IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-433

ERIC SCOTT BRANCH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal is from the denial of Appellant's motion for postconviction relief by Circuit Court Judge Nickenson, First Judicial Circuit, Escambia County, Florida, following an evidentiary hearing. This proceeding challenges both Appellant's convictions and his death sentence.

The following abbreviations will be used to cite to the record in this cause, with appropriate page number(s) following the abbreviation:

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

"TT." -- trial transcript on direct appeal to this Court;

"PC-R." -- postconviction record on appeal in this proceeding;

"PC-T." -- postconviction transcript of evidentiary proceedings.

REQUEST FOR ORAL ARGUMENT

Appellant has been sentenced to death and is, therefore, in peril of execution by the state of Florida. If this Court grants relief, it may save his life, denial of relief may hasten his death. This Court generally grants oral arguments in capital cases in the current procedural posture. Appellant, therefore, moves this Court, pursuant to Florida Rule of Appellate Procedure 9.320 (and case law interpreting the rule) to grant him oral argument in this case and to set aside adequate time for the substantial issues presented to be fully aired, discussed, and for undersigned counsel to answer any questions this Court may have regarding the instant appeal.

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STATEMENT OF CASE

Appellant was tried in Escambia County, Florida, and convicted of first-degree murder, sexual battery and grand theft[1]. The jury trial commenced on March 7, 1994 [R. 1]. On March 10, 1994, the jury found Mr. Branch guilty as charged [R. 935]. On March 11, 1994, the jury recommended death by a vote of 10-2 [R. 1032]. On May 3, 1994, the Court imposed the death sentence. The Florida Supreme Court affirmed Appellant's convictions and death sentence on direct appeal. Branch v. State, 685 So. 2d 1250 (Fla. 1996), *rehearing denied* (January 8, 1997)[2]. Petition for Writ of Certiorari to the United States Supreme Court was denied on May 12, 1997. Branch v. Florida, 520 U.S. 1218 (1997). On May 7, 1998, Appellant timely filed an initial, but incomplete, "shell" postconviction motion to toll the time to file his Petition for Writ of Habeas Corpus in

[1] The court presented a general verdict to the jurors offering premeditated first-degree murder and felony murder. Despite this, the record indicates that the State argued felony murder premised upon the underlying sexual battery charge.

[2] The following issues were raised on appeal: (1) failure to grant a continuance; (2) failure to conduct hearings to determine counsel's competence; (3) failure to give a requested instruction on circumstantial evidence; (4) insufficient evidence; (5) comment on right to silence; (6) photo of victim; (7) failure to give a requested instruction defining mitigating evidence; (8) evidence of another crime, and (9) victim impact evidence.

federal court[3] [PC-R. p137-200].

On June 30, 2003, the office of Capital Collateral Regional Counsel - North ceased to exist. Undersigned Counsel was appointed to represent the Defendant as of July 14, 2003 [PC-R. Vol. I, p877-878]. Appellant filed his Second Amended 3.850 Motion October 10, 2003. An order granting an evidentiary hearing was entered on December 15, 2003 [PC-R. p1044-1047]. An evidentiary hearing was conducted April 26-28, 2004 [PC-T. Vol. I-III]. The Trial Court entered an order denying Appellant's Motion to Vacate on February 24, 2005 [PC-R. Vol. IX, p1591-1616]. Appellant filed his Notice of Appeal on March 4, 2005 [PC-R. Vol. IX, p1617-1618].

[3] Appellant filed his initial motion prior to the effective date of the new Fla. R. Crim. P. 3.851(e)(1) setting a page limit and other requirements.

STATEMENT OF FACTS

The facts adopted by this Court set out in State of Florida v. Branch, 685 So.2d 1250 (Fla. 1996) are as follows:

> Eric Branch was wanted by police in Indiana and because the car he was driving, a Pontiac, could be traced to him, he decided to steal a car from the campus of the University of West Florida in Pensacola. When Susan Morris, a young college student, approached her car after attending an evening class, January 11, 1993, Branch accosted her and stole her red Toyota. Morris' nude body was found later in nearby woods; she had been beaten, stomped, sexually assaulted and strangled. She bore numerous bruises and lacerations, both eyes were swollen shut, and a wooden stick was broken off in her vagina. Branch was arrested several days later in Indiana and charged with first-degree murder, sexual battery, and grand theft.
>
> Evidence introduced at trial showed the following: On the night of the murder, a friend saw Branch with a cut hand, which Branch said he had gotten in a bar fight; that same night, Branch was seen on campus wearing a pair of black and white checkered shorts and driving a "smallish red vehicle"; Branch was sighted in Bowling Green, Kentucky, two days later, and Morris's car was recovered the next day in a parking lot there; when Branch was arrested, he had in his possession a pair of black and white checkered shorts stained with his own blood; a bloodstain matching Morris was found on the back of the passenger seat of the red Toyota; when Branch's Pontiac was discovered abandoned in the Pensacola airport parking lot, "medium velocity splatter" bloodstains matching Morris's DNA profile were found on boots and socks inside. Branch testified on his own behalf and was convicted as charged.
>
> The trial court followed the jury's ten-to-two vote and imposed a sentence of death on the first-

> degree murder count based on three aggravating circumstances and several nonstatutory mitigating circumstances. The court imposed life imprisonment on the sexual battery count and five years imprisonment on the grand theft charge. Branch raises nine issues.

However, the facts behind the scenes are set out in this document, the original record, and at the Evidentiary Hearing as follows:

On February 23, 1993, an Indictment was filed against Appellant [R. Vol. I, p1]. While Appellant was being held in jail on another charge in Panama City, he was served with the Indictment on June 10, 1993[R. Vol. I, p4]. Assistant Public Defender Earl Loveless was the first to represent Appellant. According to Mr. Allbritton's (trial counsel) Motion for Continuance [R. Vol. I, p115], he took over the representation of Appellant on November 1, 1993, and was concurrently lead counsel on another death case and a major drug case. The trail in this cause began on March 7, 1994, slightly over four months after trial counsel assumed responsibility of the case.

PRE-TRIAL PERFORMANCE

CONTINUANCES TO HIRE MENTAL HEALTH EXPERT - On numerous occasions during pre-trial proceedings, trial counsel motioned the court for a continuance in order to hire a mental health expert [R. Vol. I, p115-116, p158, 162; Vol. II, p290; TT. Vol. VI, p942]. At the Evidentiary Hearing, trial counsel conceded

he did not hire a mental health expert, although he indicated to the Court that hiring a mental health expert was the reason he requested the continuances.

At the Evidentiary Hearing, trial counsel's explanation for not hiring a mental health expert was, "there was no need to" [PC-T. Vol. I, p143]. If this was true, trial counsel contradicted that statement by making misrepresentations to the Court, as well as Appellant, that he intended to hire a mental health expert. Trial counsel essentially admitted such misrepresentation at the Evidentiary Hearing by stating that he did not pursue hiring a mental health expert after each request for a continuance [PC-T. Vol. I, p150]. Trial counsel also testified he had spoken to an unknown public defender and was told that Dr. Larson (psychologist hired by the public defender to examine Appellant prior to trial counsel taking over the case) had evaluated Appellant. Trial counsel also testified he had not spoken to Dr. Larson [PC-T. Vol. I, p143].

INVESTIGATOR - Trial counsel testified at the Evidentiary Hearing that he did not hire an investigator (Fred Wimberly) until one week prior to the beginning of trial for the sole purpose of finding Eric St. Pierre (the person Appellant testified at trial was the actual killer) [PC-T. Vol. I. 155-156].

Mr. Wimberly testified at the Evidentiary Hearing that Appellant told him who to speak with and where to find Eric St. Pierre [PC-T. Vol. III, p325, p331]. He also testified that he found a man named Eric St. Pierre and took his picture. Appellant then identified the man in the photograph as the person who killed Ms. Morris, and that he showed the picture to trial counsel [PC-T. Vol. I. 326-328]. Trial counsel denied Mr. Wimberly's testimony. However, the trial court made no reference to Mr. Wimberly's testimony in its order.

HIRING OF EXPERTS - At the Evidentiary Hearing, trial counsel acknowledged he did not hire any experts, although he knew the State would be calling experts [PC-T. Vol. I, p141]. Trial counsel testified at the Evidentiary Hearing that he had read about the subject matter which the State's experts would testify to. Although he had no expertise on the subject, he felt he would be able to effectively cross-examine the experts [PC-T. Vol. I, p141-142]. He also didn't want to lose open-and-close at the trial, and he was concerned that the State would discover the identity of his experts [PC-T. Vol. II, p282], via the County's billings [PC-T. Vol. II, p282].

During cross-examination at the Evidentiary Hearing trial counsel stated:

Q. Now is there any disadvantage when a defendant is declared partially indigent and asks his counsel or his counsel decides to retain an expert?

A. Well, if he's not declared partially indigent, I can go out, I can get an expert, I can ask that expert to look at the evidence and if it comes back and I don't like what they've said, I don't have to list that person as a witness. However, if he's been declared partially indigent for costs, whether I want to call that person as a witness or not, the State now knows because I've got to file a motion to have that person paid, they now know who that expert witness is and if I get an expert witness that's going to come back and say something that doesn't fit with my client's testimony, now I've helped, I've assisted the State in their case.

And when you're doing these types of cases and you have an individual declared partially indigent, you have to be careful with the experts. You go out and you can go out and get an expert and that expert can come back and absolutely agree with the State's expert. Now that's not somebody I want to give to the State. So, you know, once, again, if there are ways for me to get that information in to the jury through the State's witnesses, then I see no need to hire an expert.

[PC-T. Vol. II, p230-231].

MOTION TO SUPPRESS EVIDENCE OBTAINED FROM PONTIAC - Trial counsel did not file a Motion to Suppress the items taken from the Pontiac[4]. He believed the warrant to search the Pontiac

[4] Mr. Loveless, a seasoned public defender with capital case experience, testified that he would have filed a Motion to

contained sufficient facts to indicate there may be evidence of the crime [PC-T. Vol. I, p139]. However, trial counsel acknowledged that the affidavit for the search warrant made reference to the Appellant being seen with the Pontiac prior to the death of Ms. Morris. [PC-T. Vol. I, p141]. Trial counsel could not remember if he had performed any research on the issue of affidavits for search [PC-T. Vol. I, p140]. Trial counsel stated that generally he would file a motion if it would benefit his client and it had legal merit [PC-T. Vol. II, p224]. On direct examination at the Evidentiary Hearing, trial counsel had difficulty remembering most of his actions during this case [PC-T. Vol. I, p118, 146, 148, 150, 151, 155, 164]. However, on cross-examination trial counsel had no problem with his memory while answering the State's questions [PC-T. Vol. II, p224-274].

FAMILY AND BACKGROUND – Trial counsel testified at the Evidentiary Hearing he did not travel to Indiana where Appellant's family lived nor speak to any family member, other than Alfred Branch (Appellant's grandfather) until the week of trial [PC-T. Vol. I, p147; Vol. II, p215].

Connie Branch (Appellant's sister), testified at the Evidentiary Hearing that nine family members were present at the trial [PC-T. Vol. III, p461]. She testified trial counsel only

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suppress when he completed discovery.

spoke with them the day before trial began. She further testified that trial counsel did not inform them of questions he would ask, what would happen at the penalty phase, questions the State would ask, or ask anyone about Appellant's background [PC-T. Vol. III, p462]. Connie Branch testified the only statement trial counsel made was to instruct everyone to say the worst things possible about the Appellant [PC-T. Vol. III, p463]. Connie Branch testified that everyone would have been willing to testify on behalf of Appellant had they been asked [PC-T. Vol. IV, p464].

REQUEST TO WITHDRAW – Alfred Branch (Appellant's grandfather) testified that he, along with Verdelski Miller (Indiana attorney), spoke with trial counsel prior to trial and requested that he withdraw [PC-T. Vol. III, p487]. He testified that trial counsel stated the court would not allow him to withdraw. At a pre-trial hearing, Alfred Branch had previously informed the trial court that he wanted trial counsel to withdraw [R. Vol. II, p281].

At the Evidentiary Hearing, trial counsel did not deny the request to withdraw or that he told to Alfred Branch the Court would not permit him to withdraw [PC-T. Vol. II, p219].

TRIAL PERFORMANCE

During the guilt phase of the trial, trial counsel failed to impeach any of the State's witnesses with their inconsistent statements made in their depositions. At trial, Ms. Cowden and Mr. Flaum (State's witnesses) testified about specific details concerning the car the Appellant was driving, the clothing he was wearing, and time lines. Although trial counsel possessed Cowden's and Flaum's depositions, he did not attempt to impeach either one about their inconsistent statements given in their depositions.

Trial counsel lacked the knowledge to cross-examine Dr. Cumberland (medical examiner). In fact, at the Evidentiary Hearing Dr. Cumberland testified trial counsel asked the wrong questions [PC-T. Vol. II, p382]. Dr. Cumberland acknowledged at the Evidentiary Hearing that Dr. Daniel (defense forensic pathologist) was correct that microscopic tissue examination would be the best way to determine if an injury was premortem or postmortem. Dr. Daniel testified at the Evidentiary Hearing that the injury to Ms. Morris's vagina caused by the lodged stick was most likely postmortem and probably lodged there by pushing debris up against her body because there was evidence of similar debris found in the vagina. Dr. Cumberland did not refute that testimony at the evidentiary hearing. Dr.

Cumberland’s trial testimony went unimpeached by trial counsel.

Trial counsel lacked sufficient knowledge about forensic evidence in order to impeach Ms. Johnson (State forensic expert). At the evidentiary hearing, Dr. Kish (defense forensic expert) testified that Ms. Johnson’s theory about how blood got on Appellant’s boots while straddling Ms. Morris’s head as he hit her was speculative at best. Dr. Kish also testified the science of blood spatter could not be that specific and the blood spatter could have been deposited on the boots in a number of ways. Ms. Johnson was permitted to speculate without objection or impeachment. Dr. Kish testified that trial counsel asked questions that were not relevant to the facts of the case.

