IN THE SUPREME COURT OF FLORIDA
CASE NO. SC07-330

MAURICE LAMAR FLOYD,
Appellant,

vs.

THE STATE OF FLORIDA,
Appellee
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR PUTNAM COUNTY, FLORIDA

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

The record on the appeal from the post-conviction motion hearing is in two parts, the original record which omitted the transcripts of the hearings, and a supplement consisting of the transcripts. The original record will cited as AROA [VOL #] [page #],@ e.g AROA IV 12-14.@ The supplement will be cited as AROA-S [VOL #] [page #].@ References to the record on appeal in the direct appeal will be cited as AROA 2002 [VOL #] [page #].@

STATEMENT OF THE CASE AND FACTS

This is an appeal from the denial of relief in a 3.851 motion proceeding in a capital case. This Court affirmed Mr. Floyd=s conviction and sentence to death on direct appeal. *Floyd v. State*, 850 So.2d 383 (Fla. 2003). This Court set out the facts from the original trial in its opinion on direct appeal.

> Mary Goss, the victim in this case, was found dead at approximately 11:30 p.m. on July 13, 1998. Police found her body on the ground beside her house located on Bronson Street in Palatka, Florida.[1] The cause of Ms. Goss's death was a single .357 caliber gunshot that entered the left side of her face and proceeded to sever her brain stem, killing her instantaneously. Two days later, on July 15, 1998, police found Floyd, Ms. Goss's son-in-law, hiding in the attic of a house in the Palatka area. Floyd was subsequently charged with the murder of Ms. Goss.FN1

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[1] The body was actually found across the street from Mrs. Goss=s house, between witness Jeanette Figuero=s house and a neighboring residence.

FN1. The indictment returned against Floyd was for premeditated murder or felony murder (Count I), armed burglary of a dwelling (Count II), and aggravated assault (Count III).

. . . .[Mr. Floyd confronted Trelane at a bar about her drinking and partying, expressing his continuing displeasure with her behavior.]

When Trelane returned home around 5 a.m. on the morning of July 12, Floyd informed her that he would not permit her to sleep, and he proceeded to increase the volume on the televisions and the radio in their apartment. He also threatened to kill Trelane or someone she loved as a reprisal for her drinking or if she ever attempted to run or hide from him. Shortly thereafter, Trelane felt a gun being placed beside her head as she was lying in bed. Floyd pulled the trigger three times, but the weapon did not fire. Trelane advised Floyd that she was going to seek a divorce and testified at trial that she did not call the police about this incident because she was in a very confused state.

. . . . [Footnote 3, discussing the gun allegedly used, deleted.]

On July 13, the day Ms. Goss was murdered, Trelane and Floyd had a heated argument on a Palatka street not far from their apartment. Trelane had stopped her car in the street to speak with a friend. Her three-year-old goddaughter was also in the vehicle. Floyd was in his car behind Trelane and he insisted that Trelane take her goddaughter home, calling Trelane a "whore." Fearful for the safety of both herself and her goddaughter, Trelane decided to seek protection in a sheriff's office. Floyd followed and proceeded to ram his car into the back of Trelane's vehicle.

A high speed chase ensued, during which Trelane sounded the horn on her automobile to warn both oncoming traffic and pedestrians who might be in harm's way. The tires on both cars squealed as they slid into the parking lot at the sheriff's office. Trelane exited her car and screamed for help. Hearing both the sounds of squealing tires and Trelane's plaintive cries, Deputy Dean Kelly responded from his desk inside the sheriff's office. Deputy Kelly was the only armed officer in the vicinity as the events unfolded at approximately 7:30 p.m. that evening. Trelane hurriedly reported to Deputy Kelly that Floyd had rammed her car and that she was fearful for her safety. The deputy saw Floyd moving rapidly toward them as they spoke, and he held out his hand to prevent Floyd from accosting Trelane. He then advised Floyd that he was going to be placed into investigative custody until it could be determined exactly what had transpired. Deputy Kelly

instructed Floyd to turn around and to place his hands behind his back. Floyd extended his hands in the air and backed up, insisting that he had done nothing wrong and that he merely wanted to talk to his wife. After the deputy repeated his order for Floyd to submit to custody, Floyd fled the scene. Deputy Kelly began pursuit for a few moments but then halted, fearful of leaving Trelane and her goddaughter defenseless if Floyd decided to double back to attempt to harm them. The subsequent efforts of a K-9 unit and other officers to apprehend Floyd on the evening of July 13 were fruitless.

After giving a statement to sheriff's office personnel, Trelane called her mother, Ms. Goss, from a pay phone at the sheriff's office. Trelane testified that she "told her [mother] what was going on" regarding the incident at the sheriff's office. Ms. Goss informed Trelane that Trelane's three children were at Ms. Goss's house.FN4 After hearing what had transpired earlier on the street and at the sheriff's office between Trelane and Floyd, Ms. Goss said of Floyd, "I won't let him get my grandchildren." Ms. Goss was also aware that the twenty-one-year-old Floyd was then on probation for previous violations of the law.

FN4. Earlier on July 13, Floyd had transported Trelane's three children to be with their grandmother, Ms. Goss.

During the trial, several witnesses described the subsequent events that led to the death of Ms. Goss. J.J. Jones, the oldest of Trelane's three children, testified FN5 that on July 13, 1998, the day that Ms. Goss was killed, Floyd took him and his two younger siblings to the home of their grandmother, Ms. Goss. J.J. also stated that after he had fallen asleep that evening, Ms. Goss awakened him and instructed him to go to the home of her neighbor, Jeanette Figuero, and to call the police from there. Before he exited Ms. Goss's home, J.J. noted that she was clearly upset. As J.J. was moving toward Jeanette Figuero's home, he noticed that Floyd was "squeezing [Ms. Goss] behind the door" at the front of Ms. Goss's home. Moments later he saw Ms. Goss running outside. J.J. stated that he also observed Floyd standing on Ms. Goss's front porch and firing a gun three times. J.J.'s two siblings, LaJade Evans and Alex Evans, were directly behind him, as Ms. Goss had awakened them also. J.J. testified that he never saw Floyd leave the victim's porch, and that the last thing he observed before pounding on Jeanette Figuero's door for help was his grandmother, Ms. Goss, lying on her back. J.J. eventually led the police to the spot where he thought his grandmother's body would be. As one of the officers directed a flashlight beam on the ground, the light revealed Ms. Goss's lifeless

body. Ms. Goss was clad only in a nightgown and was not wearing any undergarments.FN6

FN5. J.J. Jones was eight years old when he testified. The trial judge engaged in witness-qualification procedures to ensure that J.J. was capable of understanding the proceedings and that he understood his responsibility to testify truthfully. After the trial judge indicated that he was prepared to have J.J. sworn as a witness, the defense voiced no objection.

FN6. Ms. Goss's husband, Clifford Goss, testified that his wife never received guests in her home unless she was fully dressed. He said that she would never have company inside her home if she was not wearing undergarments.

LaJade Evans, J.J. Jones' younger sister, testified FN7 that she followed J.J. to Ms. Figuero's home to seek help. LaJade saw Floyd on the victim's porch, shooting a gun at the victim. LaJade said Floyd fired two shots from the porch, and that she heard one more shot fired in the direction of the victim. She added that she saw Floyd running toward the victim's home but that he did not go inside the home again after having fired his weapon.

FN7. LaJade Evans was six years old when she testified. After the trial judge and the State asked qualifying questions, LaJade was sworn as a witness. The defense did not object.

Jeanette Figuero testified FN8 that during the evening of July 13, she heard three gunshots followed by the sounds of pounding on her door and the plaintive cries of a child or children saying, "Open the door, open the door, please open the door." Figuero's son, Gary Melendez, opened the door to allow J.J., LaJade, and Alex into the home. Figuero said the children were talking very fast and when she inquired as to the problem, they exclaimed that their grandmother, Ms. Goss, had been shot. When she asked J.J. who shot Ms. Goss, he responded, "Maurice Floyd." FN9 Figuero also testified that she heard J.J. mention Floyd's name when he talked to the 911 dispatcher.FN10 The prosecutor asked Jeanette Figuero if she believed that J.J. was "smart" and "bright," and whether she believed him when he said that Floyd had shot Ms. Goss. Figuero answered that she believed J.J. was a bright child and that she believed his version of the events, especially after she called over to Ms. Goss from her front porch and received no response.

FN8. In the chronology of the trial, Jeanette Figuero testified before J.J. Jones.

FN9. Floyd's objection to this testimony as inadmissible hearsay and lacking in foundation was overruled. Floyd did not object

until Ms. Figuero had fully completed her answer. Gary Melendez, Figuero's son, also testified that the children said that "Maurice Floyd" shot Ms. Goss. He said the children were frightened, crying, and nervous when they first reached Figuero's home.

FN10. Relevant parts of J.J. Jones' conversation with the 911 dispatcher were played during the trial over Floyd's hearsay objections. On the 911 tape, J.J. Jones said that "Maurice Floyd" was the person "who was shooting."

Figuero also testified that earlier in the evening on July 13, she had been speaking with her neighbor, John Brown, from the porch of her house. Brown mentioned that a young male had been constantly walking up and down the sidewalk in front of Ms. Goss's home. Subsequently, Figuero noticed that a young African-American male was on Ms. Goss's front porch, and was talking to Ms. Goss for some time through the closed screen door. She could not recognize the young male because his back was to her and it was also dark. After leaving her porch for a few moments and then returning, Figuero noticed that the young male had apparently entered Ms. Goss's home. She heard the voice of an angry male emanating from inside the victim's home, addressing Ms. Goss in sometimes profane tones. Figuero testified that she clearly heard the young male say in an angry tone, "Why did she have to involve the GD crackers." She also saw the young male move menacingly toward a person who was sitting on the sofa in Ms. Goss's home. The young male abruptly halted when he noticed that Figuero had spotted him. Figuero stated that she assumed at all times the young male was addressing himself to Ms. Goss because she knew that Ms. Goss was in the home. Approximately twenty-five minutes after hearing the angry male's voice, Figuero heard the sounds of gunfire which led J.J. Jones and his siblings to appear at her door.

. . . . [FN 11 deleted, discussing Ms. Figuero=s use of initials to repeat profanities she overheard and explain that Acrakers@ could mean white person, such as the deputy at the sheriff=s office]

John Brown, the neighbor with whom Figuero was speaking earlier that evening, testified that on the evening of July 13 he saw two men walking up and down the sidewalk in the vicinity of Ms. Goss's house. One man, dressed in black, was noticeably taller than the other. The shorter man eventually disappeared from sight, but the taller man continued walking up and down the sidewalk. The man dressed in black eventually made his way up the steps of the home to Ms. Goss's front porch and began talking to her. Brown testified that approximately an

hour later he heard a loud "commotion" emanating from Ms. Goss's house, involving a loud, angry male voice. He heard "two big shots" while he was still inside his home and subsequently heard children running. Proceeding to the sidewalk in front of his home, Brown saw a man dressed in black run off the steps of Ms. Goss's home and then run up a side street in a northerly direction. Brown stated that this man "fit the general description" of the "black man" who had dropped off children at Ms. Goss' house earlier in the day on July 13.FN12

FN12. Brown also said that the man who dropped off children at Ms. Goss's house drove a red Honda automobile. This matches the general description of Floyd's automobile which was established through other trial testimony.

Police officers Stokes and Zike responded to the 911 call made from Jeanette Figuero's home. Stokes spoke with J.J. Jones and his sister, LaJade Evans, about what had happened. He noted that they were in a very excited state when he spoke with them. He also stated that when he asked if the children had seen the shooting, they responded that Floyd had fired a gun at their grandmother, Ms. Goss.FN13 Zike testified that when he and Stokes entered Ms. Goss's home looking for suspects and clues, they noticed that "the door had been kicked in." FN14

FN13. Floyd objected that the excited utterance exception was not a proper basis to admit Stokes's testimony regarding what the children had told him. The trial judge overruled the objection.

FN14. Ms. Goss's husband, Clifford, testified that the lock on the door appeared as if it had been kicked or broken. He said the lock was not in that condition when he left for work on July 13 at approximately 4 p.m. Ms. Goss was not at home when Clifford left for work.

The State did not produce the murder weapon at trial. However, the State did present evidence of a confession that Floyd made to a friend. Tashoni Lamb testified that Floyd visited her apartment around midnight on July 13, and that he left after 6 a.m. on July 14. Floyd asked to speak with Lamb privately, out of the hearing of her children. Lamb stated that Floyd pulled a gun out of the pants he was wearing, placed it on a dresser in the apartment, and said, "I just shot Miss Mary, the grandmother." She related that Floyd's reason for shooting Ms. Goss was that "she had threatened to call the police on him." Lamb stated that she did not call the police because she concluded that they would certainly apprehend Floyd. She further testified that Floyd contacted her by phone later on July 14, a day before he was arrested. When the

prosecutor asked at trial if anyone had ever asked her to provide an alibi for Floyd, she responded, "Maurice did." She also testified that during the phone conversation, Floyd asked, "Do you want to see me die?"

