the judicial system." (1991R 642). Based on her response, she was asked "That's been your only experience in the courtroom?" (1991R 643). Juror Wynn was asked, "Have you had any prior experience in the courtroom." (1991R 681). Based on her response, she was asked, "And that's the extent of your experience in the courtroom then?" (1991R 682). Juror Hayes was asked, "Ever have any prior experiences in court or in the judicial system as a juror." Juror Hayes responded that he had received a traffic citation once. He was then asked, "Is there anything about that experience that leaves you with any particular feelings about the courts and the criminal justice system." (1991R 726-727).

Unlike in Teffeteller v. Dugger, 734 So. 2d 1009, 1020 (Fla. 1999) and Reaves v. State, 826 So. 2d 932, 939 (Fla. 2002), the Defendant does not fault defense counsel for failing to ask repetitive questioning, nor does the Defendant speculate as to potential bias of jurors. Rather, in the instant circumstance, necessary questions were not asked, and direct questions were left unanswered. Moreover the bias is apparent on its face, and is not the product of conjecture. Had defense counsel followed-up during voir dire with specific questions or required Juror Clark to responded to the questions already propounded, information, namely that Juror Clark had a pending felony charge, would have been uncovered and Juror Clark would have been struck. The 1993 order denying Defendant's motion for new trial specifically notes defense counsel's failure in this regard, stating "…particularly where counsel made no inquiry during voir dire and could have readily discovered the basis for the challenge." (R 1997). The Erlenbachs' performance was deficient and lead to "the worst possible juror" sitting on the Defendant's jury as the foreman, a position of influence. As a consequence, the Defendant was deprived a fair and impartial jury. Accordingly, the Defendant has satisfied both prongs of the Strickland analysis, and is entitled to post conviction relief.

ARGUMENT VI

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN FAILING TO APPLY THIS COURT'S DECISION IN LOWREY V. STATE, 705 So. 2d 1367 (Fla. 1998) RETROACTIVELY IN THIS CASE.

In his motion for post-conviction relief, the Defendant argued that pursuant to Lowrey v. State, 705 So. 2d 1367 (Fla. 1998), the trial court had applied an incorrect standard of law in denying the Defendant's Motion for New Trial. Specifically, in its 1993 order denying the Defendant's motion for new trial, the trial court found:

> Edward Paul Clark testified at the hearing held upon the defendant's Motion for New Trial. The Court finds Mr. Clark to be a credible witness. He related the circumstances surrounding the criminal charge filed against him, and he testified that this matter had no effect whatsoever upon his jury service or deliberations. In the absence of a showing of some bias or prejudice on the part of the juror, the defense has waived any right to challenge the verdict on this basis of a juror's disqualification, particularly where counsel made no inquiry during voir dire and could have readily discovered the basis for the challenge. [citations omitted]

(R 1997). (emphasis added). This Court in Lowrey v. State, 705 So. 2d 1367 (Fla. 1998) examined the question:

> Must a convicted defendant seeking a new trial demonstrate actual harm from the seating of a juror who was under criminal prosecution when he served but, though asked, failed to reveal this prosecution?

This Court concluded that "where it is not revealed to a defendant that a juror is under prosecution by the same office that is prosecuting the defendant's case, inherent prejudice to the defendant is presumed and the defendant is entitled to a new trial." Id. at 1368. In so ruling, this Court noted that,

> [t]he very foundation of our criminal justice process is compromised when a juror who is under criminal prosecution serves on a case that is being prosecuted by the same state attorney's office that is prosecuting the juror.

Lowrey, 705 So. 2d 1369-1370. Such a situation gives rise to a "clear perception of unfairness and the integrity and credibility of the justice system is patently affected." Id. at 1369. See Massey v. State, 760 So. 2d 956 (Fla. 3rd DCA 2000)(defendant entitled to a new trial where juror, although directly questioned, failed to disclose that less then four years prior, she had been charged with a felony, placed in PTI, and later had the case dismissed upon successful completion of the program); Reese v. State, 739 So. 2d 120 (Fla. 3rd DCA 1999)(inherent presumption of prejudice arose when jury deliberations continued with soon-to-be arrested juror). See also Young v. State, 720 So. 2d 1101 (Fla. 1st DCA 1998). Cf. Coleman v. State, 718 So. 2d 287 (Fla. 4th DCA 1998)(juror's failure to disclose prior arrest record did not give rise to "clear perception of unfairness" such that "the integrity and credibility of the justice system is patently affected").