PENALTY PHASE

At the penalty phase and Spencer hearing, trial counsel failed to present family witnesses who were present for the trial, he failed to object to the introduction of an abstract judgment of conviction, he incorrectly objected to the use of a prior conviction as an aggravator, and he helped the State prove the HAC aggravator by asking questions that revealed “defensive wounds,” which went unmentioned during the State’s questioning until trial counsel brought the subject matter up.

SUMMARY OF ARGUMENT

The issues before this Court primarily stem from ineffective assistance of counsel at pre-trial, guilt phase, and penalty phase. The evidence at the Evidentiary Hearing clearly established that trial counsel totally lacked the experience necessary to conduct a death penalty case, that he had failed to properly prepare, and did not have adequate time to fully investigate.

Trial counsel’s failure to file a Motion to Suppress the items retrieved from the Pontiac was based wholly upon an inaccurate assessment of the facts and the law. The Trial Court’s assessment was equally inaccurate. Had the evidence been suppressed, Appellant would have been better informed whether to testify at trial and the State’s case would have lacked sufficient evidence against Appellant.

Trial counsel’s stated strategy to maintain first and last closing arguments before the jury was a higher priority than investigation and hiring experts, which is patently deficient. This deficient strategy prejudiced Appellant, especially since the defense experts who testified at the evidentiary hearing would have provided reasonable doubt upon the State’s theory of events and also supported much of Appellant’s testimony. Even the State’s witness, Dr. Cumberland, indicated that Defense

Counsel failed to ask the right questions about how the stick might have become lodged in the victim's vagina. The trial court erred in finding that failure to hire experts was reasonable strategy.

Trial counsel's failure to conduct any investigation into mitigation or to hire a mental health expert constitutes a complete violation of the holding in Wiggins v. Sewall Smith, 123 S. Ct. 2527, 156 L. Ed. 472 (2003). Further, the Trial Court's order evaluated the Strickland test incorrectly by stating that the additional mitigation established would not have had a measurable effect on him in the Appellant's sentence. The Court's order makes no reference to the holding in Wiggins, and completely ignores the effect the Appellant's life history may have had upon the jury through family members and Dr. Dee's testimony.

The aggravating circumstance of prior violent felony was improperly admitted into evidence. First, the Abstract of Judgment during the penalty phase trial before the jury was clear error. Sinkfield v. State, 592 So.2d 322 (Fla. 1st DCA 1992). Trial counsel was ineffective for failing to object. Second, the information and judgment offered to the Trial Court at the Spencer hearing was error because the Indiana offense did

not constitute a felony in Florida. The Trial Court's order finding otherwise was error.

The time frames in this case play a significant role in the conduct of the court, prosecutor and trial counsel. In October 1994, trial counsel became counsel of record and was rushed to trial on March 7, 1994, a preparation time of four and one-half months, in spite of numerous motions to continue. In Weaver v. State, 894 So.2d 178 (Fla. 2004), an oral argument was held on Tuesday, May 4, 2004, wherein Justice Pariente stated: The judge has to know that when he's going in '98 to appoint a new lawyer, if that new lawyer is going to do his job, it's going to take at least a year to get that case to trial to get prepared. Although the denial of a continuance was resolved by this Court on direct appeal, it cannot be ignored that the denial of the continuances had a significant impact upon counsel's effectiveness.

ARGUMENT I

THE TRIAL COURT ERRED IN FINDING THAT DEFENSE COUNSEL WAS NOT INEFFECTIVE BY FAILING TO FILE A MOTION TO SUPPRESS THE ITEMS TAKEN FROM THE PONTIAC BECAUSE THE MOTION WOULD NOT HAVE BEEN SUCCESSFUL

The standard of review for claims of ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668 (1984). The Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process," 466 U.S. at 668. The Strickland Court requires a defendant to plead and demonstrate: (1) unreasonable attorney performance, and (2) prejudice. This Court has held that counsel's strategic decisions will not be second-guessed on collateral attack. *Brown v. State*, 846 So.2d 1114 (Fla. 2003). However, the standard to determine whether the strategy is reasonable was expressed in Skrandel v. State, 830 So.2d 109 (Fla. 4th DCA 2002).

> In assessing counsel's performance for purposes of an ineffective assistance of counsel claim, however, the standard is an objective one and not a subjective one. *See Strickland, 466 U.S. at 688; see also Schwab v. State, 814 So.2d 402 (Fla. 2002).* Thus, the focus is on what a reasonably competent lawyer, standing in the defendant's lawyer's shoes, would have been expected to do.

The standard of review for the application of Stickland has been expressed as:

> An ineffective assistance of counsel claim is a mixed question of law and fact subject to plenary review under the test set forth in *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984).*

Rose v. State, 675 So.2d 567, 571 (Fla. 1996); citing Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995). In Conner v. State, 803 So. 2d 598 (Fla. 1996), this Court acknowledged the standard of review regarding a trial court's ruling on motions to suppress as:

> … the Supreme Court utilized this two-step approach in its appellate review of determinations of probable cause and reasonable suspicion, also mixed issues of law and fact:
>
> As a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences from these facts by resident judges and local law enforcement officers.

(Citing: Ornelas v. U.S., 517 U.S. 690, 134 L. Ed. 2d 911, 116 S. Ct. 1657 (1996).

Trial counsel did not file a motion to suppress the items seized from the Pontiac [PC-T. Vol. I, p132]. The trial court's

order found that trial counsel was not ineffective for failing to file and argue a motion to suppress the items seized from the Pontiac because the Motion to Suppress would have failed [PC-R. Vol. IX, p1599]. Although Mr. Loveless (Chief Assistant Public Defender) testified that he would have filed the motion to suppress [PC-T. Vol. II, p298], the trial court did not find his testimony persuasive because he had not filed the motion during his four months of representation [PC-R. Vol. IX, p1598]. However, Mr. Loveless testified he had planned on filing a Motion to Suppress at the close of discovery [PC-T. Vol. II, p302].

The trial court relied upon three legal theories to conclude that the Motion to Suppress would have failed: (1) probable cause was present [PC-R. Vol. IX, p1598], (2) inevitable discovery [PC-R. Vol. IX, p1598], and (3) abandonment [PC-R. Vol. IX, p1597]. The trial court listed a summary of the facts alleged in the two affidavits for a search warrant as the primary facts relied upon to reach its conclusion [PC-R. Vol. XI, p1595-96].

However, there are other facts within the affidavits that narrow the knowledge of law enforcement at the time the first affidavit was executed:

- While the defendant had "previously been driving the 1982 Pontiac Bonneville" [PC-R. Vol. XI, p1595], the affidavit actually states that Ms. Cowden had seen Appellant operating the Pontiac on January 10, 1993, and Mr. Wallace took Mr. Branch from the Pensacola Airport to the University of West Florida between 6:00 p.m. and 8:00 p.m. on January 11, 1993. [R. Vol. I, p18-19].

- Ms. Morris wasn't reported missing until January 12, 1993, because she was in class until 9:15[5] on January 11, 1993.

- The affidavit states that Harbuck's investigation revealed that Mr. Branch took the Pontiac without his aunt's permission [R. Vol. I, p16].

Assuming the facts are true and nothing of importance was omitted, a summary of the facts attempting to establish a nexus between the offense, the Pontiac and Appellant stated within the four corners of the affidavits are: (1) Ms. Cowden observed Appellant operating the Pontiac on January 10, 1993, (2) Eric Branch took a taxi from the airport to the University prior to Ms. Morris's disappearance; (3) the Pontiac was located at the airport on either January 12, or 13, 1993; (4) law enforcement opened the trunk and transported the vehicle to the Escambia County Sheriff's Office; (5) Eric Branch stated to Ms. Cowden that he had injured his hand in a fight; (6) the following day after Ms. Morris's disappearance, January 12, 1993, Eric Branch was seen driving a car fitting the description of Ms. Morris's

[5] Ms. Morris was present in her class until 8:20 p.m., on Janauary 11, 1993, as testified to by Craig Hutchinson [TT. Vol.

car; (7) Ms. Morris's car was found in Bowling Green, Kentucky, on January 14, 1993, a location one hundred miles from Eric Branch's home [R. Vol. I, p16-19].

Seizure of the Pontiac without a warrant - Both Affidavits for Search Warrant specifically state: "Upon opening the trunk Morris' body was not located and the vehicle was sealed and transported to Escambia County Sheriff's Office" [R. Vol. I, p9 and R Vol. I, p17 respectively].

Both affidavits assert that the affiant has reason to believe and does believe that evidence is being kept in the Pontiac in violation of the law of Florida. No mention was made anywhere within either affidavit why the affiant believed that evidence was present, or that the affiant had actual knowledge of the presence of contraband within the automobile, or that failure to seize the car would have caused evidence to be lost if not immediately seized.

In White v. State, 710 So.2d 949 (Fla. 1998), the Florida Supreme Court explained the fundamental requirements of seizing a vehicle without a warrant pursuant to California v. Carney, 471 U.S. 386, 391, 85 L. Ed. 2d 406, 105 S. Ct. 2066 (1985), as follows:

The automobile exception is predicated upon the

IV, p690].

> existence of exigent circumstances consisting of the **known presence of contraband** in the automobile at the time, combined with the likelihood that an opportunity to seize the contraband will be lost if it is not immediately seized because of the mobility of the automobile. [emphasis added].

The Court further stated in White, *Supra*, the following:

> Since it is conceded that the government had no probable cause to believe that contraband was present in White's car, we conclude that Carney and the automobile exception are inapposite as authority. There is a vast difference between permitting the immediate search of a movable automobile based on actual knowledge that it then contains contraband and that an opportunity to seize the contraband may be lost if not acted on immediately, and the altogether different proposition of permitting the discretionary seizure of a citizen's automobile based upon a belief that it may have been used at some time in the past to assist in illegal activity. The exigent circumstances implicit in the former situation are simply not present in the latter situation.
>
> The automobile exception is a narrow, situation-dependent exception, which requires much more than the fact that an automobile is the object sought to be seized and searched.

The seizure of the Pontiac without a warrant was a violation of the automobile exception and violated Appellant's constitutional right to be free from unreasonable search and seizures.

The trial court's order presumes no harm, no foul, since "The police's alleged misconduct--the seizure of the car--did not provide them with any extra evidence that was obtained without a valid search warrant" [PC-T. Vol. IX, p1598]. The court misapprehended the concept of the invalid seizure. The

vehicle itself was property taken by law enforcement, without a warrant. The fact that the car itself wasn't introduced into evidence is irrelevant, because the seizing of the vehicle deprived the owner of access to his or her vehicle and belongings therein.

Appellant's vehicle was seized illegally and prejudiced Appellant by depriving him of his property and permitted the State to maintain possession of the vehicle while awaiting a search warrant.

Affidavits for Search Warrant - In order to have obtained a search warrant in this case, the affiant must state facts sufficient to establish a nexus between the object of the search and the Pontiac. In describing probable cause, the Court in Garcia v. State, 29 Fla. L. Weekly D 892 (Fla. 2nd DCA April 14, 2004) stated:

> "In determining whether probable cause exists to justify a search, the trial court must make a judgment, based on the totality of the circumstances, as to whether from the information contained in the warrant there is a **reasonable probability that contraband will be found at a particular place and time**." *Id. at 806* [citing *Illinois v. Gates, 462 U.S. 213, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983)]*. The duty of the reviewing court is to ensure that the magistrate had a substantial basis for concluding that probable cause existed, and this determination must be made by examining the four corners of the affidavit. [emphasis added].

The Trial Court's order in the case at bar states:

> As testified to by both Officer Harbuck and Robert Branch at trial, the Bonneville had been reported missing by the Branch family. Although Connie Branch did testify at the evidentiary hearing that the car was not reported stolen and the Defendant had permission to use the car, she did not refute the trial testimony that the car was reported missing.

[PC-R. Vol. IX, p1597]. First, the Trial Court's reliance on Officer Harbuck's trial testimony goes outside the "four corners of the affidavit," second, Connie Branch refuted the statement in the affidavit that she reported that the Pontiac was taken without her permission, which the court acknowledged, and third, Officer Harbuck did not testify at the evidentiary hearing.

Further, at trial Officer Harbuck said merely "yes, sir, it was" [TT. Vol. III, p581] in response to Mr. Patterson's question: "And subsequent to that, was it reported missing?" [TT Vol. III, p581]. Officer Harbuck was not questioned about the conversation with Connie Branch or the circumstances regarding the ownership or the lawful custody of the Pontiac. Also, the Court fails to consider Officer Harbuck's further testimony that he did not make a stolen auto report at Connie Branch's request [TT. Vol. III, p583].

When the Pontiac was seized, law enforcement knew that the Defendant had the keys to the Pontiac and had driven the Pontiac

to Florida from Indiana, because Officer Harbuck interviewed Alex Branch on January 12, 1993 [TT. Vol. III, p582], and Alex Branch gave a statement that the Defendant had been driving the Pontiac all along [TT. Vol. III, p574].

The Court in Garcia further stated:

> The affidavit in this case fails to establish a nexus between the object of the search, cocaine, and Garcia's residence. Even if we overlook the omissions and errors within the affidavit, the determination that cocaine was located within the residence was necessarily based on speculation, rather than a fair probability.

In a further explanation of nexus between the crime and items sought, the Court in Burnett v. State, 848 So.2d 1170 (Fla. 2nd DCA 2003) stated:Thus, the affidavit in the warrant application must satisfy two elements: first, that a particular person has committed a crime-the commission element, and, second, that evidence relevant to the probable criminality is likely located at the place to be searched-the nexus element. *United States v. Vigeant, 176 F.3d 565, 569 (1st Cir. 1999)*. As stated in Gates, wholly conclusory statements fail to meet the probable cause requirement; the reviewing magistrate cannot abdicate his or her duty and become a mere ratifier of the bare conclusions of others. Burnett, 848 So.2d at 1173.