. . . . .[The Court discusses a chain of custody issue related to the bullet taken from the victim=s body.]

Medical examiner Dr. Terence Steiner testified that the victim sustained a gunshot injury to her face, facial bones, and brain. The bullet entered the victim through her left cheek, and the cause of death was trauma to the brain caused by a single shot. The manner of death was a homicide. Dr. Steiner stated that during the autopsy he recovered a spent bullet, a bullet jacket, and a lead fragment. He identified those items at trial as the ones he recovered during the autopsy. When Dr. Steiner was asked to describe the physical position of the victim when she was shot, he first opined that based on blood spatter evidence, the victim was "standing up." Moments later, however, he elaborated that "perhaps she was almost maybe kneeling, but she was upright to the injury to the brain, severed the brainstem, which is instantaneous, if you will, death."

After Dr. Steiner's testimony, the State rested and Floyd presented his motion for judgment of acquittal, which was denied. Floyd did not testify in his own defense, nor did he present any witnesses or evidence on his behalf during the guilt phase. The jury convicted Floyd on all charges.FN15

FN15. In its verdict form, the jury found Floyd guilty based on the theories of both premeditated murder and felony murder. On the verdict form, the line for Count I, indicating that the jury found Floyd "GUILTY of First Degree Premeditated Murder, and First Degree Felony Murder as charged in the indictment" was checked, and the verdict form was signed by the jury foreperson. The jury found that the homicide involved a firearm. The verdict form also indicates that the jury found Floyd guilty of armed burglary of a dwelling, and that a firearm was involved in this offense. Floyd was convicted in 1999.

Additionally, the verdict form indicates that the jury found Floyd guilty of aggravated assault. Floyd does not challenge his conviction for aggravated assault. Nevertheless, we determine that competent, substantial evidence supports the aggravated assault conviction.

The State introduced victim impact evidence during the penalty phase, along with evidence of Floyd's prior conviction for a violent felony in North Carolina and evidence of his current parole violation.

> Floyd did not testify in the penalty phase, nor did he present any witnesses or evidence on his behalf. The jury recommended a sentence of death by a vote of eleven to one. A *Spencer* hearing FN16 was held prior to the pronouncement of sentence. In sentencing Floyd to death for the murder of Ms. Goss, the trial judge found four statutory aggravating factors FN17 and no statutory mitigating factors. Four nonstatutory mitigating factors were found, FN18 with each receiving little weight. The trial judge also sentenced Floyd to thirty years for the armed burglary conviction, and to five years for the aggravated assault conviction. The five-year sentence for aggravated assault was ordered to run concurrently with the thirty-year sentence for armed burglary. This appeal followed.
>
> FN16. See *Spencer v. State*, 615 So.2d 688 (Fla.1993).
>
> FN17. Those statutory aggravating factors are: (1) Floyd was on probation for the felonies of burglary and accessory after the fact to robbery when he committed the murder (great weight); (2) Floyd had previously been convicted of the violent felony of the voluntary manslaughter of his brother (substantial weight); (3) Floyd committed the murder while engaged in the commission of armed burglary of the victim's home (great weight); and (4) Floyd committed the murder for the purpose of avoiding or preventing a lawful arrest (substantial weight).
>
> FN18. Those nonstatutory mitigating factors are: (1) Floyd displayed exemplary courtroom behavior in the face of much adversity; (2) Floyd assisted defense counsel throughout the proceedings by taking notes and communicating with counsel; (3) Floyd was successfully completing his probation for other offenses before he committed the murder; and (4) Floyd expressed concern that his wife conduct herself in such a way that she not use alcohol and that she not subject their relationship to the potential stresses of the use of alcohol.

Floyd, 850 So.2d at 387-93. This Court denied all relief on direct appeal, except to reverse the armed burglary and felony murder convictions, and the aggravating factor of murder in the course of a felony.[2]

[2] This Court held that: (1) the state=s peremptory challenge of an Hispanic juror was based on death penalty views rather than on race; (2) the

evidence was sufficient to support premeditation; (3) the evidence was insufficient to show tampering with the fatal bullet; (4) the jury instruction on burglary was erroneous and required reversal of the armed burglary and felony murder convictions, and the aggravating factor of murder in the course of a felony; (5) the evidence was sufficient to support the heinous, atrocious, or cruel (HAC) aggravating circumstance instruction; (6) the evidence was sufficient to support the aggravating circumstance that murder was committed for the purpose of avoiding or preventing defendant's lawful arrest; and (7) the sentence of death based on premeditation was not disproportional, despite striking the murder in the course of a felony aggravating circumstance and reversal of the felony murder conviction. 580 So. 2d at 393 *passim.*

Mr. Floyd has always maintained that he is innocent of the homicide and the armed burglary charged in the indictment. Mr. Floyd timely filed his Motion for Post-Conviction Relief pursuant to Florida Rule of Criminal Procedure 3.851 on January 10, 2005. ROA I 1-79. He amended the motion October 17, 2005, to include an additional claim that he was impermissibly shackled throughout the trial. ROA II 395-415 (amended claim), ROA VII 1232 (order granting motion to amend). After an evidentiary hearing, the trial court denied all claims. ROA VII 1259-78. The facts developed at the hearing by the witnesses are summarized in the defendant=s written closing argument, ROA V 872-933, the state=s written summation, ROA VI 1086-1129, and the defendant=s reply thereto, ROA VI 1180-97 (the reply consisting entirely of refutation certain of the state=s assertion of facts).

Facts Relating to the Child Witnesses

At trial, LaJade Evans testified she went to sleep before Mr. Floyd came to the house. ROA 2002 IX 1707. Her grandmother woke her up, but only at the end of the incident when Mrs. Goss woke her up to tell her and the other two children to run to the neighbor's house. ROA 2002 IX 1708. LaJade said she saw Maurice shoot at her grandmother as her grandmother ran the same direction as the children, across the street to Jeanette's house. ROA 2002 IX 1710-11. However, her testimony was inconsistent and speculative. And it was capped by her testimony during questioning by defense counsel Doug Withee that the state attorney told her what to say.

Q. All right. Did you see Maurice do the last shot?

A. No.

Q. Okay. Did you see how far Maurice had run before you heard the shot?

A. Yes, sir.

Q. Where was that?

A. **I think B I think he were running, then he slowed up, then he shot, what I think.**

ROA 2002 IX 1712-13 (emphasis added).

Q. What happened when you went inside Ms. Jeanette's house?

A. He ran back to put his clothes on, went to one of his Godsister's house.

Q. **You saw Maurice go. Where did Maurice go? Did he go over to your grandmother's house.**

A. Yeah.

Q. All right. After he chased your grandmother?

A. Yes, sir.

Q. All right. **Did you see him go back into your grandmother's house?**

A. No, sir.

ROA 2002 IX 1713.

Q. [Cross examination by defense] LaJade, can you tell me if anyone has talked to you about what you're saying today in the last few weeks?

A. Yes, sir.

Q. Who has talked to you about that?.

A. Mr. Garry.

. . . .

Q. Did Mr. Garry tell you what to say today?

A. Yes, sir.

ROA 2002 IX 1717.

J.J. testified that he was awakened by his grandmother as he slept and told to go to Ms. Jeanette's house. ROA 2002 IX 1728. The state had to resort to leading questions, without objection, to get J.J. to testify that he saw Mr. Floyd arguing with

the victim before he and the other children left. ("[Y]ou said that your grandmother was mad **B** did you hear Maurice talking to your grandmother in the living room there? . . . . What happened after you got out of your bed and you saw Maurice in the living room, did you go anywhere?" ROA 2002 IX 1732.] J.J. said he saw Mr. Floyd shoot a gun three times as he stood on Ms. Goss's porch, contrary to LaJade's testimony there were only two shots from the porch. The state unsuccessfully tried to bring J.J. into line with this:

> Q. Did you see him shooting the gun?
> A. Yes, sir.
> Q. How many times did he shoot the gun?
> A. Three times.
> Q. Okay. When he was standing on the porch, how many times did he shoot the gun?
> A. Three.

ROA 2002 IX 1736.

There was no cross examination of J.J.

At the evidentiary hearing, Trelane Jackson, the mother and legal guardian of the children, testified that J.J. had worn glasses for a few months, less than a year, some time before Mrs. Goss was shot. ROA-S I 102. The glasses were prescribed because one of his eyes was weak, and his vision was off. ROA-S I 103.

The Court sustained the state=s objection to asking Ms. Jackson about the psychological treatment her children received from Mickey Hoffrichter of the Children=s Home Society in Palatka after the shooting. ROA-S I 103-07. Ms. Jackson testified she was the legal guardian for the children, ROA-S I 104. The Court

indicated he had no evidence Ms. Jackson had the authority to waive the children=s psychotherapist privilege, and that there was no proof Ms. Jackson was the legal guardian. ROA-S I 106. Defense counsel then elicited detailed testimony from Ms. Jackson that the children were her biological children, that she was currently and had always been their legal guardian, and has always had the authority to make decisions the legal guardian makes over the children. ROA-S I 106. The state demanded the Court appoint a guardian ad litem for the children and counsel for Ms. Jackson Aadvising her regarding the ramification of waiving the children B or attempting to waive the children=s privilege to any psychological or psychiatric treatment that they may have received as a result of this shooting.@ The state argued Ms. Jackson might not understand the significance or gravity of giving a waiver. The Court sustained the objection to inquiry into the psychological treatment of the children. ROA-S I 107.

Ms. Jackson said she spoke to prosecutor Wood about the children=s behavior problems and their anxiety after the shooting. ROA-S I 108. The state attorney=s victim=s advocate directed Ms. Jackson to seek the counseling at the Children=s Home Society. Ms Jackson spoke to the therapist, Mickey Hoffrichter, but she did not recall ever telling Ms. Hoffrichter that she could communicate freely with the prosecutor or any other state official about the children=s mental health. ROA-S I 109.

Ms. Jackson indicated she had no objection, as the children=s legal guardian, to the defense talking to Hoffrichter or looking at the records kept by the Children=s Home Society. The children received counseling until they moved to Hasting the

following year, 2000. ROA-S I 110.

Assistant state attorney Garry Wood, lead counsel, confirmed that his office arranged for Trelane's children to receive counseling at the Children's Home Society. ROA-S II 233. He knew their counselor, Mickey Hoffrichter, and spoke with her about the children. ROA-S II 234. Mr. Wood testified that Ms. Hoffrichter never exercised any privilege or restraint in discussing the children's cases with him. ROA-S II 237.

In a letter Mr. Wood personally typed to Donna Watson Lawson, a mental health professional, Defense Exhibit 7, ROA III 586-87, attached to several motions seeking discovery of mental health matters, ROA III 452-71, the prosecutor advised that he believed the children would follow through on their testimony about the shooting but that he had not spoken to them yet about their testimony. Mr. Wood wrote that Trelane, the children's mother, reported that the children continued to bring the subject up despite his instruction that no one speak to them about the shooting. ROA-S II 242. Mr. Wood testified at the evidentiary hearing that he wanted the psychologist to provide him with advice about the children, to give him an assessment of the situation, and to make sure "that there weren't any other issues out there." ROA-S II 245.

Mr. Wood said he told Mr. Withee about having the children interviewed by Ms. Watson Lawson, but he did not believe he gave a copy of the referral letter to Mr. Withee. ROA-S II 246. Mr. Wood also claimed he told Mr. Withee about the

counseling by the Children's Home Society, but he did not recall when or what he related. ROA-S II 248-49. Mr. Wood did not recall discussing with defense counsel Withee the matters about which Ms. Hoffrichter might testify in the guilt phase. ROA-S II 252. Mr. Wood recalled speaking to Ms. Hoffrichter April 1, 1999, four days before voir dire started in the trial but not the content. He could not recall why he wrote Ms. Hoffrichter a letter April 13, 1999, advising her that another hearing in the case was scheduled for April 16th, 1999. ROA-S II 254.

Mr. Wood recognized his own handwriting in an April 15, 1999, letter written after the trial, defense Exhibit 18 for identification. ROA-S II 256. He admitted he wrote on the letter next to Mickey Hoffrichter's name that she had been excused from testifying but that she had worked with the kids to "prep" them for their testimony. ROA-S II 257-58. Mr. Wood admitted he never told Mr. Withee that Miss Hoffrichter prepped the kids for their testimony. ROA-S II 261. The trial court refused to admit the April 15, 1999, letter which indicated the children had been Aprepped.@ ROA-S II 260.

Defense counsel Doug Withee testified that the first time he met the child witnesses was at the depositions a month before trial. He did not recall asking nor the state telling him the children were getting counseling. ROA-S II 382. Mr. Withee did not know if an expert prepared the children to testify. Had he known they had been prepared, beyond counseling, he would have Acertainly . . . absolutely@ made inquiries and would have sought to depose the expert to determine exactly what preparation

took place. ROA-S II 383.