In denying relief, the trial court found:

> Under claim eight, the Defendant alleges that the trial court applied an incorrect standard of law in denying Defendant's motion for new trial. The Defendant asserts that in ruling on the motion for new trial, Judge Yawn determined that the Defendant had failed to demonstrate any prejudice resulting from Juror Clark's service. Citing Lowrey v. State, 705 So. 2d 1367 (Fla. 1998), a case that was issued years after Judge Yawn's ruling, the Defendant contends that "inherent prejudice to a defendant is presumed when a juror is under prosecution by the same state attorney's office that is prosecuting the defendant."
>
> The Defendant's claim that Judge Yawn applied the wrong legal standard when ruling on the Defendant's motion for new trial is barred from being raised at this postconviction juncture of the case, because it is an issue that could have been raised on direct appeal. [citation omitted.]

(R 2303-2304). In concluding the issue was procedurally barred, the trial court failed to consider this Court's ruling in Lowrey v. State, 705 So. 2d 1367 (Fla. 1998) and its retroactive application. Therefore, the trial court's order must be reversed.

Lowrey clearly meets Florida's retroactivity analysis announced in Witt v. State, 387 So. 2d 922 (Fla. 1980). Witt held that a change in the law does not apply retroactively in Florida unless the change (a) emanates from this Court or the United States Supreme Court; (b) is constitutional in nature; and (c) constitutes a development of fundamental significance. Id. at 931. A development of fundamental significance is either one that "places beyond the authority of the state the power to regulate certain conduct or impose

certain penalties" or is "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test in Stovall[27] and Linkletter.[28]" Witt v. State, 387 So. 2d at 929.

This Court's Lowrey decision is constitutional in nature and constitutes a development of fundamental significance of such magnitude as to require retroactive application under the three-fold test; namely: (a) the purpose to be served by the rule; (b) the extent of reliance on the prior rule; (c) the effect that retroactive application of the new rule would have on the administration of justice. Witt 387 So. 2d at 926.

Quite clearly, the purpose of the rule in Lowrey is to safeguard the fairness of the trial and the integrity of the criminal justice system. As noted in Witt, new rules will not warrant retroactive application "in the absence of fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding." Witt, 387 So. 2d at 929. Lowrey casts such doubt as the integrity of the trial is at issue, and therefore, the first Witt factor has been satisfied.

The second Witt factor, the extent of reliance on the prior law also supports retroactive application of Lowrey. The only Florida law addressing the statutory eligibility of jurors was Rodgers v. State, 347 So. 2d

[27] Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967).
[28] Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).

610 (Fla. 1997). Rodgers addressed with whether a defendant was entitled to a new trial where a juror who was under 18 years of age sat on the jury. This Court denied relief, concluding that there was no perception that the disqualified juror rendered an unfair or impartial verdict. Rodgers addressed a very limited situation, without widespread application. As such, there can have been little or no reliance on the old law.

Lastly, retroactive application of Lowrey will have little effect on the administration of justice. With certainty, it would not require the reconsideration of any large number of cases nor require a large undertaking by the criminal justice system. In Witt, this Court noted:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases."

Witt, 387 So. 2d at 925 (emphasis added) (quoting ABA Standards Relating to Post-conviction Remedies §2.1 cmt. At 37 (Approv. Draft 1968)). It is highly likely that the Defendant is the only death row inmate, possibly the only inmate, affected by the Lowrey decision. Therefore the third-prong of

Witt has been satisfied, and the Defendant is entitled to relief under Lowrey, a clearly indistinguishable case.

Lowrey also meets the more restrictive federal test[29] for retroactive application under Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Under Teague, new rules would not be applied retroactively unless they (1) placed conduct beyond the power of the government to proscribe, or (2) announced a "watershed" rule of criminal procedure that "implicate[s] the fundamental fairness of the trial" and is "implicit in the concept of ordered liberty." Johnson v. State, 904 So. 2d 400, 30 Fla.L.Weekly S297 (Fla. 2005)(citing Teague v. Lane, 489 So. 2d at 311).