The affidavits fail to establish any nexus between the Pontiac and the disappearance of, or the death of Ms. Morris. At best, the affidavits establish a nexus between the red Toyota and Appellant.

The trial court's order finding "There certainly was probable cause to support the issuance of the search warrant…" [PC-R Vol. IX, p1598], as well as the statement in the affidavit that "Your affiant believes there is probable cause to believe that such evidence is present in the above described vehicle to be searched" [R Vol. I, p19-20] are **conclusory** and **based on speculation, rather than a fair probability**. Neither the trial court nor Agent Griffith's affidavit explains how the facts alleged in the affidavit established a viable connection between the Pontiac and the disappearance of, or the death of Ms. Morris. Both documents merely state a bunch of facts and conclude that probable cause exists. Agent Griffith did not testify at the evidentiary hearing, though the State could have called him.

Even Mr. Patterson, Assistant State Attorney, acknowledged in his opening statement to the jury the state's knowledge was that the Pontiac was parked at the airport prior to the death of Ms. Morris.

> Sometime in the afternoon, between 4:00 and 7:00 that evening, January 11, the defendant takes his vehicle, a brown Pontiac automobile, to the airport and parks it in the public parking at the airport and takes a cab back to the University of West Florida.[TT. Vol. III, p412].

The Trial Court's order makes no reference to the veracity or reliability of the affidavits, even though there was evidence within the affidavits themselves and testimony at the evidentiary hearing to suggest that parts of the affidavits were at least misleading.

Where there is false or misleading statements contained within the affidavits, the court is to view the affidavits in a manner set out in Thorp v. State, 777 So.2d 385 (Fla. 2000):

> If an affidavit for a search warrant contains intentional false statements or statements made with reckless disregard for the truth, the trial court must excise the false material and consider whether the affidavit's remaining content is sufficient to establish probable cause. See *Franks v. Delaware, 438 U.S. 154, 156, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978); Terry v. State, 668 So.2d 954, 958 (Fla. 1996).* This rule contains two components. First, the trial court must determine whether the affidavit contains an intentional false statement or a statement made in reckless disregard for the truth. Mere neglect or statements made by innocent mistake are insufficient. See *Franks, 438 U.S. at 171.* Second, if the court finds the police acted deceptively, the court must excise the erroneous material and determine whether the remaining allegations in the affidavit support probable cause. See *id. at 171-72.* If the remaining statements are sufficient to establish probable cause, the false statement will not invalidate the resulting search warrant. See *Terry, 668 So.2d at 958.* If, however, the false statement is

necessary to establish probable cause, the search warrant must be voided and the evidence seized as a result of the search excluded. Id. at page 391.

In the case at bar, both affidavits contain either false or misleading statements of fact. Both affidavits state that Robert Branch described the vehicle as a red Toyota Celica with a crack in the left turn indicator light and a short black antenna [R. Vol. I, P16]. However, Exhibit J [PC-R. Vol. VIII, p1438], is a statement given by Robert Branch on January 13, 1993. On page two of that statement, Robert Branch denies having any knowledge of or stating that there was damage to the red Toyota he observed Eric Branch driving.

Both affidavits state that Eric Branch had taken the Pontiac from Branch's aunt without permission [R. Vol. I, p4, p17]. Eric Branch's aunt, Connie Branch, testified at the Evidentiary Hearing that Eric's grandparents gave him the Pontiac to drive; Eric had driven the Pontiac to Florida from Indiana; Eric had keys to the Pontiac; and she did not tell Detective Harbuck that Eric took the Pontiac without permission [PC-T, Vol. III, p460]. Connie Branch's testimony went undisputed at the Evidentiary Hearing.

Both affidavits state that Agent Dyal interviewed Mr. Wallace, a taxi driver. The affidavits claim Wallace "identified Branch as riding in his cab" and "Branch was wearing

shorts and a white shirt" [R. Vol. I, p9, p18]. However, Exhibit I [PC-R. Vol. VIII, p1436], Agent Dyal's report, indicates that Mr. Wallace only indicated that the picture he was shown looked very much like the white male passenger he picked up at the airport on the evening of January 11, 1993, except that his passenger's hair might have possibly been a little longer. Further, the report makes no mention of Mr. Wallace describing the clothing his passenger was wearing.

The Appellant concedes that the affiant of an Affidavit for Search Warrant may rely upon and express facts relayed to the affiant by other law enforcement officers. However, it is the contention of the Appellant that the affiant must be truthful in the affidavit as to events or observations that he himself has asserted performing. In the case at bar, it is uncertain whether the affiants in both affidavits performed the functions that they swore they did.

In Agent Griffith's affidavit, dated January 14, 1993, he sets out a list of facts and events in a manner that appears to be chronological. The following are functions Griffin swore **he performed**: (1) January 12, 1993 - (a) "Investigator Steve Harbuck of the Bay County Sheriff's Office has stated to your affiant that Harbuck's investigation revealed Eric Branch had taken a 1982 Pontiac Bonneville, Indiana tag 74A7643, brown in

color from Branch's aunt without permission" [R. Vol. I, p16]; (b) "Your affiant caused a criminal records check to be made of Eric Branch which revealed that Branch is a fugitive out of Evansville, Indiana" [R. Vol. I, p16, 17]; (c) "Investigator Harbuck has stated to your affiant that Robert Branch stated that Eric Branch told Robert Branch that the red Toyota Celica vehicle in Eric Branch's possession on January 12, 1993, belonged to a girl in Pensacola that Eric Branch had met at a bar" [R. Vol. I, p17]; (d) "Your affiant requested the Pensacola Regional Airport Police to check the parking lot at the airport terminal in Pensacola for either of the above-described vehicles" [R. Vol. I, p17]; (e) "At approximately 4:00 p.m., your affiant was notified that the 1992 Pontiac was located in the parking lot of the airport" [R. Vol. I, p17]. (2) January 13, 1993, at approximately 5:00 p.m. - (a) "Your affiant observed the body of Susan Morris which was nude and covered with leaves in an apparent crude attempt to hide its location" [R. Vol. I, p18]; (b) "Your affiant has been told by Assistant Medical Examiner Dr. Gary Cumberland that his examination of Morris' body indicates the wounds to Morris' head and face are consistent with having been made by someone's fists or hands" [R. Vol. I, p18].

While Agent Griffith did not testify at the Evidentiary Hearing, he did provide a deposition in this case on October 5, 1993 [PC-R. Vol. VIII, p1360]. Agent Griffith was asked the following questions and gave the following answers:

> Q. When did you get assigned?
>
> A. It would have been the same day the body was found, or whenever. Is that September the –
>
> MR. PATTERSON: 13th.
>
> A. -- the 13th?
>
> Q. (By Mr. Loveless) Okay. What is the first thing you did?
>
> A. I mainly manned the telephones around the office calling and trying to get out BOLO's on the Morris vehicle and things of that nature.

[PC-R, Vol. VIII, p1364].]

Agent Griffith was asked if he had interviewed any witnesses. He stated that he had interviewed Melissa Fountain (actually, the last name is Cowden) at the University police station, as well as Patrick Dwyer and Eric Branch's father [PC-R. Vol. VIII, p1365]. He also testified that he was present during the search of the Toyota in Kentucky [PC-R. Vol. VIII, p1367].

Agent Griffith was also asked the following questions and gave the following answers:

Q. Anything else as far as any search or anything that you did or participated in?

A. I was the affiant on the search warrants, if that’s what you’re asking.

Q. On the Pontiac?

A. Yes, sir.

Q. Okay, were you present when that car was found?

A. No, sir.

Q. Why did you do the affidavit?

A. I don’t remember the reasoning now, other than manpower.

Q. Okay, did you actually conduct the search?

A. No, sir, I did not.

Q. Were you present when the search was conducted?

A. No, sir, I was not.

Q. Did you present the search warrant to a judge?

A. Yes, sir, I did.

[PC-R. Vol. III, p1368].

During further questioning, Agent Griffith described his involvement with events in Kentucky regarding Eric Branch. The final question asked of Agent Griffith was:

Q. What else have you done in the case?

A. I can’t think of anything else.

[PC-R. Vol. VIII, p1370].

In Agent Griffith's deposition, he makes no mention of performing any of the events that he ascribed to in his affidavit, nor makes mention of the events he observed in the affidavit. If Agent Griffith was assigned on January 13, 1993, how could he have performed the functions he described in the affidavit as occurring on January 12, 1993? Agent Griffith also testified in his deposition that he "mainly answered telephones." If so, then why did he put in the affidavit that he had observed the body of Susan Morris? It is the contention of the Defendant that the statements made in the affidavit sworn to by Agent Griffith, as to his functions and observations, were either intentionally false or given with reckless disregard for the truth to deceive the court.

FDLE Agent Bruce Fairburn submitted an Affidavit for Search Warrant on February 18, 1993 [R. Vol I, p6-14]. Again, the affidavit appears to set out the events chronologically, beginning on January 12, 1993. Agent Fairburn's affidavit sets out the functions he swore **he performed**: (1) January 12, 1993 - (a) "Investigator Steve Harbuck of the Bay County Sheriff"s Office has stated to your affiant that Harbuck's investigation revealed Eric Branch had taken a 1982 Pontiac Bonneville, Indiana tag 74A7643, brown in color from Branch's aunt without permission;" (b) "Investigator Harbuck has stated to your

affiant that Robert Branch stated that Eric Branch told Robert Branch that the red Celica vehicle possessed by Eric Branch on January 12, 1993, belonged to a girl in Pensacola that Eric Branch had met at a bar;" (c) "Your affiant requested the Pensacola Regional Airport Police to check the parking lot at the airport terminal in Pensacola for either of the above-described vehicles;" (d) At approximately 4:00 p.m., your affiant was notified that the 1982 Pontiac was located in the parking lot of the airport;" (2) January 13, 1993 – "On January 13, 1993, your affiant interviewed Melissa Cowden, a white female student at the University of West Florida."

Agent Fairburn testified at the Evidentiary Hearing that he was the lead investigator for the above-styled cause. He also testified that he spoke with Melissa Cowden, but didn't know the dates. He further testified that while he relied upon some information from other officers in preparing the affidavit, he performed the functions that he swore to. Agent Fairburn acknowledged that much of the affidavit he swore to was identical to the affidavit sworn to by Agent Griffith.

However, much of the functions Agent Fairburn swore to having performed in the affidavit and his testimony at the Evidentiary Hearing is contradicted or omitted in his deposition given on October 5, 1993 [PC-R. Vol. VIII, p1392-1432]. Agent

Fairburn testified that he first became involved in this case on January 13, 1993 [PC-R. Vol. VIII, p1396]. Agent Fairburn described what functions he performed on January 13, 1993, including interviewing two students named Allison Huff and Daniel Rodgers [PC-R. Vol. VIII, p1403]. At no time during the deposition did Agent Fairburn testify to having interviewed Melissa Cowden on January 13, 1993, as described in his affidavit. Further, none of the functions listed above as having been sworn to by Agent Fairburn were described as being performed by him in his deposition. It is the contention of the Defendant that most of the affidavit sworn to by Agent Fairburn on February 18, 1993, was information extrapolated from the affidavit of Agent Griffith. It is further contended Agent Fairburn did not perform many of the functions he swore to in the affidavit. It is also the contention of the Defendant that many of the statements made in the affidavit sworn to by Agent Fairburn, as to his functions and observations, were either intentionally false statements or given with reckless disregard for the truth to deceive the court.

The trial court’s order makes no reference to the false or misleading statements mentioned above. Had these items been removed from the affidavits and the probable cause evaluated as expressed in this argument, no reasonable judge would find that

probable cause existed to issue a warrant to search the Pontiac upon the valid facts in the affidavit.

Inevitable Discovery

The Trial Court's order makes a vain attempt to suggest that the "inevitable discovery" rule applies. As support, the Court cites Moody v. State, 842 So.2d 754 (Fla. 2003). The Court in Moody lists three theories of exceptions to the fruit of the poisonous tree doctrine if the State can show: (1) an independent source existed for the discovery of the evidence, (2) the evidence would have inevitably been discovered in the course of a legitimate investigation, and (3) sufficient attenuation existed between the challenged evidence and the illegal conduct. Id. At 759. In the present case, the State made no argument to the Court regarding inevitable discovery. This argument belongs squarely with the Court. The Court's order makes no argument regarding exceptions (1) and (3) above. The Trial Court's argument rests upon "inevitable discovery."

The only comment contained in the Court's order is: "…an investigation was clearly ongoing at the time the car had been seized" [PC-R. Vol. IX, p1598]. The trial court's order fails to explain how that investigation would have revealed any more information than they already had, which was insufficient to obtain a warrant to search the Pontiac. Further, the second

affidavit, obtained four days after the first one--January 18, 1993--expresses no additional facts that weren't contained in the first affidavit. The two affidavits were virtually identical. While the trial court's order contains the court's holding in Moody, the order fails to explain how the application of the inevitable discovery rule is more than "speculative," or that facts were possessed by the police that would have led to the evidence.

> In making a case for inevitable discovery, the State must show "that at the time of the constitutional violation an investigation was already under way." *Nix v. Williams, 467 U.S. 431, 457, 81 L. Ed. 2d 377, 104 S. Ct. 2501 (1984)* (Stevens, J., concurring). "Inevitable discovery involves no speculative elements . . . " *Id. at 444 n.5.* In other words, the State cannot argue that some possible further investigation would have revealed the evidence. See *State v. Duggins, 691 So. 2d 566, 568 (Fla. 2d DCA 1997); Bowen v. State, 685 So. 2d 942 (Fla. 5th DCA 1996)* (holding that speculation may not play a part in the inevitable discovery rule and that the focus must be on demonstrated fact capable of verification). **In other words, the case must be in such a posture that the facts already in the possession of the police would have led to this evidence notwithstanding the police misconduct.**

Moody, 842 So.2d at 759 (emphasis added).