Mr. Withee did not know who Mickey Hoffrichter was and does not recall ever speaking with her, nor did he know what the Children's Home Society of Palatka was. ROA-S II 383. He did not recall discussing with Mr. Wood any matter regarding the mental status of the children, or factors relevant to their competence to testify. He testified that the state never mentioned Donna Watson Lawson in regard to the children. ROA-S II 384. He never had any tapes of the recorded interviews the police did with the child witnesses. ROA-S II 384. Mr. Withee never consulted an expert about the children's testimony. ROA-S II 384.

SUMMARY OF THE ARGUMENT

I(A). Trial counsel was ineffective for failing to investigate the competency of the young child witnesses in this case. The state also concealed the fact that there were psychological issues which related to their competence, a *Brady* violation. Counsel also failed to object to the inadequate determination of the children=s competency made by the trial court during trial. The post-conviction court prevented any inquiry into the competency issues by post-conviction counsel. The defendant has a clear Sixth Amendment confrontation right to investigate the competency of the children. Trial counsel also failed to prevent the introduction of an astounding and unconscionable amount of cumulative hearsay and bolstering of the children=s identification of Mr. Floyd.

I(B). Trial counsel failed to prevent the introduction of a key threat supporting premeditation allegedly made by Mr. Floyd to his wife. The threat would have been suppressed pursuant to the marital privilege if the defendant had plead guilty to the charge of aggravated assault on his wife, but trial counsel had no explanation for failing to do so.

I(C). The state cause a key witness to testify falsely at trial, inconsistently with all of her prior statements, a *Giglio* violation. The testimony established the aggravating factor of killing to avoid arrest, when none of the witness's prior statement would support that conclusion. At the evidentiary hearing, the witness recanted any claim that Mr. Floyd made the inculpatory statement. The state violated *Brady* when it suppressed a critical tape recording which would have impeached the trial testimony. Trial counsel also failed to present an available alibi theory.

I(D). Trial counsel failed to investigate and present available mental health mitigation evidence. The expert hired for trial lost his files and recalled little of his evaluations at the evidentiary hearing. That expert backed out at the last minute, and trial counsel failed to provide for other expert testimony. At the evidentiary hearing, two defense witnesses found the two statutory mental health mitigators existed, and they and the state's own post-conviction mental health expert found substantial nonstatutory mitigators.

I(E). Trial counsel was ineffective for failing to object or demand a new venire when a potential juror contaminated the venire with a speech calling for the quick

execution of capital defendants, drawing applause from the venire.

II. The work of the defense mental health expert at trial was incompetent.

III. The cumulative effect of the post-conviction claims requires a new trial.

IV. The defendant was denied due process when he was forced to wear shackles in front of the jury. The trial bailiff testified all incarcerated felony defendants wore a leg brace with a shiny ankle lock readily visible from the jury box. The jurors could hear the snapping of the brace lock, see the stiff leg imposed by the brace, and see defendants struggle with the release mechanism to allow them to take their seat. Trial counsel was oblivious to the constitutional violation. There was no justification to require the shackling in this case.

ARGUMENT

STANDARD OF REVIEW

Evaluating IAC claims on appeal:

> When evaluating ineffective assistance of counsel claims on appeal, this Court will evaluate whether the alleged errors undermine our confidence in the outcome of the proceeding. *See Rose v. State*, 675 So.2d 567, 574 (Fla. 1996). Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the *Strickland* test. *See Stephens v. State*, 748 So.2d 1028, 1033 (Fla. 1999). This requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings. See *Id*."

Gaskins v. State, 822 So.2d 1243, 1247 (Fla. 2002)

Denials of 3.850 claims after evidentiary hearings:

> Generally, our standard of review following a denial of a 3.850 claim after holding an evidentiary hearing affords deference to the trial court's factual findings. ›As long as the trial court's findings are supported by competent substantial evidence, this Court will not ›substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as the weight to be given to the evidence by the trial court." *McLin v. State*, 827 So.2d 948, 954 n. 4 (Fla. 2002) (*quoting Blanco v. State*, 702 So.2d 1250, 1252 (Fla. 1997).

Nixon v. State, 857 So.2d 172, 175 n. 7 (Fla. 2003).

ISSUE ONE

TRIAL COUNSEL WAS INEFFECTIVE DURING THE INVESTIGATIVE, GUILT AND PENALTY PHASES. TO THE EXTENT DEFENSE COUNSEL WAS NOT INFORMED OF CERTAIN MATTERS, THE STATE=S FAILURE TO

DISCLOSE OR ACTIVE MISREPRESENTATION IS OF CONSTITUTIONAL DIMENSION. THE POST-CONVICTION

COURT WRONGFULLY BARRED DISCOVERY TO SUPPORT THE CLAIMS OF PREJUDICE.

Defense counsel at trial, Doug Withee, had no co-counsel for the trial. Mr. Withee had wanted co-counsel but none was available. He was forced by the circumstances in the public defender=s office to handle the guilt and mitigation investigation on his own on all of his cases in two offices, Palatka and St. Augustine, from 1992 until he left the office in 2001. ROA-S II 286. He handled a lot of cases while he had the Floyd case, at one point handling 15 other murder cases, most of them capital cases. He always had at least 10 murder cases in his caseload at any one time. ROA-S II 288-89.

These circumstances, alone, violate the basic tenets of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (1989) (AABA Guidelines 1989@) "Prevailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable." *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984).

> GUIDELINE 2.1 NUMBER OF ATTORNEYS PER CASE
> In cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant. In cases where the death penalty has been imposed, two qualified appellate attorneys should be assigned to represent the defendant. In cases where appellate proceedings have been completed or are not available and the death penalty has been imposed, two qualified post-conviction attorneys should be assigned to represent the defendant.

The prejudice arising from this failure of the Public Defender=s Office to comply with even the most fundamental requirements for adequate representation is

seen at every turn of the trial.

Mr. Withee=s heavy caseload left him insufficient time to prepare and present a defense, aggravated because of the lack of co-counsel. This is in violation of another tenet of the ABA Guidelines:

> GUIDELINE 6.1 WORKLOAD
> Attorneys accepting appointments pursuant to these Guidelines should provide each client with quality representation in accordance with constitutional and professional standards. Capital counsel should not accept workloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.

The failures of trial counsel to adequately investigate the case also fall below the standards of Guideline 11.4.1, setting out the standards for competent investigation. And Guidelines 11.8.3 and 11.8.6 further illustrate trial counsel=s failure to adequately investigate and present mitigation evidence in the penalty phase.

Such standards from the ABA Guidelines were ultimately a large basis for this Court's adoption of Florida Rule of Criminal Procedure 3.112 which states, in part, "[c]ounsel in death penalty cases should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has had adequate time and resources for preparation." Fla.R.Crim.P. 3.112(a). Appellant recognizes that this rule applies to counsel appointed after July 1, 2002, and that, as noted in the Committee Comments,

> These standards are not intended to establish any independent legal rights. For example, the failure to appoint co-counsel, standing alone, has not been recognized as a ground for relief from a conviction or sentence. *See Ferrell v. State*, 653 So. 2d 367 (Fla. 1995); *Lowe v. State*, 650 So.

> 2d 969 (Fla. 1994); *Armstrong v. State*, 642 So. 2d 730 (Fla. 1994). Rather, these cases stand for the proposition that a showing of inadequacy of representation in the particular case is required. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). These rulings are not affected by the adoption of these standards. Any claims of ineffective assistance of counsel will be controlled by *Strickland*."

Committee Comments to Fla.R.Crim.P. 3.112. Consequently, Appellant=s references to counsel Withee acting as sole counsel while under an unforgiving caseload is not a stand alone claim but, rather, an introduction to the inadequacy of representation based on the standards of *Strickland* showing the context in which the inadequate representation arose.

A. Counsel=s performance regarding the testimony of the child eyewitnesses and bolstering was deficient and resulted in prejudice to the defense. The state also concealed information relevant to the children=s competence to testify in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

Lack of State Disclosure and Defense Inquiry About the Children

The only eyewitnesses to the shooting were the victim=s grandchildren, Jeritz Jones (AJ.J.@) (seven at the time of the shooting, eight at trial), and LaJade Evans (six at the time of the shooting and trial). *Floyd*, 850 So.2d at 189,nn.5 & 7.

The defense failed to pursue questions of the children=s competence to testify, the trial court failed to properly qualify the children to testify, the defense failed to preserve the trial court=s errors, and the defense failed to prevent the repetitive, impermissible rendition of the single eyewitness identification made by Jeritz Jones.

The post-conviction court wrongfully prevented the defendant from pursuing discovery of information showing prejudice.

The lack of competent counsel under *Strickland* deprived Mr. Floyd of his Sixth Amendment right to confront the witnesses against him. The competency of child witnesses falls within the Sixth Amendment confrontation protection and requires competent representation to protect. *Kentucky v. Stincer*, 482 U.S. 730 (1987); *Wheeler v. United States*, 159 U.S. 523 (1895).

The children were of tender years when they testified. They were receiving psychological support from an agency the state attorney=s office had directed them to. The state had unfettered access to the psychological experts who evaluated and treated the children and had knowledge obtained therefrom. Some or all of the aspects of the psychological evaluations and treatment was not disclosed to defense counsel. If any information was provided to the defense, counsel failed to competently respond to the information by following up. Further, defense counsel failed to challenge the competence of the children to testify, and permitted the trial court=s inadequate determination of competency to go unchallenged, in fact complimenting the court.

Significantly, this Court specifically noted the lack of objection to the qualification of the children as witnesses, a fact not necessary for any of its holdings. *Floyd*, 850 So.2d at 389, nn. 5 & 7 (The judge questioned J.J., then, AAfter the trial judge indicated that he was prepared to have J.J. sworn as a witness, the defense

voiced no objection.@; AAfter the trial judge and the State asked qualifying questions, LaJade was sworn as a witness. The defense did not object.@)

This Court has long recognized the necessity of protections to guarantee due process when a child is a witness in a criminal proceeding. In *Lloyd v. State*, 524 So.2d 396 (Fla. 1988), a capital case, a defense expert was retained to determine whether the child witness was competent to testify. The expert had access to all of the child=s prior examinations and records. The state=s expert had administered six psychological tests and the results of those tests were also provided to the defense expert. The defense expert was also allowed one hour to examine the child, the same amount of time the state expert had been allowed.

The *Lloyd* decision recognized that a defense expert has the right to access the child=s records and examinations and the right to review the results of the state=s expert=s evaluation. The only question was whether the trial court denied the defendant due process when it limited the defense expert to a one hour examination.

> The record reflects that the court granted the defense request to pay for an expert and **allow him to conduct his own examination in order to afford the defense an opportunity to challenge the child's competency to testify.** Although the trial court limited the examination of Ryan to one hour, the judge noted that if the expert found anything to indicate there were problems with the child, he would reconsider. **All the records of the child's previous examinations were made available to the defense expert, including the tests administered by the state expert.** We find no due process violation. There is no showing that the defense expert believed other tests were necessary, and his conclusions did not indicate any abnormality or need for further examination.

Lloyd, 524 So.2d at 399 (emphasis added). Clearly, the defense has an absolute right

and obligation to access any existing records, tests, or experts relevant to the competency of a child witness.

After the parties have developed the factual basis for a determination of competency through pretrial discovery and voir dire, the trial court is obliged to make specific findings of fact to justify a finding of competency. In *Wade v. State*, 586 So.2d 1200 (Fla. 1st DCA 1991), the court explained the factors which the trial court must address with specific findings of fact:

> We reverse on the authority of *Griffin v. State*, 526 So.2d 752 (Fla. 1st DCA 1988). In *Griffin* this Court held that before finding a child competent to testify, Athe trial court should consider (1) whether the child is capable of observing and recollecting facts, (2) whether the child is capable of narrating those facts to the court or to a jury, and (3) whether the child has a moral sense of the obligation to tell the truth.@ Id. at 753 (citing *Lloyd v. State*, 524 So.2d 396 (Fla.1988), and sections 90.603(2) and 90.605(2), Florida Statutes (1985)). In this case, as in *Griffin*, the competency determination was of increased significance because the critical facts are totally dependent on the child's ability to observe and recollect.

Wade, 586 So.2d at 1203. The voir dire of the child in *Wade* was far more extensive than the perfunctory and desultory voir dire in this case. If the lengthy voir dire in *Wade* was inadequate, then surely the voir dire of the children in this case falls even further below constitutional propriety.

One of the grounds for reversal in *Wade* was Atroubling contradictions in the child=s out-of-court statements and the testimony in court, reflecting not only on her credibility but also on the reliability and competence of her testimony.@ *Wade*, 586 So.2d at 1204. There are ultiple contradictions as well in this case, discussed later in

this issue.

The judge in this case made no findings to support competency of the child witnesses in this case. His ruling as to LaJade was conclusory and without findings of facts: AI=m comfortable that she is properly qualified for her age to give testimony.@ ROA 2002 IX 1701. His ruling as to J.J. was even more remarkable, constituting no ruling whatsoever: AI=m prepared to him to have sworn [sic].@ ROA 2002 IX 1726.