Lowrey clearly meets the Teague test. The Lowrey decision is easily classified as a "watershed" rule in that it establishes the criteria for review when statutorily disqualified jurors render a verdict. Lowrey defines when and why relief is appropriate:

> In Rodgers, we held that a defendant was not entitled to a new trial under circumstances where the juror was statutorily disqualified because the juror was under eighteen years of age. In that case, no evidence or perception existed to indicate that the disqualified juror rendered an unfair or impartial vote. In this case, however, there is a clear perception of unfairness, and the integrity and credibility of the justice system is patently affected.

[29] See Johnson v. State, 904 So. 2d 400 (Fla. 2005).

Lowrey, 705 So. 2d at 1369. The Lowrey decision announced a rule of criminal procedure that is implicit in the concept of ordered liberty. In this regard, the Lowrey court wrote,

> . . . the very foundation of our criminal justice process is compromised when a juror who is under criminal prosecution serves on a case that is being prosecuted by the same state attorney's office that is prosecuting the juror.

Id. at 1370. Thus the Defendant is entitled to relief under Lowrey. Moreover, Juror Clark's service on the Defendant's jury violated the Defendant's 5th and 6th Amendment rights. Accordingly the trial court's order denying relief must be reversed.

ARGUMENT VII

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR POST-CONVICTION DNA TESTING

The Defendant sought DNA testing pursuant to Florida Rules of Criminal Procedure 3.853 on four items of evidence, namely: a man's pair of multi-colored shorts, a green tank-top shirt, a white men's shirt and a napkin. The Defendant alleged that DNA testing on the napkin and the multi-colored shorts would establish that the blood[30] on those items belong to the Defendant's girlfriend. According to the Defendant, the DNA results would

[30] The testimony at trial established that the blood on these items were Type A positive blood. Both the victim and the Defendant's girlfriend were Type A positive blood. (1991R at 2348).

substantiate the Defendant's position that blood was deposited on these items during a confrontation between the Defendant and his girlfriend and not during the assault on Mrs. Sather, thus eliminating incriminating blood evidence. As to the green tank-top shirt and white shirt, the State urged at trial that these had been worn by the murderer. The Defendant sought DNA testing to determine the identity of the wearer of these items of clothing, and thereby exclude him as the perpetrator. (R 2329-2331).

Ms. Pullar testified that DNA testing could still be done on the evidence because DNA was "extremely stable." She testified specifically regarding the white shirt and the green tank-top shirt that DNA testing could be done to "determine who [was] the wearer of the garment[s]." (R 862-863). She explained that the collar or armpit areas that had come into contact with the wearer's body, could be examined and sloghed cells would be tested. (R 931). Such testing could potentially include or exclude the Defendant as the perpetrator. (R 864).

She testified that she had previously used such testing while employed with Contra Costa County Sheriff's Department when it was important to determine the wearer of a garment. (R 933). At the hearing Ms. Pullar was asked if the clothing could have been contaminated if it had been exhibited to the jury during the trial:

> Not to the level that you pick it up in DNA. That work has been done by the FBI in mere handling and the collection of evidence. What they've done is taken items and handed them around and then tested them for trace quantities of DNA like you're talking about and it doesn't contaminate the garment or the items to the point that you would get a false positive. Work has been done and published by the FBI years ago.

(R 935). Thus she explained that handling of the items may have resulted in contamination, but would not have been sufficient to yield a false positive.

Mr. Harry Hopkins, a laboratory analysist with the Florida Department of Law Enforcement, testified that it is possible to obtain enough DNA from an item of clothing to determine whether someone has been in contact with that item of clothing, and that his lab conducts such testing on a regular basis. He explained that a person deposits DNA on the clothing through transfer of cellular material that occurs by the rubbing of clothing on the body. (R 1600-1601).

He testified that there have been a number of times when the lab has been unable to determine who had previously contacted the item, estimating that there is a 50-50 chance of detecting DNA. With regard to the white men's shirt, he stated:

> That is possible, it's a little bit hard to predict. But based on the collared area of the shirt- - most T-shirts do not rise up into the collared area so if the T-shirt did not rise up in the collared area of the shirt, then there still might be a very good possibility that it would be 50-50 that we may be able to develop something from the collared area itself. If the undershirt, for whatever

> reason and I can't think of an undershirt that does this, but if it were to go up into the collared area, then it would theoretically shield completely that person's skin from coming in contact with the collar, so that would almost virtually eliminate the ability for us to test that.