The Prosecutor, during opening statement, explained to the jury that the testimony at trail would show only the same knowledge that law enforcement had when they obtained the affidavit. This establishes that the trial court's order of

inevitable discovery was his speculation of events that did not happen.

BY MR. PATTERSON

> Sometime in the afternoon, between 4:00 and 7:00 that evening, January 11, the defendant takes his vehicle, a brown Pontiac automobile, to the airport and parks it in the public parking at the airport and takes a cab back to the University of West Florida. [TT. Vol. III, p412].

The State's own belief of the evidence at the beginning of the trial was that Appellant parked the Pontiac at the airport prior the death of Ms. Morris, thereby establishing no nexus between the Pontiac and the death of Ms. Morris, and no discovery of new information since the affidavits were obtained.

Abandonment

While the trial court's order noted that a legal conclusion could be made that Appellant abandoned the Pontiac, neither the State nor the Court argued abandonment. However, an argument of abandonment would fail because the test for determining when an object has been abandoned is one of intent, which "may be inferred from words spoken, acts done, and other objective facts." United States v. Barlow, 17 F.3d 85, 86 (5th Cir. 1994). In California v. Greenwood, 486 U.S. 35, 40, 108 S. Ct. 1625, 10 L.Ed.2d 30 (1988), the Court stated: "An expectation of privacy does not give rise to Fourth Amendment protection, however,

unless society is prepared to accept that expectation as objectively reasonable.” Millions of cars are parked at airports daily. Unlike garbage bags left on the street, burglary of a conveyance is a felony and society has to objectively expect the right to privacy of their vehicle when they park at an airport. Appellant’s intent was to have his family pick up the Pontiac at the airport, which he expressed at trial, and would also have expressed at a suppression hearing, had one be requested.

> [Branch]: I pull back in with my car into overnight parking, because I figured I could leave my car there and drive her car to Panama City and have Robert and Alex bring me right back to the airport after they pick my paycheck up, and then I could fly out and Robert could have the brown Bonneville that would be sitting in the parking lot waiting for him after I flew back to Indiana.

[R. Vol. V, p816.]

Trial counsel’s failure to file Motions to Suppress fell substantially below standards that a reasonably competent lawyer, standing in the defendant's lawyer's shoes, would have been expected to do. The trial court’s order finding otherwise is error. Moreover, the trial court’s order fails to state, alternatively, whether prejudice would have been present had defense counsel filed the Motion to Suppress and had been successful.

Without dispute, trial counsel acknowledged that suppressing the evidence seized from the Pontiac would have been beneficial to Appellant's case. Such acknowledgment is a mere understatement. The evidence seized from the Pontiac is the only evidence the State possessed which inferred contact between Appellant and Ms. Morris. The DNA of the blood found on Appellant's boots and socks established a strong probability that the blood belonged to Ms. Morris. Without this evidence, the only connection of Appellant to Ms. Morris was the circumstantial evidence that Appellant stole Ms. Morris' car. Inasmuch as trial counsel failed to seek suppression of the seized evidence, Appellant was forced to testify to explain the presence of the blood on his boots and socks in order to establish that he did not beat, strangle, or sexually assault Ms. Morris. Appellant was prejudiced by the introduction of the evidence seized from the Pontiac.

Finally, the trial court's order makes the bare bones finding that the "arguments that the affidavits were unconstitutionally vague are without merit" [PC-R. Vol. IX, p1599]. The trial court's finding is in conflict with the law because the search warrants are unconstitutionally overbroad.

> For a search warrant to be valid it must set forth with particularity the items to be seized. U.S. Const. amend. IV; Art. I, Sec. 12, Fla. Const.; *Sec. 933.04*,

> Fla. Stat. (1991). This particularity requirement makes general searches impossible and limits the executing officer's discretion when performing a search. See *Carlton v. State, 449 So. 2d 250 (Fla. 1984).* While this requirement must be given a reasonable interpretation consistent with the character of the property sought, id., when the purpose of the search is to find specific property, the warrant should particularly describe this property in order to preclude the possibility of the police seizing any other. See *North v. State, 159 Fla. 854, 857, 32 So. 2d 915, 917 (1947).*

Green v. State, 688 So.2d 301, 306 [Fla. 1996].

The first search warrant [R. Vol. I, p15] specified generic and general items to seize: "certain trace evidence, including human blood, hair, fiber, fingerprints and other trace evidence…" The second search warrant included a pair of brown pants [R. Vol. I, p6]. Both affidavits amounted to no more than a fishing expedition. They make no mention of the boots and socks or specifically indicate Ms. Morris's blood. The first affidavit refers to "…articles of clothing or other personal items belonging to Susan Morris in the vehicle to be searched" [R. Vol. I, p20]. No such items were found.

Trial counsel was not only deficient in failing to file and argue the Motion to Suppress, but Appellant was prejudiced because the State's case for Murder and Sexual Battery would have been wholly insufficient against the Appellant. The trial court erred in finding otherwise.

ARGUMENT II

THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT MITIGATION AT THE PENALTY PHASE BECAUSE IT WOULD HAVE MADE NO DIFFERENCE IN THE COURT'S SENTENCING

The standard of review for claims of ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668 (1984). The Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process," 466 U.S. at 668. The Strickland Court requires a defendant to plead and demonstrate: (1) unreasonable attorney performance, and (2) prejudice.

In assessing a claim of ineffective assistance of counsel for failure to investigate and present mitigation under the Stickland standard, the Court in Wiggins stated:

> In light of these standards, our principal concern in deciding whether Schlaich and Nethercott exercised "reasonable professional judgment," *id., at 691, 80 L Ed 2d 674, 104 S Ct 2052*, is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself reasonable. Ibid.* Cf. *Williams v. Taylor, supra, at 415, 146 L Ed 2d 389, 120 S Ct 1495* (O'Connor, J., concurring) (noting counsel's duty to conduct the "requisite, diligent" investigation into his client's background). In assessing counsel's investigation, we must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," *Strickland, 466 U.S., at 688, 80 L Ed 2d 674, 104 S Ct 2052*, which includes a context-

> dependent consideration of the challenged conduct as seen "from counsel's perspective at the time," *id., at 689, 80 L Ed 2d 674, 104 S Ct 2052* ("Every effort [must] be made to eliminate the distorting effects of hindsight").

The trial court's order focused on: (1) whether "counsel was ineffective for failing to **present** mitigation evidence" [PC-R. Vol. IX, p1612], (2) the defendant suffered no prejudice because "a mental health expert would [not] have provided any significant aid to the defense during mitigation" [PC-R. Vol. IX, p1613], (3) and "the additional evidence of abuse, rejection or abandonment would not have had a measurable effect on the Defendant's sentence. In fact, [the court] would not have given this mitigator any more weight than it was attributed in this Court's sentencing order" [PC-R. Vol. IX, p1614].

The Court apparently forgot a jury was involved. First, the trial court only considered what affect the mental health expert, lay witnesses, and other mitigation had upon the trial court, without any consideration as to what affect such evidence would have had upon the jury, if presented. Secondly, the trial court's order attempts to vindicate trial counsel's deficient investigation by speaking only to prejudice, which is faulty to begin with; and therefore, fails to mention or consider trial counsel's failure to investigate or prepare for the penalty phase trial: motions to continue to obtain mental health

experts--but unobtained, failure to contact family members, failure to obtain records, lack of experience in capital cases, and lack of time to prepare.

What is ironic about the Court's failure to discuss deficient performance in its order is that the trial court specifically pointed out in the penalty phase the lack of presentation of mitigation and the defense's deficient performance in waiting to hire a mitigation expert.

> THE COURT: I want to make it clear on the record what the situation is. The Court has denied those [continuance] requests because I believe the Defense simply **waited and waited and waited** through a number of continuances before beginning to seek that information. I simply was not willing to delay the case one more time to do that when there was nothing unusual about the information that couldn't have been sought earlier. That's not my concern right now.
>
> My concern right now is that there is very typically in penalty phase hearings information from family, friends about the defendant's childhood background, incidents growing up, both bad incidents and good incidents, that there's information about the defendant's character, I think in one of these I wound up seeing a whole string of merit badges from the boy Scouts and other information about the defendant being helpful, that those are things which could be presented today in which there is no reason, so far as I know, could not have been collected and those are not being presented now.
>
> That's your choice if you choose not to present those, but it is not my understanding that any of that sort of thing is not available today because of a denial of a continuance. Is that accurate? For that I'm asking Mr. Allbritton.

[TT. Vol. VI, p985][emphasis added]. Although the trial

court pointed out that the defense had “waited and waited and waited,” he didn’t ask trail counsel what he had specifically done in an attempt to obtain the subject matter evidence mentioned above. Had he done so, trail counsel would have had to explain to the court, as he did in the evidentiary hearing, that he had performed zero mitigation investigation, prior to the beginning of the trial.

In Johnson v. State, 30 Fla. L. Weekly S 207 (Fla. Mar. 31, 205), this Court denied Johnson’s ineffective claims similar to those presented by the Appellant here. However, there are substantial differences in Johnson as compared to the instant case. In Johnson trial counsel testified that: (1) he did speak with the family prior to trial and discussed their testimony, (2) he did hire an expert for mitigation and spoke with the expert, (3) he had conducted a number of penalty phase proceedings prior to Johnson’s case, and (4) he discussed family background with Johnson. The following was presented at the Evidentiary Hearing supporting the Appellant’s claim and distinguishing differences from those in Johnson.

Mr. Loveless testified that he represented Appellant prior to Mr. Allbritton. Mr. Loveless had previously conducted approximately a dozen capital cases [PC-T. Vol. II, p293]. Mr.

Loveless had obtained a confidential expert, Dr. Larson, to evaluate Appellant [PC-T. Vol. II, p295]. Mr. Loveless stated that hiring an expert is done "in virtually every capital case" [PC-T. Vol. II, p295]. Mr. Loveless further testified that it is "imperative" to obtain an entire background of a defendant when the State is seeking a death sentence [PC-T. Vol. II, p300]. Mr. Loveless testified that he had traveled to Indiana and Kentucky to investigate Appellant's background [PC-T. Vol. II, p294].

Dr. Larson testified he was retained by the Public Defender's office to conduct a two-hour evaluation [PC-T. Vol. I, p111]. He also testified that at the time of Appellant's case he had been involved in over 100 capital cases [PC-T. Vol. I, p111]. Had be been further involved in the case, he would have expected to have received substantial documents regarding the Appellant's background [PC-T. Vol. I, p113]. Although trial counsel knew Dr. Larson evaluated the Appellant, he did not contact Dr. Larson [PC-T. Vol. I, p143]. Trial counsel testified he did not hire a mental health expert, in spite of the fact that he informed the court on numerous occasions that he intended to do so:

Trial counsel filed a Motion for Continuance on January 24, 1994, stating, among other things:

- During this period of time, counsel is involved in discovery in a major drug case as well as another capital case that is scheduled for trial in February.

- Additional time is necessary so that the undersigned counsel can further pursue information regarding the penalty phase of the case. This will require travel to the state of Indiana to conduct further interviews and obtain records and consult experts.

- Additional time is necessary so that defendant will have effective assistance of counsel at trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I Sec. 2, 9, and 15 of the Constitution.

[R. Vol. I, P115-116].

Trial counsel filed another Motion for Continuance [R. Vol. I, p158] and Motion to Postpone Phase II on March 1, 1994 [R. Vol. I, p162]. Contained in those motions, trial counsel stated that he was not prepared for the penalty phase.

- That in the event of a conviction for first degree murder, counsel for defense would be moving for a psychiatric examination of the defendant prior to proceeding to the penalty phase.

- In the event of a conviction, the defendant intends to offer mitigating testimony from witnesses of which the majority would be brought on from out of town.

At the March 1, 1994, hearing, trial counsel argued his motions for continuance and explained that he was not prepared for a penalty phase in this case. At a hearing held on March 1, 1994, the trial court denied the continuance based upon trial counsel's representation he was unprepared for the penalty

phase. [R. Vol. I, p146-150].

At a hearing held on March 4, 1994, trial counsel renewed his motion for continuance [R. Vol. II, p290]. The court denied the motion again. On March 11, 1994, prior to the beginning of the penalty phase, trial counsel stated to the Court that he was not prepared for the penalty phase and again requested a continuance [TT. Vol. VI, p942]. The motion was again denied. Contained within trial counsel's motions were statements that he intended to travel to Indiana and to hire a mental health expert. He did neither.

Trial counsel testified at the Evidentiary Hearing that he did not go to Indiana [PC-T. Vol. I, p147]. Other than Alfred Branch, trial counsel spoke to Appellant's family for the first time the week of trial [PC-T. Vol. II, p216]. Trial counsel could not recollect the amount of time he spent with Appellant's family members or the substance of the conversation [PC-T. Vol. II, p217]. Trial counsel did not testify that he had obtained school records, medical records, or any other background records pertaining to Appellant's history.

Connie Branch, Appellant's aunt, testified at the Evidentiary Hearing. She stated that the following individuals were present and prepared to testify if requested: Alfred Branch (Appellant's grandfather), Marcelle Branch (Appellant's

grandmother), herself, Alex Branch (Appellant's cousin), Sharon McCurdy (Appellant's mother), Neil Branch (Appellant's father), and Doug McCurdy (Appellant's stepfather) [PC-T. Vol. III, p461]. She further testified that none of the above individuals were told what to expect, what kind of information would be helpful, what questions the prosecutor might ask, what answers would be inappropriate, nor were they instructed that their demeanor would also be taken into account [PC-T. Vol. III, p462-463]. According to Connie Branch, trial counsel told the family to say the worse things they could think of about Eric, because a reversal of a death sentence is easier than a life sentence [PC-T Vol. III, p463]. Trial counsel denied he made that statement. Connie Branch stated that no family member refused to testify; they weren't asked to testify [PC-T. Vol. III, p464].