Regarding the ruling on LaJade=s competency, a strikingly similar case shows the ruling here to be constitutionally infirm. The First District found that the trial court=s ruling in that case that Athe child was competent to testify >within the confines of what was reasonable for a four-year-old=@ was insufficient. *Griffin v. State*, 526 So.2d 752, 755 (Fla. 1st DCA 1988). The judge in this case made the same vague and nonspecific finding of competence for LaJade Evans, AI=m comfortable that she is properly qualified for her age to give testimony.@ ROA 2002 IX 1701. In other words, both judges made a conclusory and qualified determination that, for her age, a child witness was competent.

The child in *Griffin* was asked the de minimis litany of questions Aconsistent with those questions employed in other jurisdiction admitting the unsworn testimony of children.@ *Id*. at 755. That litany was characterized by the court thus:

> [J]urisdictions which, like Florida, admit a child's unsworn testimony, usually employ a series of simple, direct questions to determine the child's competency. For example, "[c]hildren are often asked their names, where they go to school, how old they are, whether they know who the judge is, whether they know what a lie is, and whether they

know what happens when one tells a lie."

Griffin, 526 So.2d at 754.

In *Griffin*, the examination was inadequate:

> In the instant case, **apparently on the basis of the de minimis competency examination conducted at the beginning of the child's videotaped deposition,** the trial court found the child was competent to testify **"within the confines of what is reasonable for a four-year-old."** This finding does not satisfy the criteria set forth in section 90.605(2), which require the trial court to determine whether "the child understood the duty to tell the truth or the duty not to lie." In interpreting this statute, Florida courts have held that it is the duty of the trial court to determine whether the child was capable of observing, recollecting, and narrating facts, and whether the child had a moral sense of the duty to tell the truth. In fulfilling that duty, the trial court may examine the child personally, or may determine the child's competency on the basis of the examination conducted by the attorneys. In addition, in applicable circumstances, **the trial court may rely on the testimony and reports prepared by experts regarding the child's ability to testify.** See, generally, *Lloyd v. State*, 524 So.2d at 400.

Griffin, 526 So.2d 755-56 (emphasis added). The absence of any ruling on J.J.=s competence is even more egregious. Defense counsel failed to object to the inadequate qualifications. Doing so would have compelled the court to make such findings or would have preserved the lack of findings for appeal.

While there must be some need for a psychological examination of a child before it may be ordered, the bar is substantially lower than that for an intrusive physical examination, such as in a child sexual battery prosecution. Psychological interviews, as sought by post-conviction counsel in this case, are Amuch less intrusive than a physical exam,@ *Gray v. State*, 640 So.2d 186, 193 (Fla. 1st DCA 1994).

The requirement that there be some need for a psychological examination is grounded in the assumption that the defense has already had access to less intrusive means to evaluate a child witness=s competency. In *State v. LeBlanc*, 558 So.2d 507 (Fla. 3d DCA 1990), the court recognized what less intrusive means of ascertaining competence were readily available to the defense:

> [F]ar less intrusive means were available for evaluating the victims, thus, refuting the claim of manifest injustice. Respondent chose to forego **deposing the court-appointed child psychologist**. Additionally, he was provided with the **psychologist's reports**. Further, by amended discovery, the respondent was furnished with the **reports of an interviewer at the Children's Center**. The respondent also had access to the **videotaped interviews conducted at the Children's Center**. All of these reports and videotapes could have been provided in lieu of reexamining the children.

558 So.2d at 510 (emphasis added). The sources of information discussed in *LeBlanc* are precisely the sorts of information post-conviction counsel repeatedly sought in this case, and which trial defense counsel should have sought.

In the instant case, the state failed to inform the defense of the psychologist, failed to identify let alone provide reports from any counselor, and otherwise deprived the defense of the most basic knowledge of matters going to the children=s competency, constituting a violation under *Brady v. Maryland*, 373 U.S. 83 (1963). To the extent that the defense knew of any of these matters, counsel was ineffective for failing to avail himself of the opportunity to develop the question of competency. Finally, the post-conviction court deprived Mr. Floyd of the ability to develop any of the facts necessary to determine whether a psychological examination was called for

by its repeated denial of access to existing records and counselors.

The children had serious competency issues. LaJade Evans contradicted herself in deposition **B** she said that the assailant came into the house through the back door, ROA 2002 II 234, but also that he came in through the bathroom window, ROA 2002 II 240, both statements directly contradicted by all other evidence in the case as set out in *Floyd*. She contradicted herself when she said she did not see Mr. Floyd at the house that night, and then she did see Mr. Floyd at the house that night. ROA 2002 II 233. She erroneously identified her grandfather as involved in the altercation: AGranddaddy **B** I mean Grandma@ slammed Maurice on the floor. ROA 2002 II 234. She testified to seeing the actual bullets shot from the gun, an impossibility from her angle and at night, and then framed it as an inference: AI saw a bullet. . . . A bullet would shoot out a gun.@ ROA 2002 II 236. She said the intruder said nothing to her grandmother, then that he did say something. ROA 2002 II 238. She made the unsupported inference that her grandmother threw Mr. Floyd to the ground **B** she didn=t see Ms. Goss slam Maurice on the ground, but she heard it. ROA 2002 II 239. The kids ran to their Aother grandma@ across the street, but she could not recall her Aother Grandma=s@ name, ROA 2002 II 236. Defense counsel asked if LaJade had spoken about the incident with Awherever you=re living, has any of the foster parents or the counselors talked to you about this?@ ROA 2002 II 243. LaJade said she had spoken with such people. Defense counsel=s lack of preparation is exemplified by the fact the children had never gone to live with foster parents, they had always remained

in the custody and care of their mother.

At trial, LaJade continued to make inferences, reported information she could have learned only from others, and testified directly contradictory to the facts developed at trial. She said she saw Maurice fire two shots from the Goss porch, then run across the street. She said she did not see Maurice fire the third shot, but she was able to make a guess without objection: AI think he were running, then he slowed up, then he shot, what I think.@ Then she reported facts she could not possibly have observed since she was taken into the neighbor=s home: AHe ran back to the Goss house to put his clothes on, went to one of his Godsister=s house.@ ROA 2002 IX 1712-13. Also troubling in this particular statement is that the assailant had to get dressed, a fact uncorroborated by any other evidence, implying the assailant was less than fully clothed at the time of the shooting **B** this is not consistent with the Aangry argument@ theory the state has always put forward as the inculpatory scenario in this case. Finally, LaJade testified that AMr. Garry,@ i.e., prosecutor Garry Wood, had told her what to say in her testimony. AQ. Did Mr. Garry tell you what to say today? A. Yes, sir.@ ROA 2002 IX 1717. She also testified that AMiss Nikki@ (apparently Mickey Hoffrichter) and AMiss Sandra@ had spoken to her about her testimony shortly before trial, but she did not know who they were. ROA 2002 IX 1717.

Jeritz Jones, AJ.J.,@ made similar inferences, statements contradictory to LaJade=s, and statements of fact he could not have observed, and could have learned only from his frequent talks with his mother, or from others. He said in his deposition

that Mr. Floyd was Acoming for us . . . .>Cause he tried to kill my mama and us, all of us. He didn=t want us to live.@ However, he could not say how he knew this, and therefore this was obviously not a direct observation. ROA 2002 II 257-59. He said his sister (LaJade) saw Maurice shoot Ms. Goss, directly contrary to LaJade=s testimony and recollection. ROA 2002 II 261. J.J. also testified in deposition that he spoke about the events Avery often@ with his mother. ROA 2002 II 262. Both he and LaJade, in speaking frequently about the events with their mother, would have picked up their mother=s version of events, based almost entirely on hearsay and biased by the fact she and her mother were the victims and she was estranged from Mr. Floyd.

Defense counsel Withee never asked how well J.J. could see the assailant (was the interior lit where J.J. viewed the assailant, how did he see outside with only a single streetlight), whether J.J. was wearing glasses or needed them, or precisely how he knew it was Mr. Floyd (identified by voice, by face, inferred from sister LaJade=s identification).

Defense counsel had filed a pretrial motion specifically seeking Anames, addresses and phone numbers of any and all counselors, custodians, and psychologists pertaining to Lajade Evans, Jeritz Jones and Alexander Evans.@ ROA 2002 I 89. At the pretrial hearing on the motion, Mr. Withee agreed with the state that the state had Aresponded to that.@ ROA 2002 VII 1463. However, Mr. Withee did not indicate the content of the response, nor does the trial record show any written notice or response. Apparently, the critical information was not provided because, at the evidentiary

hearing, Mr. Withee testified he knew nothing about any counseling, and that the Children=s Home Society, and the counselor, Mickey Hoffrichter, were unknown to him. ROA-S II 383-84. The lack of notice constitutes a violation of the State=s obligation under *Brady v. Maryland*, 373 U.S. 83 (1963).

If the state did adequately inform Mr. Withee about the counseling and prepping, then defense counsel=s lack of recollection and certainly his failure to undertake any follow up to such notice is a failure to render effective assistance of counsel. Competent counsel would have realized the import of the disclosure, would have located the counselors and discussed matters relating to the competence of the children to testify, and would have recalled the information at the evidentiary hearing. Competent counsel would have sought his own independent evaluation, a right and obligation recognized under the case law cited herein. The prejudice is apparent on the face of the children=s speculative, inconclusive and contradictory depositions and testimony.

The Post-conviction Court erred in denying access to any evidence of the psychological counseling and preparation provided to the child witnesses.

The court repeatedly denied post-conviction counsel=s efforts to gain access to the counseling records and to speak to the counselors, and refused to permit the children to be interviewed or deposed for the evidentiary hearing. The State=s objections and the Court=s refusal to permit access to the children and their records prevented the defense from making the appropriate inquiry to ensure the reliability of

the children=s testimony at the trial. These actions have prevented the further development of prejudice arising from the state=s *Brady* violations and defense counsel=s failure to adequately investigate regarding the children.

The first post-conviction denial occurred when the defendant=s Motion to Allow Psychological Examination of the Children, ROA I 135, was denied at hearing April 7, 2005, ROA II 210-74. Mr. Floyd=s post-conviction counsel explained at the hearing that he wanted a psychologist to interview the children to lessen the chance of a negative impact of such an interview. ROA II 215, 220 (expert could assess what the children actually saw and heard as opposed to what they inferred or learned from others), 227 (psychological exam was sought as a substitute for a deposition of the children), 237 (AI think a psychological evaluation by a psychologist would be less intrusive on the children=s well being and psyche than having me go in and questioning them . . . .@). The court denied the motion at the hearing.

The next denial came at a hearing on the defendant=s motion for discovery. ROA VIII 1444-1555. Counsel for Mr. Floyd explained that he wished to depose the mother and any mental health professionals who treated or counseled the children, obtain documents from them relating to the children=s psychological status, and then depose the children. ROA VIII 1473-74. The trial court ruled that no deposition of the children could be done without further order of the court, and that the court would appoint an attorney guardian ad litem for the children Ato defend whatever you=re going to try to do,@ before considering whether to permit depositions. ROA VIII 1478.

The trial court=s order prohibited deposition without order of the court and appointment of guardian ad litem, and also specifically prohibited any and all contact with the children by defense counsel, their representatives or investigators. ROA III 417.

The next denial occurred in ruling on three motions: the defendant=s renewed motion to allow psychological evaluation of the child witnesses, ROA III 452-58; a motion to depose the children=s mother and to have her bring any psychological records she might have about the children, ROA III 459-64; and a motion to subpoena the psychological records from the Children=s Home Society and to depose any counselors revealed in the records, ROA III 465-71 (the ROA index includes this third motion in the Motion to Depose Trelane Jackson).

The hearing, held November 14, 2005, ROA IV 650-732, resulted in a total prohibition on the development of the psychological record. The written order of the court, belatedly issued with the denial of all relief on the 3.851 motion February 2, 2007, more than a year after the November 14, 2005, hearing, AOrder Disposing of Defendant=s Unresolved Pre-Hearing Motions,@ ROA VII 1232-34, denied any psychological examination of the children, and prohibited the defense from subpoenaing any psychological records of the children from their mother or the Children=s Home Society.

At the November 14, 2005, hearing, post-conviction defense counsel indicated he wanted to depose the children, ROA IV 660 (page 11 of the transcript,

unnumbered in the ROA), and wanted to reserve the right to seek evaluations, depending on the outcome of the discovery of the psychological records and counselors. The defense included in the motion the correspondence from the state attorney to Donna Watson Lawson, a mental health professional indicating the children had suffered psychological problems from the shooting. ROA III 457-58. The details of the letter are discussed earlier in this brief in the Statement of the Facts at p. 14. The letter shows that the children were talking about the shooting regularly with their mother and perhaps others. It also indicates that the family was repeatedly exposing the children to the scene of the shooting. More importantly, it indicates that the state attorney had concerns that the children might not Afollow through with their testimony,@ or he would not have initiated the evaluation.