(R 1602-1603).

He acknowledged that despite the passage of time, it was "certainly possible" to obtain DNA results. (R 1605-1606). He agreed that DNA testing could be performed, but indicated concern over "the conclusion made from the testing." (R 1612). He also indicated that the absence of the Defendant's DNA on the green tank-top shirt would not necessarily mean that the Defendant could not have worn the shirt. (R 1602).

The State argued that the Defendant was not entitled to DNA testing because even if someone else's DNA was found on the items, it would not mean that the Defendant was not involved in the homicide. The State also argued that if the Defendant's DNA was not found on the items, that would not necessarily mean that the Defendant was not involved in the homicide because the Defendant may not be a "sluffer." In this regard, the State asserted "it isn't going to answer any questions." (R 1649).

The trial court denied the Defendant's request for DNA testing of the napkin and multi-colored shorts, stating that, "the Defendant has failed to explain with reference to specific facts about the crime, how the results will

exonerate the Defendant or mitigate his death sentence on the minor participant theory." (R 2335). The trial court's analysis is flawed.

Clearly, the DNA results would negate the State's claim of direct evidence linking the Defendant to the homicide. Further, the DNA results would confirm the absence of the victim's blood on the Defendant's clothing, and thus, bolster the Defendant's minor participant theory. These results would corroborate the fact that the victim was unharmed when the Defendant left her home and the Defendant was not present during the murder. Therefore, the Defendant was entitled to DNA testing on the napkin and the multi-colored shorts. The trial court's order fails to address the requested testing of these two items.

In denying the Defendant's request for DNA testing of the green tank-top shirt and the white shirt, the trial court relied on the testimony of Mr. Hopkins. The trial court concluded that the Defendant had failed to establish a reasonable probability that he would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial. (R 2335). However, in denying the motion, the trial court failed to consider the testimony of the Defendant's expert, Ms. Pullar.

In Robinson v. State, 865 So. 2d 1259, 1264-1265, (Fla.), cert. denied, 540 U.S. 1171, 124 S.Ct. 1196, 157 L.Ed. 1224 (2004), this Court held:

> Pursuant to Florida Rule of Criminal Procedure 3.853, the defendant must allege with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence. [citations omitted] It is the defendant's burden to explain, with reference to specific facts about the crime and the items requested to be tested, how the DNA testing will exonerate the defendant of the crime or will mitigate the defendant's sentence.

Further, the defendant must demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case. Hitchcock v. State, 866 So. 2d 23, 27 (Fla. 2004)

Florida Rule of Criminal Procedure 3.853(c)(5) provides that the trial court in its order must make the following findings:

> c. Whether it has been shown that physical evidence that may contain DNA still exists.
> d. Whether the results of DNA testing of that physical evidence likely would be admissible at trial and whether there exists reliable proof to establish that the evidence containing the tested DNA is authentic and would be admissible at a future hearing.
> e. Whether there is a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

See also Cole v. State, 895 So. 2d 398 (Fla. 2005).

The Defendant alleged with specificity the existence of physical evidence that may contain DNA and the nexus between the physical results of each piece of evidence and the probability of acquittal or a lesser sentence. Specifically, the Defendant alleged that DNA results would

establish that the Defendant was not the wearer of two items of clothing which were worn during the criminal episode and were found at the murder scene. The DNA results would meaningfully corroborate his assertion of minor participant, and thereby, establish a statutory mitigating circumstance.

The State argued that the DNA test results would not be admissible due to claims of potential contamination. However, Ms. Pullar put to rest any concerns of contamination. Both experts agreed that DNA testing could be performed and results obtained. Such results at a minimum bear directly on the presence of the statutory mitigator of minor participant, and thus establish the required nexus between the potential DNA results and the issues in the case. It is clear that the Defendant met his burden of proof, and is entitled to the requested DNA testing. Accordingly, the trial court's order denying the Defendant's request for post-conviction DNA testing must be reversed.

CONCLUSION

Based on the foregoing, the trial court's order denying the Defendant's Motion for Post-Conviction Relief must be reversed.

CERTIFICATION OF TYPE

It is hereby certified that the size and type used in this Brief is 14 point Times New Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Barbara Davis, Esquire, Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118 by U.S. Mail this 2nd day of November, 2005.

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