Connie Branch also testified to her observations of Appellant while he was growing up: Eric did not like confrontations and would not fight; Eric would lie, even when the consequences to tell the truth would be less harsh; she observed that Eric's head was flat when he was an infant because his mother would not pick him up; she never saw either his mother or father hug or kiss Eric, nor did she ever hear them tell Eric they loved him; Eric's mother showed favoritism to his

brother Robert; Eric may have been sexually abused; Eric's parents were alcoholics [PC-T. Vol. III, p464-477].

Only Robert and Alfred Branch testified at the penalty phase of the trial and provided information that was inadequate and paltry compared to what evidence was available.

The family members who appeared at the original trial were unavailable to testify at the Evidentiary Hearing because of financial difficulty or work constraints [PC-T. Vol. III, p477]. However, Dr. Henry Dee was provided with substantial documentation regarding Appellant, as well as affidavits from those family members. He testified at the Evidentiary Hearing to the following statutory mitigators:

- Ability to conform his actions to the law was substantially impaired by alcohol [PC-T. Vol. I, p80-81]. Appellant's heavy drinking on the night of the incident, along with his lack of impulse control and good judgment, impaired his ability to conform his conduct to the law [PC-T. Vol. I, p82].

- Extreme emotional distress – Appellant, while under the influence of alcohol, was wrongly released from custody in Indiana, was being pursued by authorities from Panama City for days, and was told by his grandfather he was wanted by the Indiana authorities. All these factors placed Appellant under a great deal of stress [PC-T. Vol. I, p82].

The trial court's order assessing Dr. Dee's testimony of cross-examination is incorrect. On page 23 of its order, the Court stated: "In fact, the Defendant's expert, Dr.

Henry Dee, testified during cross-examination to the exact opposite conclusion on all three of these mitigators." Apparently, the trial court was as confused by the cross-examination questions as was Dr. Dee, which he stated on re-direct.

> Q. [Mr. Reiter] Let me see if I can clear up something I'm confused about, also. During cross, Mr. Pitre asked you about all of the statutory mitigaotrs. He went down the list.
>
> A. [Dr. Dee] Yeah.
>
> Q. And he brought up one called duress?
>
> A. Yeah.
>
> Q. Did I ask you – didn't I ask you about extreme emotional distress?
>
> A. Uh-huh.
>
> Q. And unable -- impairment – impairment to conform actions to the law. Aren't those the two?
>
> A. Yes.
>
> Q. And did you find those two exist?
>
> A. Yes.
>
> Q. So clearly I noticed them, right?
>
> A. Right. I guess maybe I got a little confused in his questioning.

[PC-T. Vol. I, p98].

The State's question to Dr. Dee, as pointed out on page 23

of the Court’s order, was regarding “clinical diagnosis that the defendant was under any extreme mental or emotional disturbance.” First, Dr. Dee had testified on direct examination that no clinical diagnosis exists for any of the legal statutory mitigators:

> Q. Now, with regard to these statutory mitigators, have you ever been told of or aware of any standard that’s to be utilized in determining the definition of those particular mitigators.
>
> A. No, I think it’s sort of a judgment call for any – any person who’s reviewing the information.
>
> Q. Is there anything in the clinical area that sets out those words, that give you some definition?
>
> A. No.

[PC-T. Vol. I, p83].

Second, there is no such statutory mitigator: “extreme mental or emotional disturbance.”

As to the mitigator “ability to conform conduct to the law substantially impaired,” was asked by the State in the following way:

> Q. Isn’t it true that you found that the defendant was, in fact – had the ability, the capacity, to appreciate the criminality of his conduct?
>
> A. Yes.
>
> Q. He had the ability to conform his conduct to the

requirements of the law; isn't that also correct?

A. Yes. I think it was impaired but certainly not obliterated.

[PC-R. Vol. IX, p1613].

The first question involves a defense of insanity, not mitigation, and Dr. Dee expressly stated that the Appellant's ability to conform his conduct to the law was impaired. The trial court is wrong in his assessment of Dr. Dee's testimony having been the "exact opposite."

Dr. Dee testified to information about the mental condition of Eric Branch, his background, and nonstatutory mitigators obtained through conversations with Appellant, as well as records, affidavits, and reports he had received.

- Dr. Dee testified that he had seen Appellant for a total of 16 hours on two occasions. He performed a number of tests [PC-T. Vol. I, p67].
- Impulsive personality - Appellant has from quite an early age been an extraordinarily impulsive individual who acted

  without sufficient thought or deliberation to the consequences of his behavior [PC-T. Vol. I, p69].
- Dr. Dee reviewed affidavits and records from the following individuals: Sharon McCurtry (mother), Doug McCurtry (stepfather), Robert Branch (brother), Alfred Branch (grandfather), Connie Branch (aunt), Alex Branch (cousin), Matthew Branch (uncle), Marilee Rurick (probation officer), Sheldon Tharpe (chief of police of Rockford), Annie Noscoe

(girlfriend), Al Logsdon (school principal), and Neil Branch (father) [PC-T. Vol. I, p70].

- Alcohol dependency – Appellant has been alcohol dependent since the eighth grade [PC-T. Vol. I, p72].
- Alcoholic parents – father and mother both alcoholics [PC-T. Vol. I, p72]
- Physical abuse – Appellant suffered from physical abuse as early as age three [PC-T. Vol. I, p72]. When Appellant was around age 13, his father had physical fights with Appellant. [PC-T. Vol. I, p75-76].
- Inconsistent parenting – raised by parents until eight months of age, then lived with grandparents. From third grade to seventh grade he lived with his mother and stepfather [PC-T. Vol. I, p73]. Appellant's grandparents did not discipline him, but his father and stepfather were harsh disciplinarians [PC-T. Vol. I, p74]. Because of this inconsistency, appellant would not accept authority [PC-T. Vol. I, p75].
- Abandonment – in the summer of the seventh grade Appellant was left on his father's doorstep for a day or two before his father returned home. His grandparents again raised Appellant [PC-T. Vol. I, p73].
- Hyperactivity – records indicate that Appellant suffered from hyperactivity, which was not diagnosed or treated [PC-T. Vol. I, p77].
- Head trauma – sources indicate that Appellant had suffered head trauma as a child from beatings and a motorcycle accident, which could have caused his present personality [PC-T. Vol. I, p78].
- Loss of his child – when Appellant was incarcerated the mother of his child obtained his approval for adoption [PC-T. Vol. I, p7]
- Sexual abuse – Appellant's mother and his probation officer offered reports of sexual abuse Eric suffered [PC-T. Vol. I, p80].
- Juvenile incarceration – Appellant spent 18 months in a

juvenile detention center, where he reportedly suffered sexual abuse at the age of 14 or 15 [PC-T. Vol. I, p80].

- Low self-esteem and higher IQ – Appellant's IQ score went up in prison, probably due to a structured environment and opportunity to educate himself. While this should cause self-esteem to rise, it didn't in Appellant's case [PC-T. Vol. I, p103].

Trial counsel should have obtained all of this information prior to the trial. Trial counsel was unaware of any of it. He did not investigate, hire a mental health expert, obtain any of the Appellant's records, nor call to testify most of the family members who appeared at the trial. Trial counsel could have had all of Dr. Dee's testimony and Appellant's family members introduced at trial had he spent time with Appellant's family members and prepared them and himself properly.

While the Trial Court may have found in its order that none of the information presented would have changed his position on sentencing, trial counsel was obligated to obtain this information for presentation to the jury. Trial counsel's

deficient performance undermined the confidence in the outcome of the penalty phase.

ARGUMENT III

THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO HIRE EXPERTS BECAUSE THEY WERE OF QUESTIONABLE VALUE, COUPLED WITH THE TACTICAL DECISION TO MAINTAIN FIRST AND LAST CLOSING ARGUMENTS

The standard to determine if trial counsel was ineffective in this matter is set out in Strickland and State v. Riechmann, 777 So.2d 342 (Fla. 2000):

> To determine whether counsel was ineffective, a number of factors should be considered. First among these are the attorney's reasons for performing in an allegedly deficient manner, including consideration of the attorney's tactical decisions. See *State v. Bolender, 503 So.2d 1247, 1250 (Fla. 1987); Lightbourne v. State, 471 So.2d 27, 28 (Fla. 1985).* A second factor is whether cross-examination of the State's expert brings out the expert's weaknesses and whether those weaknesses are argued to the jury. *Card v. Dugger, 911 F.2d 1494 (11th Cir. 1990).* See *Rose v State, 617 So.2d 291, 297 (Fla. 1993).* The final factor is whether a defendant can show that an expert was available at the time of trial to rebut the State's expert. See *Elledge v. Dugger, 823 F.2d 1439, 1466 (11th Cir. 1987).*

The trial court's order found: "Due to the questionable value of a forensic pathologist, coupled with the tactical decision to maintain first and last closing argument, the Court finds that trial counsel's performance was not constitutionally deficient" [PC-R. Vol. IX, p.1603]. The trial court's order makes no reference to any legal standard in assessing trial

counsel’s decision, or to the standard set out in Riechmann or any of the cases cited therein.

As to the first prong in Riechmann, trial counsel’s reasons for not hiring a forensic pathologist or a blood spatter expert were unconscionable. Trial counsel testified at the Evidentiary Hearing that: he had read about the subject matter the experts for the State would testify to; he had no expertise in either vocation; he felt he would be able to effectively cross-examine the experts; he didn’t want to loose open-and-close at the trial; and he was concerned that the State would discover the identity of the experts, via the County’s billings.

On cross-examination trial counsel stated:

> Q. Now is there any disadvantage when a defendant is declared partially indigent and asks his counsel or his counsel decides to retain an expert?
>
> B. Well, if he’s not declared partially indigent, I can go out, I can get an expert, I can ask that expert to look at the evidence and if it comes back and I don’t like what they’ve said, I don’t have to list that person as a witness. However, if he’s been declared partially indigent for costs, whether I want to call that person as a witness or not, the State now knows because I’ve got to file a motion to have that person paid, they now know who that expert witness is and if I get an expert witness that’s going to come back and say something that doesn’t fit with my client’s testimony, now I’ve helped, I’ve assisted the State in their case.
>
> And when you’re doing these types of cases

> and you have an individual declared partially indigent, you have to be careful with the experts. You go out and you can go out and get an expert and that expert can come back and absolutely agree with the State’s expert. Now that’s not somebody I want to give to the State. So, you know, once, again, if there are ways for me to get that information in to the jury through the State’s witnesses, then I see no need to hire an expert.

[PC-T. Vol. II, p230-231].

However, it is unclear how a confidential expert could be revealed or how the State’s knowing whom he hired would affect anyone’s testimony. In fact, trial counsel’s inaccurate knowledge of the legal procedures regarding confidential experts prejudiced the Appellant further, because he testified that he discussed this with the Appellant, and thereby mislead the Appellant as to the law [PC-T. Vol. II, p231]. Trial counsel’s strategy to do basically nothing in this case, is almost an identical strategy to counsel in Williams v. State, 507 So.2d 1122, 1123 (Fla. 5th DCA 1987).

> The issue on this appeal, raised by Williams's 3.850 motion and the Evidentiary Hearing thereon, is whether his appointed trial counsel was effective in light of a record that reflects virtually no pretrial investigation and a determination to present no witnesses at trial, all in the name of preserving rebuttal during closing argument. Trial counsel even advised Williams not to testify, which would have meant the state's version of events was un-contradicted. Trial counsel also declined to depose the alleged rape victims prior to trial, ostensibly in order to retain a tactical surprise examination. A

> trial strategy to do nothing, contrary to the dissent, is not an acceptable one.

Second prong – Cross-examination weakness and closing

Forensic Pathologist –

There is no question that the charge of sexual battery was based upon the premise that the Appellant intentionally inserted the stick found within Ms. Morris's vagina. The trial court found that open and closing argument was more important than calling an expert to refute Dr. Cumberland's testimony at trial.

> Trial counsel did attempt to elicit testimony similar to Dr. Daniel's opinion during the cross-examination of Dr. Cumberland. However, Dr. Cumberland continued to opine that the debris and body movement was unlikely to have caused the stick to become lodged in the victim's vagina. Thus, without calling an expert witness (causing the defense to lose the tactical advantage of first and last closing arguments) counsel could not have elicited any further favorable testimony regarding this circumstance.

[PC-R. Vol. IX, p1602]. Whether trial counsel could have obtained more favorable testimony from Dr. Cumberland is unknown, because Dr. Cumberland testified: "There probably would have been some questions the attorneys should have asked that they didn't" [PC-T. Vol. II, p382].

Further, the trial court's assessment of Dr. Cumberland's testimony at trial is incorrect regarding the debris found in Ms. Morris's vagina. In fact, Dr. Cumberland's opinion is in contradiction with his own findings:

Q. You found nothing else, no evidence of pieces of wood?

A. Oh, there were pieces of wood loose in the vagina, but there were not pieces of wood that were embedded underneath the mucosa that lines the vagina.

Q. Doctor, could that have been caused if an individual, hypothetically, is being dragged? Could that possibly have gotten in that way?

A. In my opinion, no, because if you're dragging a person by their arm, then –

Q. What about their feet?

A. By their feet, just by a token of grabbing the feet and lifting them up to drag the body you've raised the introitus to the vagina high enough that it would be cleared from picking up debris.

Q. What about covering an individual and pushing debris onto an individual as if building a shallow grave out of sticks and leaves?

A. In my opinion, that would be very difficult to do, and I base that on the fact of the difficulty that it is to obtain vaginal swabs on a deceased body postmortem using Q-tips that have a wooden stick that extends about four inches long. Many times it's very difficult to get the external or labia majora open to the point where you can find the right area to probe to get into that area. And so, I mean, I guess anything is possible but the probability, in my opinion, would be very, very low.