Counsel for the defense told the court he was seeking leave of court to file the subpoenas duces tecum to discover the records, to allow the question of whether they should be produced to be brought to a head. ROA IV 691 (p. 42 of transcript). The post-conviction court balked at issuing the subpoenas, despite the offer of defense counsel to provide copies of any subpoenas to any special counsel who might be appointed to challenge the issued subpoenas. ROA IV 693 (p. 44). When defense counsel indicated the nature of the questions he wanted to ask of J.J., 14 years old at the time of the post-conviction proceeding, the court implied that would be inappropriate: AYou=re going to use those words with a **B** how old is J.J. now **B** [State] He=ll be 14.@ ROA IV 693 (p. 44). Defense counsel then explained that was why he

wanted to have an expert make the inquiry, to ensure it was the least intrusive and potentially harmful. ROA IV 694 (p. 45).

The need for evaluation existed because the state attorney in the Watson letter indicated there were psychological issues, the children had received counseling and treatment between the time of the offense and the trial, and the children had been contaminated by repeated discussions of the incident as indicated in the state attorney=s letter and the testimony of the children at the time of trial that they had discussed the incident with others. ROA IV 697 (p. 48).

The trial judge denied the motions saying,AI=m not going to let you have any subpoenas that are designed to gather both confidential and private information concerning the children.@ ROA IV 706 (p. 57). As to deposing J.J., the state argued that such a deposition could harm the youth. The defense indicated it would much prefer to have the inquiry made by a professional who could minimize the impact and risk of harm to the child. ROA IV 717-21 (p. 68-72). The court denied the subpoena. ROA VII 1234 (erroneously denoted in the belated order as an oral motion to depose the younger witness, LaJade Evans).

Finally, the trial court refused to allow inquiry into the mental health treatment of the children at the evidentiary hearing. As explained earlier herein, the mother said she had no objection to disclosing the mental health matters. Despite her express waiver and agreement to talk about the subject, the court sustained the state=s objection. ROA-S I 106-07.

The defendant has an absolute right in confronting his accusers, the child witnesses, to ensure that they were competent and that their testimony did not arise from confusion, inference, mistake, or undue pressure from family, the state, or the state=s mental health counselors. *Lloyd*. The state had unrestrained access to the counselors and the children, critical information about the competency of the child witnesses which it never disclosed to the defense. The defense at trial never sought the information to assist in determining whether the children were competent to testify. And the defense failed in its duty to require the court to make proper findings of fact of the children=s competency. As a result, Mr. Floyd was deprived of the effective assistance of counsel as required by the state and federal constitutions, *Strickland*, and he was deprived of due process and the Sixth Amendment right to confront his accusers protected by the state and federal constitutions. *Lloyd*.

Failure to Preserve Issues Regarding Impermissible Hearsay Testimony and Bolstering

The state repeatedly introduced hearsay statements of other witnesses prior to J.J.=s testimony, without objection by the defense on the grounds that the testimony was cumulative and unfairly prejudicial to the defendant=s case.[3]

The trial rulings on the hearsay testimony were inconsistent. The trial Court allowed, at ROA 2002 VIII 1614-19, the testimony of Corporal Stokes, who repeated J.J.=s statement to him identifying Mr. Floyd as the shooter, and repeated it twice again

[3] While some objections were raised, none addressed the fact that the

when he responded unresponsively to a question from the defense, all without objection as cumulative. The trial court=s rationale was that the hearsay was an excited utterance, which does not address the cumulative nature of the testimony. *Id*.

Inconsistent with that ruling, the court struck the testimony of Officer Zike to the same hearsay observation. Officer Zike testified he was with Corporal Stokes at the scene. When the defense timely objected to the anticipated hearsay of the same interview to which Corporal Stokes testified, the court invited witness Zike to testify that the children identified Mr. Floyd as the shooter.[4] Only then did the court strike

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repetitive hearsay was cumulative and inadmissible.

[4] The defense timely objected to the line of questioning when it was apparent the state was going to elicit the hearsay statement without a proper foundation for excited utterance. The trial court found the objection timely but did not sustain the objection or find that the foundation had been laid. Instead, the court ordered the state to ask the question, the answer was given, and the court invited the defense to object. Given the court=s prior ruling indicating it would not consider objections made after an answer was given, ROA 2002 VIII 1523, the Court=s invitation for objection after the answer is inexplicable. The defense noted that the objection had already

the answer after it invited the defense to object again. ROA 2002 IX 1643-44. If the testimony was inadmissible for Zike, it was inadmissible for Stokes.

At ROA 2002 IX 1676-79, Jeanette Figuero testified that the children identified Floyd as the shooter when they arrived, ROA 2002 IX 1677, that she heard J.J. name Floyd to the 911 operator, ROA 2002 IX 1678, and that she heard him identify Floyd a third time to police at the scene, ROA 2002 IX 1679. What she heard J.J. tell the police appears to have been during the interview that Corporal Stokes and Officer Zike conducted. Thus, the inadmissible identification to the police, held to not be an excited utterance by the ruling of the trial court as to witness Zike, was admitted three separate times **B** once over hearsay objection by Stokes, once by court invitation and ineffective instruction to strike by Zike, and once without objection by Mrs. Figuero.

Mr. Withee testified in the evidentiary hearing that he had no recollection of any strategic or tactical reason for his failure to preserve the repetitions by timely objection. ROA-S II 400. The only reason defense counsel ever gave for his minimal objections throughout trial was that he did not want to antagonize the jury by making

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been made prior to the question, but renewed the objection. The Court took the objection as a motion to strike and instructed the jury briefly. The damage was already done. The defense did not move for mistrial in the face of this gross abuse of discretion by the trial court. This is ineffective assistance under *Strickland* requiring retrial.

repeated objections. AI did everything I could not to file objections to every stinking thing.@ ROA-S II 399. But Mr. Withee admitted he knew it was his duty to object, AWe are told to, in seminars, object to everything. . . . That [not objecting] has been my policy throughout, is to not make objections all the time and interrupt the flow of the trial, particularly when it isn=t going to mean a hill of beans anyway.@ ROA-S II 393. The Commentary to 11.5.1, ABA Guidelines for the Appointment and Performance of Counsel In Death Penalty Cases (1989) states: ACounsel in a death penalty case must be especially aware at all trial level stages not only of strategies for winning at that level but also of **the need to fully preserve issues for later review.@**

Mr. Withee also had no tactical reason for failing to object to Mrs. Figuero buttressing J.J.=s testimony and the multiple hearsay testimony of his statements the night of the shooting. Ms. Figuero testified at ROA 2002 IX 1678-79 that J.J. was a bright boy and that she believed what he told her about the shooting.

This Court did not, as the state claimed in its response to the 3.851 Motion, find that this failure to object was harmless error. Rather, this Court found that the failure to object was not fundamental error.

> [A]ll of the cases on which Floyd relies are distinguishable. In those cases either defense counsel timely objected to the asserted improper bolstering, a policeman improperly bolstered the credibility of the only eyewitness to the defendant's criminal act, or an expert opined on a matter not related to her expertise. None of these situations occurred in Floyd's case. We therefore reject Floyd's assertion of entitlement to relief on the basis of fundamental error.

Floyd, 850 So.2d at 400. This Court=s narrow rejection on fundamental error grounds

invites the claim now made, that counsel was ineffective for failing to object to this highly prejudicial and inadmissible bolstering. Relief was denied in the above-quoted excerpt by distinguishing case law where counsel had thought to object. That might forestall relief on direct appeal for failure to preserve the issue, but it does not address this post-conviction claim.

Trial counsel had no legitimate tactical reason to permit the testimony to go unchallenged, he knew from his seminars he should have done so, but he refused Ato file objections to every stinking thing . . . particularly when it isn=t going to mean a hill of beans anyway.@ Admitting the bolstering testimony, and admitting without objection Ms. Figuero=s repetition of the children=s hearsay statements as to who was shooting at their grandmother, alone and combined demonstrate ineffective assistance of counsel so prejudicial as to require relief pursuant to *Strickland*. The prejudice from the buttressing is heightened because it reinforced the repeated hearsay repetitions of J.J.=s identification.

The degree of multiple repetitions of J.J.=s statements is astounding and unconscionable. ROA 2002 VIII 614-19 (testimony of Corporal Stokes, who repeated J.J.'s statement to him and repeated it twice again when he answered unresponsively to a question from the defense); ROA 2002 IX 1643-44 (Officer Zike=s testimony at the invitation of the court); ROA 2002 IX 1676-79 (Jeanette Figuero=s testimony that the children identified Floyd when they first came to her door, ROA 2002 IX 1677, that she heard J.J. name Floyd to the 911 operator, ROA 2002 IX 1678, and that she

heard him identify Floyd a third time to police, ROA 2002 IX 1679, as well as her bolstering); ROA 2002 IX 1688 (Gary Melendez, adult son of Ms. Figuero, heard the children identify Floyd to his mother , the same conversation Ms. Figuero related at ROA 2002 IX 1677); ROA 2002 IX 1779-80 (the 911 tape of the phone report Mrs. Figuero testified about).

The multiple instances of hearsay overwhelmed the evidentiary value, the three statements of J.J. blossoming into two to three times as many. Counsel Withee suggested only one reason why he might have failed to properly object on cumulative grounds. Pressed on the issue at the evidentiary hearing, he testified that after his objections on other grounds were repeatedly denied, AWould my head have fallen to the counsel table with a thud at that point or would I have become exhausted? I might, I might, yes. I don=t like the jury to hear what the kids are going to say eight times or nine times, certainly.@ ROA-S II 405. Mr. Withee recognized at the post-conviction hearing that the cumulative testimony was improper and prejudicial, and that he failed to act.

Once the state=s intention of repeatedly introducing the hearsay became clear, i.e. after the attempt with Zike, defense counsel should have objected and/or sought a motion in limine to terminate the prosecutorial abuse pursuant to Florida Rule of Evidence 90.403. The testimony should have been excluded under section 90.403, based on this Court=s analysis of the dangers of multiple admissions of child hearsay statements in *Pardo v. State*, 596 So.2d 665 (Fla.1992):

[Although child abuse hearsay may be admissible under section 90.803(23)] we also agree with the court below that this is not the end of the inquiry. As that court stated:

> Although the child's statements cannot be excluded as hearsay, the statements, like any other evidence, are subject to analysis under section 90.403, Florida Statutes (1989). **Thus, the defendant can move for exclusion of the evidence under section 90.403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."**

582 So.2d at 1228 (emphasis added). Thus, **although the admission of a child victim's hearsay statement is not excludable as hearsay or as a prior consistent statement under the statute, the admission of the statement is subject to the balancing test found in section 90.403.** [FN6]

FN6. Section 90.403, Florida Statutes (1989), provides in relevant part:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

Cast in this light, the district courts' decisions in *Kopko* and *Pardo* are not totally at odds. Both courts recognize that **repetitious admission of prior consistent statements creates special concerns in the prosecution of criminal cases.** The courts simply approach the problem from different perspectives. The *Kopko* court created a categorical rule of exclusion which fails to account for the plain language of the statute, while the *Pardo* court took account of the mechanism which already existed in the Florida evidence code for excluding the needless or prejudicial presentation of cumulative evidence.

Of course, the same concerns embodied in section 90.403 are those which underlie the common law rule against prior consistent statements. As Wigmore explained:

> When the witness has merely testified on direct examination, without any impeachment, proof of consistent statements is unnecessary and valueless. The witness is not helped by it; for, even if it is an improbable or untrustworthy story, it is not made more probable or more trustworthy by any number of repetitions of it. Such evidence would ordinarily be cumbersome to the trial and is ordinarily rejected.

4 John H. Wigmore, Evidence ' 1124 (Chadbourn rev. 1972) (emphasis added). The propriety of the rule was also noted by the First District in *Allison v. State*:

> The salutary nature and the necessity of such a rule are clearly apparent

> upon reflection in cases like the present, for without that rule a witness's testimony could be blown up out of all proportion to its true probative force by telling the same story out of court before a group of reputable citizens, who would then parade onto the witness stand and repeat the statement time and again until the jury might easily forget that the truth of the statement was not backed by those citizens but was solely founded upon the integrity of the said witness. **This danger would seem to us to be especially acute in criminal cases like the present where the prosecutrix is a minor whose previous out-of-court statement is repeated before the jury by adult law enforcement officers.**
>
> 162 So.2d 922, 924 (Fla. 1st DCA 1964) (emphasis added). Finally, as the court in *Kopko* stated:
>
> > By having the child testify and then by routing the child's words through respected adult witnesses, such as doctors, psychologists, [Child Protection Team] specialists, **police** and the like, with the attendant sophistication of vocabulary and description, there would seem to be a **real risk that the testimony will take on an importance or appear to have an imprimatur of truth far beyond the content of the testimony.**
> >
> > 577 So.2d at 960 (emphasis added).

Pardo v. State, 596 So.2d 665, 667-68 (Fla.1992) (emphasis added).