[TT. Vol. IV, p751-752]. Dr. Cumberland's opinion of how difficult it would be to insert the stick by pushing debris is inconsistent with the fact that he in fact found debris in the vagina. Trial counsel failed to follow up on questioning Dr. Cumberland.

Trial counsel did not bring out any weaknesses in Dr. Cumberland’s (medical examiner) testimony on cross-examination or closing argument. The only reference to Dr. Cumberland by trial counsel during closing argument was: **“The doctor has said there was a stick found in Susan Morris”** [TT. Vol. V, p909]. This was the only statement trail counsel made about Dr. Cumberland’s testimony throughout his entire closing argument. That statement certainly does not establish any weakness in Dr. Cumberland’s testimony or opinions.

At the Evidentiary Hearing, Dr. Jack Daniel, a forensic pathologist, testified that in his opinion it was quite likely that the stick penetrated the vagina by the pushing of debris onto the body because the body was covered with debris, the vagina contained loose wood fragments, and there was no indication of internal lacerations or bruising, which he would have expected to see [PC-T. Vol. II, p359-360]. At the Evidentiary Hearing, Dr. Cumberland testified he didn’t further clarify his statement that there were other reasons to explain

why the stick was not forced into the vagina because trial counsel didn’t ask the right questions.

At trial, Dr. Cumberland opined that the stick present in the vagina was inserted premortem due to the vital reactions in

injuries that occur before death [TT. Vol. IV, p738]. On cross-examination, trial counsel requested Dr. Cumberland to explain to the jury what he meant about vital reaction [TT. Vol. IV, p743]. In response, Dr. Cumberland gave a lengthy explanation to the jury, and after the conclusion, trial counsel asked no further questions about the matter.

At the Evidentiary Hearing, Dr. Daniel disagreed with Dr. Cumberland's explanation regarding the vital reaction. Dr. Daniel opined that if the stick had become lodged premortm he would have expected more injury and bleeding, and therefore indicated that the stick was most likely inserted postmortem. He further testified that Dr. Cumberland did not perform the tests necessary to determine whether the injury was premortem or postmortem [PC-T. Vol. II, p346-347]. During the evidentiary hearing Dr. Cumberland agreed with Dr. Daniel that microscopically is the best way to determine in some instances postmortem versus premortem injuries [PC-T. Vol. II, p381]. Trial counsel failed to ask these questions at trial.

On direct examination at the guilt phase and the penalty phase, Dr. Cumberland did not use the words "defensive wounds." However, on cross-examination, trial counsel asked Dr. Cumberland: "Q. Now, you talked about injuries to the arm.

Would you describe those again, please?" [TT. Vol. IV, p746; "Q. Did you reach an opinion as to the possible cause of those bruises?" [TT. Vol. IV, p747]. It was only when these questions were asked that Dr. Cumberland expressed the injuries as the "type of wounds that we commonly see in defense situations where in an attempt to ward off blows" [TT. Vol. IV, p747]. The trial court's order disagreed with Appellant that it was trial counsel's questions that elicited testimony regarding "defensive wounds." The court's order points to the trial transcript at page 958, and acknowledges that the prosecution elicited "defensive wounds" on **redirect examination**. [emphasis added]. However, on page 747 of the trial transcript, the following occurred:

> Q. Did you reach an opinion as to the possible cause of those bruises?
>
> A. The placement of the bruises, the bruise to the left arm could have been delivered by a discrete blow by a relatively small object or a hand or could be associated with a restraint-type hold where the arm was grabbed to try to hold the person from moving. The bruise down the back side of the left arm and the wrist region as well as the bruises on the back side of the right hand are the type of **wounds that we commonly see in defense situations** where in an attempt to ward off blows to the head and face region, a person will throw their hands up above their face and duck their chin down to protect themselves. [emphasis added].

There was no rational basis for counsel to have pursued

this line of questioning. The issue of defensive wounds had not appeared prior to trial counsel's questions. The State pursued this issue only after trial counsel initiated it. Trial counsel essentially proved the State's case regarding an element of HAC.

At trial, trial counsel asked Dr. Cumberland on cross-examination what could cause the bruises on the external area around Ms. Morris's vagina [TT. Vol. IV, p744]. Dr. Cumberland testified that it could have been caused by an "erect penis" [TT. Vol. IV, p744]. Again, trial counsel had no rational basis to ask the question.

During the penalty phase, Dr. Cumberland testified that in his opinion the ligature around Ms. Morris's neck did not cause her death because the bruises were larger than the size of the ligature [TT. Vol. VI, p953]. Dr. Daniel disagreed with that finding [PC-T. Vol. II, p348]. Trial counsel did not challenge Dr. Cumberland's finding on cross-examination. In his autopsy, Dr. Cumberland stated "disarticulation," but no fractures to the neck. However, during his trial testimony Dr. Cumberland testified about fractures in the neck. Dr. Daniel pointed out this inconsistency during the Evidentiary Hearing, and noted that trial counsel failed to ask Dr. Cumberland any questions about this subject at trial [PC-T. Vol. II, p347].

The trial court's order found no prejudice "from counsel's alleged omission since the defense at trial was that the Sexual Battery was committed by someone else" [PC-R. Vol. IX, p1604]. This finding ignores Appellant's right to have counsel test the State's case, especially in a circumstantial evidence case. Honors v. State, 752 So. 2d 1234 (Fla. 2nd DCA 2000)(A fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.); Pace v. State, 750 So. 2d 57 (Fla. 1999); Morrow v. State, 715 So. 2d 1075 (Fla. 1998) (The failure to call witnesses can constitute ineffective assistance of counsel if the witnesses may have been able to cast doubt on the defendant's guilt, and the defendant states in his motion the witnesses' names and the substance of their testimony, and explains how the omission prejudiced the outcome of the trial.)

Trial counsel was not sufficiently prepared to rebuke Dr. Cumberland's testimony. Only through another pathologist could doubt have been cast upon the elements of sexual battery. The trial court's finding that no prejudice exited because the Appellant claimed he wasn't there presumes the Appellant would be believed. Absent that belief, it was imperative to cast doubt upon the state's case through opposing experts.

Blood Spatter Expert – The trial court's order states that it was important for trial counsel to establish that the source of the blood was on the same plane as the boots [PC-R. Vol. IX, p1601]. On direct examination by the State, Ms. Johnson, FDLE blood spatter expert, conceded the fact, plus added some speculation of her own. At trial Ms. Johnson gave the following opinion:

> Q. Okay. Thank you. Ms. Johnson, if you would, explain what conclusions you were able to draw from the pattern that you have demonstrated?
>
> A. Based upon the analysis of the blood stain patterns, I detected a pattern on the inside portion of the right and left boot, and I have this marked with my red marking tape indicating the pattern area. **These spatters are consistent with medium-velocity spatter, which is spatter that you normally would expect from a beating. These spatters are also pretty much 90 degrees in shape, and they're consistent from coming from a point of origin as if the victim were on the ground and whoever was wearing the boots was actually straddling the victim when the bloodshed was occurring.**
>
> Q. And was that because the spatter indicates that the boots were on the same plane as the source of the blood?
>
> A. That is correct. If you notice, that the blood stain patterns are pretty much at the same height and they're on the inside of each boot.

[TT. Vol. III, p546].

Trial counsel didn't establish any weakness in the position of Ms. Johnson on cross-examination or in closing argument. In

fact, his cross-examination had Ms. Johnson restate her opinion without any challenge or alternative explanation:

> Q. Okay. However, that is not the only explanation or the only possible explanation, is it?
>
> A. For the medium-velocity spatter?
>
> Q. Yes, ma'am.
>
> A. In my opinion, it would be pretty much consistent with that.
>
> Q. I understand. But that's not –
>
> A. Maybe you could think of another scenario that I could use as an example.
>
> Q. What about the slinging of blood?
>
> A. Okay. If I would observe slinging blood, it would have more angular appearances like I explained to you earlier, tadpole shaped, but these spatters – when I look at a blood spatter, I look for a pattern, and that's what I saw on the boots. I don't look for just one or two stains. I'm looking for a particular pattern, and the pattern that I did detect was consistent of being very circular, very small, three millimeters in size, and it was consistent with a pattern and that's what I do analyze. I don't just analyze a single spatter. It has to be a pattern.
>
> Q. And you say that this was consistent with someone straddling where the force was delivered?
>
> A. Yes, sir.
>
> Q. Okay. Since it's at a 90-degree angle, you said, the spatter, that would indicate that the straddling would have to be from a standing position?
>
> A. Yes, that's my opinion.
>
> Q. Because if you're straddling from this position –

A. That’s right. Your shoes are behind you.

Q. – and administering a beating –

A. That is correct.

Q. – there is no way for blood to get there, is there?

A. That is correct.

Q. So you’re suggesting that person was standing here and the victim was on the ground and a beating was being administered?

A. That is correct.

[TT. Vol. III, p549-551]. Based upon trial counsel’s inadequate cross-examination the jury was left with the impression that straddling and beating the victim was the only way that the blood could have been deposited on the boots. However, Dr. Kish testified that Ms. Johnson’s opinion went much further than could be explained by science:

Q. When you say you disagree with her opinion, what do you mean?

A. In regards to the definitiveness of it where she interprets the fact that the boots were in immediate proximity when straddling somebody and impacting them, is that possible? Yes, it’s possible. But I would not be able to say to that degree of certainty based upon the stain patterns we have in the case factors.

In other words, the opinion that as far as how far anybody should be able to go with this case would be that the spatters on those boots could be one of three mechanisms or a combination of those three mechanisms.

Q. Okay. Did she testify about mechanisms?

A. Nothing to my knowledge other than direct impact.

[PC-T. Vol. III, p403]. Dr. Kish also testified that Appellant's explanation of how the blood appeared on his boots was just as consistent as Ms. Johnson's explanation [PC-T. Vol. III, p404].

Dr. Kish also explained that trial counsel's cross-examination was inadequate:

> Q. Do you have an opinion as to whether or not there were questions that should have been asked or questions that should not have been asked?
>
> A. Yes.
>
> Q. For example?
>
> A. Questions that – a question that probably should not have been asked would be the idea of castoff or flung blood. The overall distribution of stain patterns that we see on the boots and so forth don't fit that. So that question should not have been asked in regards to cross-examination of Ms. Johnson.
>
> The other issue that should have been asked would have been what other – and explored in more depth would be these alternative explanations that I have given to you. What about aspirated blood? What about blood dripping into blood? What other ways can we create stain patterns of that particular size? How did you test your hypothesis that this person's feet--head was down in the vicinity between the two feet when she was actually impacted to create those stain patterns? How were you able to exclude these other potential mechanisms as far as creating the actual stain patterns that were on the boots?

[PC-T. Vol. III, p406-407]. Dr. Kish's testimony establishes that trial counsel had not adequately prepared for cross-examination of Ms. Johnson and should have utilized an expert.

As to closing argument, trial counsel argued to the jury that Ms. Johnson's opinion did not contradict Appellant's explanation that Ms. Morris fell onto the same plane as his boots [TT. Vol. V, p900]. However, that argument failed to deplete Ms. Johnson's conclusion that the person had to be straddling the victim and beating her. Trial counsel provided no opposing expert to establish that Ms. Johnson's conclusion was speculative at best.

Third prong – availability of experts

Dr. Daniel testified there were many experts in forensic pathology that were available at the time of trial who could have assisted counsel or testified.

Dr. Kish testified that not only was he available to testify at the time of trial, but there were numerous experts in the field that could have testified. The Appellant had the right to have a jury hear opposing experts to test the State's case. The trial court's finding that the experts were unpersuasive fails to consider the effect on a jury. The State's experts went unchallenged by trial counsel. Trial counsel failed to establish any weakness in their testimony on cross-examination

or in closing argument. Trial counsel's desire to retain open and close for closing argument was an unreasonable tactical trade-off considering the positive testimony at the Evidentiary Hearing by defense experts.

ARGUMENT IV

THE TRIAL COURT ERRED IN FINDING THAT THE INDIANA CONVICTION AMOUNTED TO A VALID PRIOR VIOLENT FELONY THAT SATISIFIED SECTION 921.141(5)(B), FLORIDA STATUTES

It is important to note that the State, in their memorandum to the trial court [PC-R. Vol. IX, p1488], argued that this issue is procedurally barred because it could have been raised with the issue of "violent" felony on appeal[6].

Carpenter v. State, 785 So.2d 1182 (Fla. 2001), appears to be a case of "first impression" for this Court on what procedure should be used in determining whether an out-of-state conviction qualifies for a statutory aggravator under Section 921.141(5)(b), where the elements and definitions of the out-of-state statute are not clear that the offense would be a felony in Florida. In light of Carpenter and the issue raised herein,

[6] Inasmuch as this Court might agree with the State, this issue will be raised in Appellant's Habeas proceeding to protect Appellant's rights and avoid a potential procedural bar.

the Appellant respectfully requests this Court reconsider its holding in the Appellant's direct appeal of "without merit," as it pertains to the issue of the out-of-state statute "violent" felony argument.

In its order finding that the Appellant's Indiana conviction amounted to a felony in Florida, the trial court incorrectly stated that Appellant based his claim on Branch v. State, 671 So.2d 224 (Fla. 1st DCA 1996). While the Appellant certainly relies on Branch, Id., the Appellant also relied on Carpenter as well as other authorities cited in Appellant's 2nd amended 3.850 Motion.

In its order the trial court stated it agreed with the State that Carpenter, Id. distinguishes between aggravating factors and enhancements to noncapital criminal sentences. The trial court and the State are correct, as far as they went. However, neither the State nor the trial court mentioned the remainder of the holding in Carpenter:

> In the present situation, however, the Legislature has not provided for any type of comparison and has specifically provided that only a "felony involving the use or threat of violence to the person" may establish an aggravating factor under section 921.141(5)(b). Sec. 921.141(5)(b), Fla. Stat. (emphasis added). **Further, based on the elements and definitions in the Nevada Statutes, it is not clear that the offense would be a felony in Florida. Resolution of the issue would require a separate trial**

> **concerning the Nevada events within the trial of this case. Strictly construing this statutory language in favor of the defendant.** See. E.g., *Donaldson v. State, 722 So.2d 177, 184 (Fla. 1998*) ("It is axiomatic that penal statutes must be strictly construed."), we determine that an out-of-state conviction related to an offense that has only similar but different elements and does not constitute a "felony" in that state does not amount to a felony in Florida as a matter of law for the purposes of establishing the prior violent felony aggravating circumstance under the present statute.

Id. At 1205. (emphasis added).

The language in Carpenter, Id., is clear regarding a prior violent felony aggravator under Section 921.141(5)(b). In the situation where an out-of-state statute has similar, but different elements and is not a felony in that state, the conviction cannot be used as an aggravator. It is also clear that when the elements and definitions of the out-of-state statute are not clear that the offense would be a felony in Florida, "resolution of the issue would require a separate trial concerning the [out-of-state] events within the trial of th[e] case. Strictly construing this statutory language in favor of the defendant." Id. At 1205.

While the comparison of the Indiana statute to Florida's statutes in Branch v. State, 671 So.2d 224 (Fla. 1st DCA 1996), may not be the same comparison for Section 921.141(5)(b), it did find that the elements are different.

Our review of the statutes in question leads us to the

> conclusion that the crime of sexual battery in Florida is not analogous to the crime of sexual battery in Indiana for purposes of the habitual violent felony sentencing. Each crime requires elements that the other does not. [fn1 Indiana has a separate crime of "Rape." *Ind.Code Sec. 35-42-4-1.]* See *,* e.g.*, Dautel v. State, 658 So.2d 88 (Fla. 1995); Forehand v. State, 537 SO.2d 103 (Fla. 1989)*.

"Sexual battery" in Indiana does not constitute a "sexual battery" as contemplated by the Florida statute, and is, in fact, more comparable to a simple battery. See Florida Statutes Sec. 794.011(h) (1991)(sexual battery defined as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object"); see also Florida Statutes Sec. 784.03 (1991)(a person commits battery if he actually and intentionally touches or strikes another against their will or intentionally causes bodily harm to an individual). Elledge v. State, 346 So. 2d 998 (Fla. 1977) (remanded for re-sentencing because a non-statutory aggravating circumstance was considered. The prior Indiana conviction involved an offense alleged as count 5 of the information, to-wit:

> [O]n or about October 15, 1991, Eric S. Branch, did with the intent to arouse and satisfy his own sexual desires, ***touch another person***, to-wit: Tiffany Pierce, the said Tiffany Pierce being compelled to submit to the touching by force, to-wit: ***covering the mouth of Tiffany Pierce and forcing her to the ground and telling Tiffany Pierce not to scream***, contrary to the form of the statutes in such cases made and provided

by I.C. 35-42-4-8 . . .

The offense is denominated "sexual battery" under Indiana Statute is 35-42-4-8, which provides in pertinent part:

> **Sexual battery** - Any person who, with intent to arouse or satisfy the person's own sexual desires or the sexual desires of another person, touches another person when that person is:
>
> (1) Compelled to submit to the touching by force or imminent threat of force; . . . commits sexual battery, a Class D felony . . . The crime of "sexual battery" as defined by this statute is not a lesser included offense of rape in Indiana. Scrougham v. State, 654 N.E. 2d 542 (Ind. App. 1990).

"Sexual battery" as it is defined in Florida, is "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object," Section 794.011(1)(h), Fla. Stat. The Indiana offense simply does not contain any of the essential elements of Florida's sexual battery offense.

The Indiana offense contains elements of touching like Florida's battery[7], but the crime also requires specific intent: to arouse or satisfy the person's own sexual desires or the sexual desires of another person. Thus, the Indiana offense

---

[7] In Florida, "A person commits battery if he:

(A) Actually and intentionally touches or strikes another person against the will of the other; or

(B) Intentionally causes bodily harm to an individual." Section 784.03, Fla. Stat.

appears to require more than Florida's battery because it contains the added element of specific intent. However, at the time of Appellant's trial, it was analogous to no other statutory offense in Florida other than simple battery -- a misdemeanor in the first degree. Fla. Stat. 784.03(2) is not a qualifying offense for purposes of the prior violent felony aggravating circumstance and, thus, an impermissible factor to consider in the capital sentencing calculus in Florida.

More importantly in deciding the specific issue raised here, it is what the Indiana offense is not, relative to Florida law, which is decisive. What the Indiana information and statute clearly demonstrate is that this offense does not contain elements essential to, and which necessarily define, Florida's crime of "sexual battery." The Indiana offense lacks the essential elements of the penetration or union with the victim's vagina, anus or mouth with the sexual organ of the perpetrator[8]. Alternatively, there is also no required element of

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8 In fact, such elements are found only in other Indiana statutes defining other criminal offenses. Essentially, rape as defined by Indiana Statute 35-42-4-1, requires knowing or intentional sexual intercourse with a member of the opposite sex by force or imminent threat of force. Penetration of the vagina, even the slightest, is required for this offense. *Holder v. State, 272 Ind. 52, 396 N.E. 2d 112 (Ind. 1979).* This statute covers only one aspect of Florida's sexual battery statute, vaginal penetration. Indiana Statute 35-42-4-2, Criminal Deviate Conduct, prohibits sodomy. *Estes v. State, 195 N.E. 2d 471*

the penetration of the victim's vagina or anus by an object. Thus, the Indiana conviction was not for an offense analogous to or the same as Florida's sexual battery. Further, given that this Indiana offense has been held not to be a lesser-included offense to rape (defined in Indiana as essentially forced vaginal sexual intercourse), they are also mutually exclusive offenses.

The Indiana offense is also not aggravated battery in Florida. First, the offense lacks the essential elements of the aggravated battery relating to the infliction of great bodily harm, permanent disability, permanent disfigurement, or the use of a deadly weapon during its commission. Thus, the offense is not analogous to, and is not, an aggravated battery under Florida law.

The Indiana offense is not an aggravated assault under Florida law. Neither the Indiana statute nor the information requires or alleges the essential element of creating a well-founded fear in the victim that violence is imminent. The Indiana statute does not require, nor did the information allege, a deadly weapon or an intent to commit a felony. Thus,

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(Ind. 1964). It also prohibits insertion of an object into the anus. *Stewart v. State, 555 N.E. 2d 121 (Ind. 1990)*. These are only some, not all of the aspects of Florida's sexual battery statute, but those elements are not included in the state for which Appellant was convicted.

the Indiana offense is not an aggravated assault in Florida.

None of the offenses contemplated by the prior violent felony aggravating circumstance in Fla. Stat. 921.141 (5)(b) are the same as or analogous to the elements of the Indiana offense as it is defined by Indiana statute and as alleged in the Indiana information. At the very most, the Indiana conviction is analogous to only a simple misdemeanor battery in Florida. Thus, the Trial Court committed reversible error when it found that the Indiana offense is a felony.

ARGUMENT V

THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO OBJECT TO THE INTRODUCTION OF THE ABSTRACT OF JUDGMENT DURING THE PENALTY PHASE BECAUSE THE STATE INTRODUCED ADDITIONAL DOCUMENTS AT THE SPENCER HEARING.

The standard of review for claims of ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668 (1984). In Appellant's memorandum to the trial court, he cited to Sinkfield v. State, 592, So.2d 322 (Fla. 1st DCA 1992) as support for his argument. The trial court's order found that this case was distinguishable because: "At the sentencing hearing--where trial counsel could have still moved to either strike that aggravator or for a new penalty phase--the State effectively precluded any further argument by submitting further

documentation regarding the Indiana conviction" [PC-R. Vol. IX, p1611]. Again, the trial court ignores the effect the admission of the abstract had upon the jury in considering "prior violent felony" as an aggravator. The trial court is required to give great weight to the jury's recommendation.

The trial court's order agreed with the general proposition cited in Sinkfield, but was of the belief that because the State introduced additional documentation at the Spencer hearing the argument was without merit [PC-T. Vol. IX, p1611].

During the penalty phase, the State introduced a certified copy of an abstract [TT. Vol. VI, p972] purporting to be a prior offense of sexual battery. While trial counsel objected to whether the Indiana offense amounted to a violent felony, he did not object to the admission of the abstract [TT. Vol. VI, p973]. Trial counsel was unaware of the legal characterization of the Abstract, because in his Memorandum in Support of a Life Sentence, he incorrectly identifies the Abstract as "a certified copy of the defendant's judgment of conviction…" [R. Vol. III, p469].

The trial court found in its order that trial counsel did not object. The abstract was presented to the jury in an attempt to establish that Appellant had been convicted of a prior violent felony. However, the abstract contained no

identifying information to establish that Appellant was in fact the individual referenced in the abstract (State's exhibit H-1). At the Evidentiary Hearing, trial counsel acknowledged that no identifying factors were present in the abstract [PC-R. Vol. VII, p1165]. The abstract was inadmissible hearsay. Williams v. State, 515 So.2d 1042 (Fla. 3rd DCA 1987).

In Sinkfield v. State, 592 So.2d at 323, the Court found:

> However, after the issuance of the original mandate herein, this court issued its opinion in *Killingsworth v. State, 584 So.2d 647, 1991 Fla. App. LEXIS 8080, 16 Fla. Law W. D 2189 (Fla. 1st DCA 1991).* Like Sinkfield, the Killingsworth defendant did not object on any ground to the admission of a certified copy of a judgment and sentence introduced by the state to prove prior conviction (although this fact is not explicitly stated in the opinion). The Killingsworth court nevertheless relied on Miller to hold that the mere identity between the name appearing on the prior judgment and the name of the defendant on trial does not satisfy the state's obligation to present affirmative evidence that they are the same person. The court therefore held that a motion for judgment of acquittal should have been granted, and ordered the appellant discharged.

Appellant was prejudiced because the jury was given instructions on a prior violent felony and was permitted to consider the abstract for that aggravator. Had trial counsel objected, the jury would not have been permitted to consider the prior violent felony aggravator.

At the Evidentiary Hearing, the State presented the victim

of a rape in Panama City for which the State claims Appelant was convicted. The State presented this testimony to establish that no prejudice would exist as to the prior felony in Indiana. This is an issue for another day. The prejudice prong for ineffective assistance of counsel is not what might be presented in a new trial, but what the prejudice is at the present trial as a result of deficient performance.

ARGUMENT VI

THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL'S FAILURE TO IMPEACH WITNESSES WAS REASONABLE STRATEGY AND, THEREFORE, NOT INEFFECTIVE

The standard of review for claims of ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668 (1984). The trial court's order found that because trial counsel did not want to lose the jury, his omissions constituted reasonable trial strategy [PC-R. Vol. IX, p1605]. Throughout the trial court's order no mention is made regarding trial counsel's obligation to test the State's case. Trial counsel cannot hide behind the mere assertion of "trial strategy" and do nothing to impeach a witness with prior inconsistent statements that bolstered the State's circumstantial case.
Williams v. State, Supra 507 So.2d at 1123.

> The issue on this appeal, raised by Williams's 3.850 motion and the Evidentiary Hearing thereon, is whether his appointed trial counsel was effective in light of a record that reflects virtually no pretrial investigation and a determination to present no witnesses at trial, all in the name of preserving rebuttal during closing argument. Trial counsel even advised Williams not to testify, which would have meant the state's version of events was un-contradicted. Trial counsel also declined to depose the alleged rape victims prior to trial, ostensibly in order to retain a tactical surprise examination. A trial strategy to do nothing, contrary to the dissent, is not an acceptable one.

At the Evidentiary Hearing, trial counsel stated that his reasoning for not utilizing the depositions to impeach at trial was two-fold: (1) he could effectively cross-examine the witnesses and (2) he didn't want to alienate the jurors. The undersigned concedes that generally the Court will not second-guess trial counsel's strategy. Roesch v. State, 627 So.2d 57 (Fla. 2nd DCA 1993).

> Tactical decisions generally are for counsel to make and will not be second-guessed unless shown to be patently unreasonable. See, e.g., *Sanborn v. State, 474 So.2d 309 (Fla. 3d DCA 1985).* This is not to suggest that the client should never be consulted in matters of strategy, or that the client cannot be called upon to help choose between competing avenues of defense. In the present case, the state's response suggests that counsel may have set out Roesch's options - pursuing possible defense witnesses versus forcing the state to trial without its own witnesses - and honored Roesch's preference. This is not ineffective assistance so long as counsel "investigated each line [of defense] substantially before making a strategic choice about which lines to rely on at trial."

Trial counsel acknowledged that this case was based upon circumstantial evidence. He even requested a special instruction regarding the elements of circumstantial evidence. Although trial counsel declared that his failure to impeach witnesses with their deposition was trial strategy, that strategy must be weighed against the fact that those were witnesses the State was utilizing as building blocks to prove their case. The Court should not defer to patently unreasonable decisions by defense counsel that are labeled as trial tactics. Ridenour v. State, 768 So.2d 480 (Fla. 2nd DCA 2000).

In Ms. Cowden's deposition given in September of 1993, she was not sure what Appellant was wearing when she came back to her dorm room on Monday night, a short time after the homicide occurred [PC-R. Vol. VII, p1220-1223]. At trial six months later, however, Ms. Cowden remembered exactly what Appellant was wearing: "He had on a white Nautica sweatshirt, black-and-white checkered shorts, and brown boots" [TT. Vol. VII, p598].