In the Amended Order Denying Relief, the post-conviction court rejected some claims and ignored others. The court missed the point, and in fact makes the defendant=s case when he ruled that no one saw J.J. with glasses, therefore the question of his eyesight is a Anon-starter.@ ROA VII 1262. The question is whether J.J. should have been wearing glasses and, for whatever reason, was not doing so at the time of the shootings or thereafter. The fact that J.J. needed glasses during the relevant time frame, but was never seen to have been wearing them, should be of substantial concern.

The post-conviction court rejected any claims arising from LaJade=s statement

that the prosecutor told her what to say. But to do so, the court had to reject LaJade=s testimony that she was coached and instead find prosecutor Wood=s denial to be credible. By finding Wood credible, the court has impeached LaJade. Her testimony is so unreliable that it should have been objected to and excluded entirely. If the testimony had not been struck on proper motion, mistrial would have been appropriate.

The court rejected finding any Aprepping@ by the state through Ms. Hoffrichter. However, the fact that there was any preparation should have been brought out by the defense. Further, because of trial counsel=s failure to investigate, and the post-conviction court=s prohibition on inquiry of Ms. Hoffrichter, it is impossible to confirm there was no impropriety. The court=s finding that there is Ano evidence that suggests the witnesses were coached or told what to say,@ ROA VII 1263, can be made only because the court prevented the development of such evidence. And there is, indeed, evidence Asuggesting@ coaching and being told what to say, denied only by a naked assertion of prosecutor Wood, who may or may not know the extent of coaching provided by the counselors such as Ms. Hoffrichter. Only the files of the Children=s Home Society, the counselors, and the children have the ultimate truth on this matter.

The post-conviction court found Mr. Withee to have acted reasonably by avoiding Aspurious@ objections to avoid antagonizing the jury, and by avoiding Aattacking@ the child witnesses. ROA VII 1264. This misses the point of the defendant=s complaint entirely. As set out herein, the complaint is that Mr. Withee

failed to make reasonable objections, such as objecting to the inadequate determination of the competency of the children, which should have been done outside the hearing of the jury and therefore beyond the risk of antagonizing. Post-conviction counsel never pressed to attack the children, but only to investigate their mental and physical status in a manner consistent with protecting the children from such attacks, just as the child witnesses in the case law raised and discussed herein were properly examined without attack. Trial counsel should have done the same.

The post-conviction court also erred in finding that trial counsel=s Astrategy@ was to Anot pepper the record with unnecessary objections for fear of irritating the jury . . .@ ROA VII 1264. The fundamental basis of the defendant=s complaint on this issue is that the objections were necessary, trial counsel knew they were necessary from the seminars he attended, and yet he failed to perform competently.

The court also erred when it rejected the claim of ineffective assistance when trial counsel failed to object to Mrs. Figuero=s impermissible bolstering of J.J. ROA VII 1265. The Amended Order concludes this Court found the bolstering to be harmless error, when, as urged herein, this Court found there was no fundamental error, but did not reach the question of harmless error. This Court must determine whether the failure to object to bolstering fell below standards, and then decide whether that failure was harmful.

Defense failure to preserve this error, alone and in conjunction with the other errors in dealing with the children=s testimony, created prejudice sufficient to meet the

Strickland standard, in violation of the defendant=s rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and state constitutional protections.

B. Trial counsel was ineffective for failing to prevent evidence of prior bad acts from being introduced at trial, especially a threat which should have been protected by the spousal privilege. This resulted in prejudice to the defense.

The state introduced without objection a threat Mr. Floyd allegedly made to his wife, Trelane, the day before the shooting. AHe told me if I ever tried to get away from him or run or hide or if he caught me drinking again that he would kill me; and if he couldn't get to me, he would kill somebody that I love, whether it be my mamma, my daddy, or even my children.@ ROA 2002 VIII 1529. This statement would have been excluded through competent lawyering, and a critical piece of damning evidence excluded from trial.

Mr. Withee testified that he never considered having Mr. Floyd plead straight up to the aggravated assault charge to allow the marital privilege to be exercised. ROA-S II 381; Florida Rule of Evidence 90.504.[5] Once Trelane Floyd was removed

[5] Professor Ehrhardt notes that the privilege does not apply under section 90.403(3)(b), when the defendant is charged with a crime against the spouse. Ehrhardt, C, Florida Evidence '504.3 and n.3, citing *Ex Parte Beville*, 58 Fla. 170, 50 So. 685, 692 (1909) (dissent). The professor goes on to note in the same section that the 1978 amendment to section 90.504 eliminated a former exception which denied the privilege when the defendant was charged with a crime against a third person committed in the course of committing a crime against the spouse. That would appear

as a victim from the case, the communication between them of the threat would have been subject to Mr. Floyd=s marital privilege and inadmissible.

The state could not prevent the entry of such a plea provided the prerequisites of Florida Rule of Criminal Procedure 3.172 are satisfied, as to voluntariness and a factual basis. The factual basis is a given considering the assault conviction. Competent counsel would have ensured the plea was voluntary. Once the prerequisites are met, the state cannot prevent the court from accepting the plea. *State v. Odum*, 763 So.2d 1067 (Fla. 4th DCA 1999).

When the state filed notice of intent to use the threat, ROA 2002 I 166-68 (the Notice), Mr. Withee conceded its admissibility. ROA 2002 II 213 (the response). He never addressed the threat in the hearing on the motion, ROA 2002 VII 1323-45, and he allowed it to be introduced without objection.

The only reason Mr. Withee gave at the evidentiary hearing for acquiescing to the introduction of the threat was that his theory of the case was that the shooting was the result of a domestic dispute, which raised an appellate issue that the death penalty was barred. ROA-S II 381-82. Counsel Withee failed to understand that all of the acts of domestic violence would have still been admissible because they were not

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to be the circumstance, if any, which might have allowed the threat to be admitted regardless of the assault charge, but the elimination of the circumstance makes clear that no such exception is now permitted.

communications, and his defense theory would have been undiminished. The only matter excluded would have been the damning threat.

The prejudice is clear. The jury heard a threat that foreshadowed the shooting, and contributed to the conclusion the shooting was premeditated. This Court expressly noted the threat in its factual summary, 850 So.2d at 388, and relied on the threat to sustain the conviction for premeditated murder

> We further note that **one day prior to the fateful events of July 13 that led to Ms. Goss's death, Floyd threatened to kill his wife or someone she loved.** "No definite length of time for [premeditation] to exist has been set and indeed could not be."

850 So.2d at 397. Given that conviction for felony murder was reversed, the sole basis for a first degree murder conviction hinges on this statement.

Prejudice must be guarded against when offenses are joined. *United States v. Lewis*, 787 F.2d 1318 (9th Cir. 1986); *Bean v. Calderon*, 163 F.3d 1073 (9th Cir. 1998). If prejudicial offenses are joined and the trial court denies a motion to sever, reversible error occurs. AStudies have shown that joinder of counts tends to prejudice jurors= perceptions of the defendant and of the strength of the evidence on both sides of the case.@ *Lewis*, 787 F.2d at 1322 (citations omitted). Joinder can prejudice a defendant in many different ways. *Drew v. United States*, 331 F.2d 85, 88 (D.C. Cir. 1964) (defendant may be embarrassed or confounded in presenting separate defenses; the jury may use the evidence to infer a criminal disposition from which is found guilt of the other crime or crimes charged; the jury may cumulate the evidence; or a latent

feeling of hostility may be engendered by the charging of several crimes). Maurice Floyd suffered each kind of prejudice. He suffered the additional, overriding prejudice of introduction of the only overt evidence of premeditation.

Defense counsel failed to do what was necessary to raise the privilege. Because the counts against both victims were joined, Mr. Floyd could not testify on the assault charge without fear of negative inferences and overbearing prosecutorial conduct relating to the shooting, denying him a fair opportunity to defend himself on the assault charge, and allowing the critically prejudicial evidence of the privileged communication to be used to establish premeditation. See *United States v. Bronco*, 597 F.2d 1300 (9th Cir. 1979).

In the Amended Order Denying Relief, the post-conviction court misconstrued the grounding for the defendant=s complaint on this issue. The court spends considerable time rejecting the claim that the defense should have merely objected to the threat. ROA VII 1265. But the court ignores or overlooks the fact that trial counsel had the ability to remove the threat from the equation entirely with an open plea to the aggravated assault charge. The trial court frames this as failure to sever the charge, ignoring the rest of the claim **B** not that the charge would be severed, but that it would be removed entirely by the open plea. The case law as to severance illustrated the prejudice arising from including the assault charge. An unconditional open plea would have erected the marital privilege to exclude the threat. This, the post-conviction Order ignores entirely. This Court should reach this matter de novo

and find counsel was ineffective, and require a new trial or, at the very least, reduce the judgment to second degree murder.

C. Defense counsel was ineffective for failing to adequately investigate theories of innocence, Mr. Floyd=s alibi, or to present any such defense to the jury, prejudicing the defense. The state violated its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States,* 405 U.S. 150 (1972).

A critical witness against Mr. Floyd was Tashoni Lamb, ROA 2002 IX 1773-95. She testified Mr. Floyd arrived after the time of the shooting, confessed the shooting, displayed a gun, and stayed the night. Only Lamb=s and the children=s testimony connect Mr. Floyd to the shooting.

The post-conviction court denied relief on this claim on faulty grounds, misinterpreting the nature of the claims made and finding facts which are incorrect or unsupported by the record. For instance, the court identified state attorney investigative notes as a Apolice interview,@ ROA VII 1267 (p.9 of Amended Order). The court characterized the *Giglio* complaint as being grounded solely on Ainconsistencies 5 years apart@ between Ms. Lamb=s trial testimony and her testimony in the evidentiary hearing, ignoring the proof that Ms. Lamb never heard Mr. Floyd say he shot the victim because she threatened to call police.

The post-conviction order, ROA VII 1268 (p. 10 of Amended Order), ignores the fact that a tape recording never produced to the defense included the fact that Ms. Lamb said the **only** reason Mr. Floyd gave for the shooting was that the victim was talking trash and he got angry, an assertion she stood on even after the detective asked

her to tell him everything. While the police report indicated the Atalking trash/angry@ reason, it failed to reflect the context that it was the only reason given after encouragement to tell everything, a critical distinction the post-conviction court glosses over in the Order. The post-conviction court dismisses the critical differences between Ms. Lamb=s trial testimony and every other statement ever recorded about what she said as Ausing different semantics on different days.@ ADifferent semantics@ in the hands of competent counsel is impeachment. In this case, the discrepancies are substantive.

Substantial evidence existed to impeach Ms. Lamb=s credibility. The state arrested and charged Ms Lamb=s boyfriend with battering Ms. Lamb when he found Mr. Floyd had spent the night at Ms. Lamb=s residence. Prosecutor Garry Wood knew of the matter. ROA-S II 227. Mr. Wood signed the nolle prosequi form dismissing the charges against the boyfriend after the grand jury hearing in which Ms. Lamb testified, and before the trial in this case. ROA-S II 229 (Wood=s testimony he signed the nol. pros.); ROA III 588 (the nol. pros. document). State Attorney Investigator Julian Brown interviewed Ms. Lamb three days before the grand jury, ROA III 584 (his notes), and her boyfriend at the jail two days before the grand jury, ROA III 585 (his notes, including an annotation the boyfriend had not seen Mr. Floyd while they were incarcerated at the jail together, and that Browning Awarned him [the boyfriend] off becoming LEO agent.@).

Either the state failed to inform the defense of the nol. pros., a *Brady* violation,

or defense counsel was ineffective for failing to follow up on the matter. The fact of the nol. pros. alone stands as legitimate impeachment, regardless of whether the state would admit to the quid pro quo. Also, as shown herein, Ms. Lamb was angry at Mr. Floyd because he failed to intervene during the boyfriend=s beating. Ms. Lamb had been harassed threatened with prosecution for harboring Mr. Floyd if she did not testify against him.

Defense counsel had the right and duty to impeach Ms. Lamb with this material. *Fulton v. State*, 335 So.2d 280 (Fla. 1976) (defendant has absolute right to question witness about actual or threatened charges or investigation leading to charges); *Jean Marie v. State*, 678 So.2d 928 (Fla. 3d DCA 1996) (defendant has right to cross-examine key witness to show witness had charges nolle prossed two months before trail testimony, even though there was no evidence of an agreement between the witness and state); *Lewis v. State*, 623 So.2d 1205 (Fla. 4th DCA 1993) (proof of agreement for pretrial nolle prosequi not necessary to permit cross-examination on same). Mr. Floyd was deprived of his constitutional right to confrontation under the Sixth Amendment due to ineffective assistance of counsel and the state=s *Brady* violations.

The post-conviction court found no merit to the Anolle prosequi claim@ because there was no evidence of a quid pro quo agreement. The case law just cited establishes there is no need to show an agreement, the fact of a nolle prosequi is alone sufficient to impeach. The post-conviction court ignored the claim that Ms. Lamb was

threatened with criminal prosecution to force her to testify. The court also ignored the claim that counsel was ineffective for failing to cross-examine Ms. Lamb about her anger at Mr. Floyd for not intervening in the beating in which she lost a tooth. This Court is free to consider such overlooked matters de novo, as no finding of fact was made by the trial court.