In her deposition, Ms. Cowden had a great deal of trouble remembering what happened in the latter part of the day. For example, she could not recall where she met Appellant before they headed to the Rat (a bar) and she did not remember how long they stayed there together [PC-R. Vol. VII, p1209]. She also

did not know what time she got back to her dormitory later that night after looking for Eric [PC-R. Vol. VII, p1218). At the trial, however, Ms. Cowden suddenly remembered all of these facts with unusual clarity. She testified she met Appellant in her dorm room, and they stayed there for 10-15 minutes [TT. Vol. IV, p594; 614]. She also testified that they were together at the Rat for about twenty minutes, and she returned to her dormitory that night around 9:30 or 10 o'clock [TT. Vol. IV, p614-15].

At trial, the State also presented the testimony of Joshua Flaum. He testified that he had seen Appellant "loading up a small, red car around 11 o'clock" [TT. Vol. IV, p642]. However, in Mr. Flaum's deposition he stated that he wasn't even certain that the vehicle was "red" [PC-R. Vol. VII, p1244]. What did not come out at trial is that Mr. Flaum had given a statement to police only a few days after the instant offense, in which he made no mention of seeing Appellant by the victim's vehicle that night. Trial counsel did not utilize Mr. Flaum's statement to the police to establish that he did not mention to law enforcement about seeing Appellant by the victim's vehicle [TT. Vol. IV, p642-43].

Trial counsel's failure to impeach witnesses that had changed their testimony at trial amounts to deficient

performance and prejudiced Appellant by implying the State's witnesses' memories were reliable. Kegler v. State, 712 So.2d 1167 (Fla. 2nd DCA 1998).

ARGUMENT VII

THE TRIAL COURT ERRED IN FINDING THAT APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE FOR FAILURE TO INVESTIGATE IS WITHOUT MERIT

The trial court's order finding the above claim without merit refers primarily to what postconviction counsel presented. The trial court makes no mention of the obligation of trial counsel to investigate [PC-R. Vol. IX, p1605].

The Appellant contends that in most cases, each issue is connected to the other. The path chosen to follow in the beginning affects the next choice and the next choice. Trial counsel's failure to investigate affected each choice of strategy and subsequent events thereon. Because trial counsel's choices were based upon lack of experience and failure to investigate, the State's case went virtually untested.

This case ultimately went to trial on March 7, 1994, allowing only four and one-half months for counsel to prepare for trial. Trial counsel hired an investigator, Mr. Wimbelry, only one week prior to trial. Fred Wimberly testified at the

Evidentiary Hearing that he was hired on March 1, 1993. Mr. Wimberly testified he had submitted a detailed bill (Clerk's docket item #356, filed 5/13/94) describing the functions he performed in finding Eric St. Pierre, the person who actually killed Ms. Morris, according to Appellant's trial testimony. Mr. Wimberly testified he met with Appellant, who provided him with the addresses and persons to contact in order to find Eric St. Pierre. He further testified that he indeed spoke to Eric St. Pierre on the phone and met with him at an apartment complex and took photographs of him, one of which was introduced as Exhibit E [PC-R. Vol. VIII, p1433]. He also had the impression that Eric St. Pierre knew Appellant and disliked him, but Mr. Wimberly couldn't remember why he had that impression. He testified that on March 7, 1994, the date the trial began, he notified trial counsel that he had found Eric St. Pierre and identified who he was in Exhibit E. He testified that he was not requested to do anything further. The trial court made no mention of Mr. Wimberly's testimony whatsoever in its order.

At the Evidentiary Hearing, Alfred Branch testified, that on the day he appeared in court to speak to the Judge, he and Verdelski Miller (an Indiana attorney) met with trial counsel and was requested to withdraw from the case. Alfred Branch testified that trial counsel stated to him that the Judge was

not pleased with him about the complaints, but the Judge would not allow him to withdraw. Alfred Branch submitted an affidavit to the Court complaining about trial counsel's representation of Appellant on February 17, 1994 [R. Vol I, p338-340].

Appellant sent a letter to the judge on February 17, 1994 [R. Vol. I, p355-356], and stated as of the letter's date, trial counsel had visited him only once for a short period of time.

In summary, Appellant was denied a fair adversarial testing of the State's case. This was Trial counsel's first capital case. He had less than five months to prepare for trial, while also handling a case load in excess of 20 cases, including another capital case and major drug case. He didn't hire any experts to test the State's experts. Arguably, he had little contact with Appellant. When he did hire an investigator, it was six days before trial. Trial counsel knew that Appellant claimed that Eric St. Pierre was the actual killer. When Mr. Wimberly found Eric St. Pierre, trial counsel did nothing to acquire his presence at trial, take a deposition, or obtain forensic samples of fingerprints, hair, and blood of Eric St. Pierre. Although trial counsel denies being told that the person in Exhibit E was, in fact, Eric St. Pierre, Mr. Wimberly had no reason to manufacture false information on his billing

nor to lie at the Evidentiary Hearing.

Trial counsel knew, or should have known, that he was unable to competently represent Appellant, given his inexperience in capital cases and lack of time to prepare. When it became apparent he had a conflict with Appellant, due to dissatisfaction of representation, trial counsel should have moved the Court to withdraw, or, in the alternative, to appoint co-counsel. Trial counsel did neither. One has to wonder whether trial counsel gave 100 percent of his ability given his statements at the Evidentiary Hearing. Trial counsel stated that the photographs of Ms. Morris would remain in his mind forever and that "the jury told Eric what he did wrong, you (referring to Mr. Reiter) are telling me what I did wrong, what did Ms. Morris do wrong." Although trial counsel is entitled to his emotions, the question becomes "how did it affect his representation in conjunction with the other circumstances listed above?"

ARGUMENT VIII

THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL'S FAILURE TO OBJECT AT THE GUILT AND PENALTY PHASE WAS REASONABLE AND AND THEREFORE NOT INEFFECTIVE

The standard of review for claims of ineffective assistance of counsel is set out in Strickland v. Washington, 466 U.S. 668 (1984). The trial court's order primarily accepted trial counsel's decision not to object because the issue was either unworthy of objection or he didn't want to lose the jury.

During the guilt phase, trial counsel failed to lodge objections to several improper comments and arguments made by the State. Appellant's counsel is aware that strategy plays a role in trial counsel's decisions, but each circumstance must be reviewed to ascertain if such decisions were reasonable.

> This Court has recognized that "the decision not to object to improper comments is fraught with danger . . . because it might cause an otherwise appealable issue to be considered procedurally barred." *Chandler v. State, 848 So.2d 1031, 1045 (Fla. 2003)*. However, this Court has also noted that "a decision not to object to an otherwise objectionable comment may be made for strategic reasons." *Id.*; see also *Ferguson v. State, 593 So. 2d 508, 511 (Fla. 1992)* ("The decision not to object is a tactical one."); *McCrae v. State, 510 So.2d 874, 878 (Fla. 1987)* ("Whether to object to an improper comment can be a matter of trial strategy upon which a reasonable discretion is allowed to counsel.")

Zakrzewski v. State, 866 So.2d 688 (Fla. 2003).

During the examination of Dr. Cumberland, the prosecutor

requested the doctor to speculate on an event without a good-faith basis to believe that the event occurred. Trial counsel failed to object.

> MR. PATTERSON: If the soft - the ligature around her neck was not sufficient to cause the strangulation that you saw, from the placement of the sock and the injuries relative to it, would it have been sufficient to have been used as a device to control that person?
>
> DR. CUMBERLAND: Yes, it would have been - ... So based on that and the circumstances of the death, it would be a reasonable interpretation that the sock was used as a means of control where if the person involved was not - did not like the attitude or the direction that the person was going, that sock could be tightened up, which would cause the person to feel their wind being cut off and a constriction around their neck and panic and would be more likely to comply with what the perpetrator would like them to do [TT. Vol. V, p955].

The prosecutor also improperly invoked sympathy for the victim during closing argument when he argued: "All you have to do is ***look at what happened to that poor girl*** to know what the intent was … " "… unspeakable things to her and leave her for dead" [TT. Vol. V, p893]. When explaining premeditation, the prosecutor again invoked sympathy by arguing: "It simply means that you must have time to reflect in your own mind when you are kicking and hitting and choking ***this poor girl*** that you know what you're doing is going to kill her. That's premeditated murder" [TT. Vol. V, p893-894]. These two arguments went without objection and represent nothing more than a means to

inflame the jury's emotions.

Trial counsel failed to object to the prosecutor's improper bolstering of the testimony of Melissa Cowden and improper vouching for her credibility:

> You had an opportunity to see Melissa Cowden testify, to be careful to tell you the truth regarding what she saw and she heard. She held nothing back. I'm sure her testimony was embarrassing for her with regard to some aspects of it but she told the truth. The Eric that killed Susan Morris had a cut on his hand

[TT. Vol. V, p889].

The prosecutor also impermissibly argued and accused Appellant of stealing his own brown car, even though there was no evidence it was stolen: "He has a car that he's been driving around for some time ***that he basically stole***, but he wants to steal another now" [TT. Vol. V, p889]. This argument is not based upon any evidence in the record, and it prejudicially presents to the jury an uncharged offense. Trial counsel's performance was deficient.

At the Evidentiary Hearing, Trial counsel's explanation for not objecting was that he didn't want to lose the jury. However, trial counsel filed a motion to exclude comments or evidence for sympathy [R. Vol. I, p91] and argued the motion to the court [R. Vol. II, p287]. Mr. Patterson, the prosecutor, agreed that he would not argue sympathy to the jury [R. Vol. II,

p285]. During the Evidentiary Hearing, Trial counsel agreed that many of the comments by the prosecutor could only be characterized as gaining sympathy of the jury, yet he failed to object.

Trial counsel's failure to object cannot objectively be construed as reasonable strategy. He argued the motion not to invoke sympathy, the jury was subjected to sympathy for Ms. Morris against Appellant, the jury was permitted to consider that Appellant stole his own car, and no record of objection was preserved for appeal, all because Trial counsel didn't want to upset the jury.

At the penalty phase, the prosecutor made impermissible argument without objection by Defense Counsel:

> [MR. PATTERSON]:***I cannot imagine again a more difficult situation*** for a woman, any woman, particularly a young woman. It has to be out of someone's worst nightmare to be walking in a dark parking lot on a rainy, misty night ***and to find yourself*** attacked, beaten, drug into the woods, sexually battered and finally choked to death. If that does not fit the definition of heinous, atrocious and cruel, ***I think*** it would be difficult to imagine a situation that does.

[TT. Vol. VI, p1014](emphasis added).

The Florida Supreme Court has repeatedly condemned prosecutorial argument that invites the jury to base its decision on such emotions. See, e.g., King v. State, 623 So.2d

486 (Fla. 1993); Rhodes v. State, 547 So.2d 1201 (Fla. 1989); Garron v. State, 528 So.2d 353 (Fla. 1988); Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985) ("[Closing argument] must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.")

ARGUMENT IX

THE TRIAL COURT ERRED IN NOT ADDRESSING CUMULATIVE ERRORS BECAUSE NOT A SINGLE ERROR WAS FOUND BY THE COURT

Appellant failed to receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The sheer number and types of errors involved in this trial, when considered as a whole, deprived the Defendant of due process and virtually guaranteed the sentence he received.

In Jones v. State, 569 So.2d 1234 (Fla. 1990) the Florida Supreme Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "**cumulative**

errors affecting the penalty phase" Id. at 1235 (emphasis added). In Nowitzke v. State, 572 So.2d 1346 (Fla. 1990) cumulative prosecutorial misconduct was the basis for a new trial. When cumulative errors exist the proper concern is whether:

> even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.

Jackson v. State, 575 So.2d 181, 189 (Fla. 1991). See also Ellis v. State, 622 So.2d 991 (Fla. 1993) (new trial ordered because of prejudice resulting from cumulative error); Taylor v. State, 640 So.2d 1127 (Fla. 4th DCA 1994).

However, Appellant's counsel acknowledges this Court stated in Downs v. State, 740 So.2d 506 (Fla. 1999) and Bryan v. State, 748 So.2d 1003 (Fla. 1999) that where no error is found, a claim of cumulative error will not stand. The trial court's order found no error occurred and therefore, did not address this claim [PC-R. Vol. IX, p1615]. However, based upon the claims above, this Court's review is de novo as to Appellant's claims.

The trial record is permeated with evidence of trial counsel's failure to function as competent counsel. This was

trial counsel's first death case. As a result, trial counsel: (1) didn't file a Motion to Suppress (Claim I), (2) didn't speak with the doctor who originally examined the Appellant (Claim II), (3) didn't hire his own mental health expert (Claim II & III), (4) didn't hire his own pathologist (Claim III), (5) didn't hire his own forensic expert (Claim III), (6) helped the state in proving HAC (Claim II), (7) didn't hire an investigator until the week of trial (Claim II & VII), (8) didn't subpoena for deposition or trial Eric St. Pierre (Claim II & VII), (9) didn't conduct any depositions or speak with the State's witnesses (Claim VII), (10) continually represented to the court he was not ready to proceed and intended to hire a mental health expert, but didn't (Claim II & III), (11) didn't withdraw from the case when requested to do so, (12) didn't speak to any family members until the week of trial (Claim II), (13) didn't prepare the family for testimony (Claim II), (14) didn't obtain any of Appellant's historical records (Claim II), (15) didn't impeach any of the State's witnesses, although he possessed their prior inconsistent statements (Claim VI), (16) didn't object to improper statements by the State or their witnesses (Claim VIII), (17) didn't' object to the admission of an abstract judgment, (18) didn't know what a Spencer hear was

(Claim II), and (19) didn't express any specific knowledge of the case law regulating the issues of this case (Claim I, IV, & V). The cumulative errors cannot be said to be harmless beyond a reasonable doubt. The results of the trial and sentencing are not reliable. Rule 3.850 relief must issue.

CONCLUSION AND RELIEF SOUGHT

Appellant prays for the following relief, based on his prima facie allegations demonstrating violation of his constitutional rights:

That his convictions and sentences, including his sentence of death, be vacated and a new trial provided.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first class postage prepaid, to Casandra Dolgin, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050 on August 31st, 2005.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is Courier New 12 point.

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