More critical to the matter at hand is the fact that Ms. Lamb disavowed hearing Mr. Floyd ever tell her anything about shooting Mrs. Goss when she threatened to call the police. This is consistent with every other statement by her, except for the false testimony the state attorney elicited from her at trial. Ms. Lamb=s initial report to the police shortly after the shooting, her grand jury testimony, and testimony at the post-conviction hearing all refute any claim that she heard Mr. Floyd say he shot the victim because she was going to call the police.

The police report by the principle investigator, Detective Sandberg, ROA III 571-78, showed that Ms. Lamb told the police shortly after Mr. Floyd was arrested that Ahe told her he shot Ms. Goss because she made him angry,@ ROA III 578. There was no mention in the report of the additional motive, that she was going to call the police. Prosecutor Wood testified he reviewed the report for the case and knew the initial report was that the only reason given was AShe made him angry.@ ROA-S II 219-23.

The tape of that interview by Detective Sandberg of Ms. Lamb, introduced as Defense Exhibit 6 in the hearing, ROA III 570, shows that Ms. Lamb told the

detective that Mr. Floyd told her Mrs. Goss was running her mouth and that is why he shot her. Despite the detective=s advice that he wanted to know everything, Ms. Lamb offered nothing more.

> DETECTIVE SANDBERG: Did he say why he shot her?
> MS. LAMB: Well, he just said she was running her mouth, she just was running her mouth, talking, and he say he just shot her.
> DETECTIVE SANDBERG: Because I sure, you know, want to know exactly everything.
> MS. LAMB: Yeah.
> DETECTIVE SANDBERG: Like I said, I just talked to him tonight --
> MS. LAMB: Uh-huh.
> DETECTIVE SANDBERG: **C** and he told me some things, but I want to hear everything --
> MS. LAMB: Yeah.

ROA-S I 154.

The evidence at hearing shows that the tape recorded interview was never provided to the defense in discovery. Neither the investigator, Freddie Williams, ROA-S II 432, nor Mr. Withee, ROA-S II 368-70, recalled ever hearing the tape or being aware of its existence, and the tape was not in the defense file. The defense had demanded discovery of AAny . . . recorded statements made by any person to the police, the state attorney, or the grand jury which tends to establish Defendant's innocence, to mitigate punishment, or to impeach the credibility or contradict the testimony or any witness who the State will call at the trial of the cause.@ ROA 2002 I 70. The state is, therefore, guilty of another *Brady* violation for failing to provide this critical tape to the defense. While the Order denying relief in this cause finds that the tape offers no more evidence than the written

report, ROA VII 1268, the tape makes it absolutely clear that the sole reason given was anger, even after coaching from Detective Sandberg for any additional motive. The Order also erroneously concludes the tape was not suppressed because it was disclosed and the content was included in the report.[6] The content differed as explained herein, and the tape was suppressed because the defense had demanded all tape recordings from the state and the state never produced them.

The *Giglio* violation was also well established at the evidentiary hearing. The police report and the taped interview showed no motive of shooting Ms. Goss because she was going to call the police. In the grand jury testimony, Ms. Lamb testified:

> . . . . And I asked him why he did it. And **he said she was talking trash**, and when she threatened to call the police, that is when he shot her.
>
> Q She threatened to call the police?
>
> A Yeah, she told him, **<u>evidently</u> she told him she was going to call the police.** And he shot her.

Grand Jury Proceedings, August 5th, 1998, ROA V 1064 (emphasis added).

> A I asked him **B** I told you, **I asked him why he did it and he told me. And he told me that they had suppose to have been house cleaning him that day, him and his wife, and she decided she wanted to ride and drink. And he was home keeping the kids. And it started from that.**

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[6] It is ironic that the post-conviction court relies on the police report to cure any *Brady* claim. Thee post-conviction court repeatedly refused to admit the police report, see, e.g. ROA-S II 209-11 (admission refused after identified by Wood as document he relied upon, argued it went to his state of mind on the *Giglio* claim re Lamb=s false trial testimony of motive); ROA-S II 371 (admission refused after Withee identifies report as one he relied upon to prepare his case, relevant to his ineffectiveness on the Lamb/motive issue). The report is in the record, ROA III 571-78, only as an identified exhibit. Presumably, the judge=s reliance on the report renders it cognizable evidence for all purposes. Otherwise, the trial court=s reliance on a document not in evidence renders its finding unsupported by the evidence.

Grand Jury Proceedings, ROA V 1065 (emphasis added).[7]

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[7] It is clear how Ms. Lamb came to even think about calling police as a motive B State Attorney Investigator Julian Brown testified at the evidentiary hearing that his notes from an interview with Ms. Lamb August 3, 1998, were true and accurate, although he denied any present recollection of anything that occurred during the meeting. The trial court in its Order denying the 3.851 motion erroneously characterized the notes as a police report and incorrectly quoted the notes in support of his finding that Ms. Lamb never changed the facts, but was only Ausing different semantics on different days.@ ROA VII 1258. The notes report:

TL AWhat you did?@

? AI shot. (p).@ AShe was talking trash.@

AThreatened to call the police.@ AI shot her.@

Defense Exhibit 14, ROA III 584 (symbols for Adefendant@(delta) and Api@ in original). This is the first time an aggravating factor is reported. Whatever qualification Ms. Lamb made in the statement which Browning failed to record, she certainly qualified it when the state attorney asked her to clarify the statement in the grand jury testimony.

The Order also errs when it claims that AThe record is devoid of any evidence that suggests that any state official had any input in Tashoni Lamb=s recollection of Floyd=s statements.@ ROA VII 1268 (p.10). In fact, Browning has such input, and

convenient amnesia at hearing as to the nature and degree of that input **B** but it is recorded in his notes.

Then, at trial, State Attorney Tanner twice elicited from Ms. Lamb the false testimony that Mr. Floyd told her he shot Mrs. Goss when she threatened to call the police, to the exclusion of any other reason expressed by Mr. Floyd. First, as part of a narrative of the alleged confession:

> . . . . And I asked him why he did it.
> And he said that she had threatened to call the police on him.

ROA 2002 IX 1787.

State Attorney Tanner made it crystal clear that Ms. Lamb was saying the only reason for the shooting was because Mrs. Goss was going to call the police, to the exclusion of any other reason.

> Q [By State Attorney Tanner] Did you have any further conversations with him as to why he shot her or how the shooting occurred or anything like that?
> A No.
> Q Why didn't you ask him about it?
> A I asked him why did he shoot her, you know. And he told me that she had threatened to call the police on him.
> **Q And that was it?**
> **A Yes.**

ROA 2002 IX 1789 (emphasis added).

This exchange is remarkable for several things. It is a demonstration of ineffective assistance when defense counsel failed to object to the repeated elicitation of the alleged motive. It is a demonstration of ineffective assistance for defense counsel's complete failure to recognize the critical distinction between the exclusive motive asserted at trial, the initial motive asserted to Detective Sandberg (she was

talking trash and he got angry at Mrs. Goss), and the multiple motives (if Aevidently@ can be considered competent evidence) asserted in the grand jury testimony (he shot the victim because she made him angry,Aevidently@ he did so after she threatened to call the police, and it started because of a fight with his wife). Defense counsel had the grand jury testimony before trial as the result of the court=s order. He had the police report by Detective Sandberg. He did not have the audio tape of Sandberg=s interview due to the state=s *Brady* violation, and therefore didn=t know that, due to Detective Sandberg=s coaching to tell him everything, Ms. Lamb=s report of anger arising from trash talk meant that it was the only motive related by Mr. Floyd.

At the evidentiary hearing, prosecutor Wood testified that his boss, State Attorney Tanner, was fully informed about the case when he examined Ms. Lamb. He would have received the police report and the grand jury testimony. Mr. Wood was familiar with the material, and he was present with Mr. Tanner elicited the trial testimony quoted here. ROA-S II 272-73.

The effect of the trial testimony was to unambiguously limit the motive for shooting Ms. Goss solely to the fact that it occurred when she threatened to call the police. It turns out Mr. Floyd never told her he shot Mrs. Goss because she threatened to call the police. Ms. Lamb testified at the post-conviction evidentiary hearing that she does not recall Mr. Floyd ever telling her he shot Ms. Lamb because she was going to call the police. ROA-S I 171. She said she drank every day around the time of the shooting and trial, and that she had probably also had a few drinks

when she testified to the grand jury. ROA-S I 172.

Ms. Lamb=s testimony in the grand jury was that Aevidently@ Ms. Goss was going to call the police, and it was after that threat that Mr. Floyd shot her. That testimony doesn=t even establish that calling the police was the reason for shooting **B** it was simply part of the sequence of events **B** not motive. More importantly, Ms. Lamb couched her testimony with the qualifying adverb Aevidently.@ Definitions of Aevidently@ make clear the assertion is a conclusion, an inference, not a fact: A2. According to the evidence available: *She=s evidently going to be late*.@ American Heritage Dictionary at 471 (2nd College Ed. 1985); A2. apparently: used to indicate that something may be true based on available evidence. *He then completely ignored her, evidently intent on hurting her feelings even more*.@ AEvidently,@ Encarta Dictionary Online, http://encarta.msn. com/dictionary_/evidently.html (October 5, 2007); A2 : on the basis of available evidence <he was born ... *evidently* in Texas -- Robert Coughlan>.@ AEvidently,@ Merriam-Webster=s Online Dictionary, http://www. britannica.com/dictionary? book =Dictionary&va=evidently&query=evidently (October 5, 2007).

The word Aevidently@ does not mean the person observed the fact asserted, it only means that the person inferred the fact asserted from the available evidence. Ms. Lamb had weeks to assemble those facts before going to the grand jury **B** she was a close friend of the family and Mr. Floyd and she would have had the opportunity to read the newspapers and listen to the grapevine. She therefore inferred the sequence

of events. She testified to that inference to the grand jury. Once Ms. Lamb was effectively cross-examined at the evidentiary hearing about her basis for asserting the connection between the shooting and calling the police, Ms. Lamb was forced to concede under oath that she had never heard Mr. Floyd say such a thing. That fact is gone, refuted by the testimony of Ms. Lamb=s recantation of what State Attorney Tanner got her to say at trial.

The state=s behavior at trial is a blatant violation of *Giglio v. United States,* 405 U.S. 150 (1972). Combined with the *Brady* claim of failure to provide the defense with the interview tape establishing Atalking trash@ as the sole motive even after encouragement to give additional motives, the constitutional violations in this case are profound.

A *Giglio* claim is established if a defendant shows: (1) presentation of false testimony (2) that the prosecutor knew was false; and (3) the statement was material. *See Ventura v. State*, 774 So.2d 553, 562 (Fla. 2001), *quoting Robinson v. State*, 707 So.2d 688, 693 (Fla. 1998).

When there has been a suppression of favorable evidence in violation of *Brady v. Maryland*, the undisclosed evidence is material Aif there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding **would have been** different. A >reasonable probability= is a probability sufficient to undermine confidence in the outcome.@ *United States v. Bagley*, 473 U.S. 667 , 682 (1985) (emphasis added).

A more defense friendly standard of materiality applies when the prosecutor knowingly uses perjured testimony, or fails to correct false testimony. The falsehood is deemed material Aif there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.@ *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added); *Giglio*, 405 U.S. at 154; *Napue v. Illinois*, 360 U.S. 254, 271 (1959). As the Supreme Court has held, this standard of materiality is equivalent to the *Chapman v. California*, 386 U.S. 18 (1967), Aharmless error beyond a reasonable doubt@ standard. *Bagley*, 473 U.S. at 679.

This Court recently clarified the appropriate *Giglio* analysis in the case of *Guzman v. State*, 868 So.2d 498 (Fla. 2004), by stating:

> Thus, while materiality is a component of both a *Giglio* and a *Brady* claim, the *Giglio* standard of materiality is more defense friendly. The *Giglio* standard reflects a heightened judicial concern, and correspondingly heightened judicial scrutiny, where perjured testimony is used to convict a defendant. . . . . Under *Giglio*, once a defendant has established that the prosecutor knowingly presented false testimony at trial, the State bears the burden to show that the false evidence was not material.
>
> . . . .
>
> To reiterate, the proper question under *Giglio* is whether there is any reasonable likelihood that the false testimony could have effected the court=s judgment as the factfinder in the case. If there is any reasonable likelihood that the false testimony could have affected the judgment, a new trial is required. The state bears the burden of proving the presentation of the false testimony was harmless beyond a reasonable doubt.

Id. at 507-08.

The jury heard that the sole reason for the shooting was because Mrs. Goss threatened to call the police. This effectively eliminated any possibility that the

shooting was done in the heat of passion and destroyed the chance for a conviction for second degree murder. Even more damaging, this Court found that the aggravating factor of avoiding arrest was supported by Lamb=s testimony. While this Court looked to the fact that Mr. Floyd faced a probation violation and arrest for the domestic fight earlier in the evening, that evidence has no weight if there is no credible evidence Ms. Goss was shot when she threatened to call the police. The only evidence of that motive is Ms. Lamb=s statement, qualified in the grand jury testimony as being a mere conclusion, falsely introduced as the sole motive in the state=s case in the trial, and disavowed by Ms. Lamb in the evidentiary hearing.

The aggravating factor of avoiding arrest is unsupportable after Ms. Lamb=s recantation and the testimony in the grand jury transcript which was not before this Court on direct appeal.

> **Where the victim is not a law enforcement officer, the proof of the requisite intent to avoid arrest must be strong.** *Robinson v. State*, 610 So.2d 1288, 1291 (Fla.1992); *Riley v. State*, 366 So.2d 19, 22 (Fla.1978) ("[T]he mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases.").

Griffin v. State, 866 So.2d 1, 17 (Fla. 2003). In this Court=s opinion, it sustained the Ato avoid arrest@ aggravator based almost exclusively on the testimony of Ms. Lamb:

> Considering all of the evidence discussed supra, **especially Floyd's uncontradicted confession of having killed Ms. Goss because she "had threatened to call the police on him,"** we determine that no relief is warranted on the issue of the avoid arrest aggravating circumstance.

Floyd, 850 So.2d at 407.

There is no evidence that if Mrs. Goss called the police, Mr. Floyd would be arrested as a direct result of the call. Mr. Floyd, assuming he was there, was free to leave the house and avoid capture. More is required to establish that the shooter in this case, if it was Mr. Floyd, had any belief or intent that the shooting would help him avoid arrest.

This Court distinguished this case from *Urbin v. State*, 714 So.2d 411 (Fla. 1998), specifically because in *Urbin* the evidence showed a dual motive, witness elimination (the Aavoid arrest@ factor) and that the defendant shot the victim because she was resisting a robbery. Ms. Lamb=s full testimony, assembled from all of her statements up to and at trial, is that Mr. Floyd was angry because of the fight with his wife, because Mrs. Goss was trash talking, and that he shot her after she threatened to call the police. Ms. Lamb=s true testimony suggests two alternate motives beyond avoiding arrest, compared to the one alternate motive in *Urbin.* Lamb=s testimony would have compelled this Court to rule consistently with *Urbin.*

The prejudice from the *Giglio* violation is also manifest in the guilt phase. Ms. Lamb=s trial testimony was facially false and a *Giglio* violation. She was also open to other impeachment. She told Detective Sandberg that Mr. Floyd arrived at her apartment after she received a telephone call at 1:00 a.m. from Camellia Wright telling her about the shooting. ROA-S I 153. While she later maintains that Mr. Floyd was

already in her apartment when Ms. Wright called, there is a fundamental flaw in the evidence **B** Camellia Wright testified at the evidentiary hearing that she never called Ms. Lamb that night, she had no phone at that time nor Ms. Lamb=s phone number, and no one from the defense ever contacted her until the post-conviction phase. ROA-S I 178-79.

The telephone call never occurred, and Ms. Lamb=s constant assertion of the phone call, to Detective Sandberg, to the grand jury, at the trial, and even on both direct and cross examination at the evidentiary hearing, shows that she has problems recollecting anything from that night. A jury would have had that fundamental factual flaw to consider. Instead, Ms. Lamb=s testimony went unchallenged and unimpeached.

Mr. Withee was ineffective for failing to glean the facts from the police report (he never had the chance to hear the tape because of the *Brady* violation argued herein), the grand jury testimony, and for failing to contact Ms. Wright to confirm the telephone call. Properly presented to the jury, the jury would have known Ms. Lamb lied about the reason for shooting Ms. Goss, that she lied about who, if anyone, called her at 1:00 a.m., that she told two different stories about whether Mr. Floyd arrived before or after 1:00 a.m., that she was mad at Mr. Floyd when he failed to rescue her during the tooth-removing beating her boyfriend administered and was arrested for inflicting (testimony at the evidentiary hearing, ROA-S I 165), that she was harassed by persons who threatened to jail her for hiding Mr. Floyd if she didn=t come to court

to testify against him, ROA-S 168, and the other inconsistencies shown in the record.

Instead, Mr. Withee conducted no cross examination of Ms. Lamb. None.

The *Brady* violations also compel relief regarding Ms. Lamb. The prosecution has a duty under *Brady* to disclose favorable evidence to the accused whether requested by the accused or not. 373 U.S. 83, 87 (1963):. AWe hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.@ The Court later held in another case that Athat the duty to disclose such evidence is applicable even though there has been no request by the accused.@ *Strickler v. Greene*, 527 U.S. 263, 280 (1999); citing *United States v. Agurs*, 427 U.S. 97, 107 (1976). A[T]he duty encompasses impeachment evidence as well as exculpatory evidence.@ *Id.*, *citing United States v. Bagley*, 473 U.S. 667, 676 (1985). AThere are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching, that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.@ *Id.* at 281-82.

The Supreme Court detailed four aspects of materiality or prejudice for a *Brady* claim under *Bagley* in *Kyles v. Whitely*, 514 U.S. 419, 434 (1995): materiality does not require proving that disclosure have resulted in acquittal, but only Areasonable probability@ of a different result sufficient to undermine confidence in the outcome of

the trial; it is not a sufficiency of the evidence test; once a reviewing court applying *Bagley* has found a constitutional error there is no need for further harmless-error review; and the State=s disclosure obligation turns on the cumulative effect of all of all suppressed evidence favorable to the defense, not on the evidence considered item by item. *Id.* For a *Brady* claim, Athe rule encompasses evidence >known only to police investigators and not to the prosecutor.=@ *Strickler*, 527 U.S. 280-81.

In this case, the state knew they had threatened Ms. Lamb with arrest and prosecution for her complicity in harboring Mr. Floyd. Ms. Lamb committed a first degree felony. Section 777.03, Fla. Stat. (1998) (an accessory after the fact in a first degree murder case is guilty of a first degree felony). She testified in the evidentiary hearing that she was harassed and threatened with jail for harboring Mr. Floyd if she did not testify. ROA-S 168. The defense certainly never threatened her with prosecution. The state never informed the defense. This is a *Brady* violation requiring a new trial.

As to the failure of counsel to present an alibi defense, Mr. Withee should have argued the alternative theories available to him at trial B that Mr. Floyd shot Mrs. Goss in the heat of passion arising out of the domestic dispute he had with his wife, and, in the alternative, the alibi defense Mr. Floyd has always maintained. Mr. Floyd gave an alibi which exonerated him, yet it was not adequately developed by defense counsel or presented to the jury. The court admitted as a court exhibit a tape of an alibi, ROA 2002 X 1845, but the defense acquiesced when the state withdrew its request to

present the tape. At the evidentiary hearing, Mr. Withee claimed he timed the alibi out and found it placed Mr. Floyd back in Palatka at the time of the shooting. He had no explanation, however, for why he could not use the testimony of Mr. Floyd=s father, that the defendant called him about 11:15 p.m. from St. Augustine, and that the father picked Maurice up in St. Augustine and dropped him off at Ms. Lamb=s after 1:00 a.m., reflected in defense notes of the interview with Mr. Floyd=s father. ROA-S II 378. This could have been combined with the evidence from the police interview that Ms. Lamb initially said Mr. Floyd arrived after the 1:00 a.m. telephone call, a fact Mr. Withee denied knowledge about in the evidentiary hearing. ROA-S II 372.. If he was not aware of the post-1:00 a.m. arrival report, it would be because of the state=s *Brady* violation when it failed to give the defense the interview tapes.

Reasonable counsel may present alternative theories to the jury in the guilt phase: A>If you believe my client's version of events, then you must find him not guilty; if you do not believe him, then he still is not guilty of first-degree murder, but only of a lesser-included offense.= . . . [I]t cannot be said that counsel's decision to offer alternative theories, neither of which conceded the crime charged, amounted to representation that was unreasonable.@ *State v. Williams*, 797 So.2d 1235,1240-41 (Fla. 2001). Defense counsel had the opportunity to build a defense alibi case. He failed to do so either because the state deprived hi of knowledge, or because he failed to recognize the opportunity with the facts he had.

If Ms. Lamb had told the jury the additional facts she told the grand jury, that

Mr. Floyd was angry when Ms. Goss talked trash, and he was angry at his wife for drinking and driving instead of helping with the housework, the testimony would have been a major contribution to the alternative theory of heat of passion killing. It would have also dispelled the sole basis for supporting the Ato avoid arrest@ aggravator.@ Instead, defense counsel failed to inform the jury of many facts supporting the alternative theories of defense, and allowed false and incomplete testimony to make a record supporting an aggravating factor which did not exist.

D. Counsel was ineffective during the penalty phase proceedings against Mr. Floyd. This resulted in prejudice to the defense and denied Mr. Floyd his constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

(i) Failure to conduct an adequate investigation into potential mitigation evidence for the penalty phase was deficient and prejudiced the defense.

Substantial evidence exists of statutory and nonstatutory mental health mitigators. Defense counsel was ineffective for failing to adequately investigate to fulfill his obligations under *Strickland*, or *Williams v. Taylor*, 529 U.S. 362, 413 (2000), or *Wiggins v. Smith*, 539 U.S. 510 (2003). These United States Supreme Court cases mandate that trial counsel in capital cases are obligated to conduct a thorough investigation into the defendant=s background.

The defense experts at the evidentiary hearing established that Mr. Floyd met the criteria for two statutory mental health mitigators:

> The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance and;

> The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the conduct to the requirement of the law was substantially impaired.

Section 921.141(b)(f) Florida Statutes (1998). ROA-S I 56-57 (Dr. Dee=s testimony); ROA III 579-80 (written report of Dr. Berland); ROA-S III 524-38 (Dr. Berland=s testimony).

Dr. Dee also established several nonstatutory mitigators. Mr. Floyd suffered from brain damage which caused impulsive, unthinking behavior. ROA-S I 52-55. He had suffered a sleep disturbance since childhood, largely untreated and indicative of the brain damage. ROA-S I 57.

Dr. Berland testified that Mr. Floyd met the statutory mitigation criteria and also suffers from a long-standing psychotic disturbance that involves endogenous, or biologically determined, mood disturbance. It includes: thought disorder in the form of particularly delusional paranoid beliefs; perceptual disturbance including, at the least, auditory hallucinations; early childhood brain injury evidenced by psychotic symptoms typical of the injuries and reports of childhood incidents which could have caused damage; brain injury in the automobile accident at age 18; and cumulative brain injury from all of the brain injury noted over time. ROA-S III 537.

The state=s own expert, Dr. Riebsame, agreed that substantial mitigating factors existed in Mr. Floyd=s case. Mr. Floyd=s executive functioning scored in the 16th percentile, a low score indicating impairment in executive functioning. The sleep

disorder was mitigating and contributed to the behavioral problems. Mr. Floyd was learning disabled, and a chaotic childhood and inattentive parenting deprived him of the opportunity for intervention to address his problems. His brain operated dysfunctionally **B A**his brain functions in a very different way. . . . You may use the term abnormal way.@ He could not diagnose brain damage because he did not have a history of that. Dr. Riebsame testified that, if he were testifying for the defense, he would present the history of a learning disorder that reflects a brain abnormality as a nonstatutory mitigating factor. Dr. Riebsame said he did not diagnose psychosis **B** Mr. Floyd has strong antisocial features which raise his score on a psychopathic test instrument, but not enough to qualify as a diagnosed psychopath. ROA-S III 609-622. He could not rule out that the fact that Mr. Floyd had a twin brother who was stillborn indicated that Mr. Floyd suffered brain damage from prenatal or birth trauma. ROA-S III 588.

The defense expert employed by Mr. Withee, Dr. Krop, had no recollection of the case, and he could not locate his files, despite the fact that he normally retained capital case files. ROA-S II 312. He could only rely on correspondence to defense counsel Withee. ROA-S II 314. His correspondence indicated he found the same disparity between verbal and performance IQ that every IQ test given to Mr. Floyd since age 15 had also disclosed. ROA-S II 317. All the other experts, including Dr. Riebsame, relied in part on Dr. Krop=s IQ test, the only reported scores from the Krop evaluation.

Mr. Withee testified that he relied upon Dr. Krop to develop mitigation. ROA-S II 290. He gathered only limited materials to give Dr. Krop. ROA-S II 296. He never obtained a psychological evaluation readily available from North Carolina, performed after Mr. Floyd was arrested as a juvenile in the shooting of his brother. ROA-S II 296. Mr. Withee=s investigator, Mr. Williams, likewise did no investigation to locate mitigation witnesses or facts, except for a few records provided to Dr. Krop. ROA-S II 430-31.

Mr. Withee abandoned all mental health mitigation efforts when he received a letter from Dr. Krop dated March 26, 1999, a mere ten days before trial advising that there were Afew, if any, mitigating factors which could be presented. ROA IV 624. This was despite a preliminary letter three months earlier finding a learning disability and learning deficits. ROA IV 623. Given the multiple nonstatutory mitigators readily available and presented in the post-conviction hearing set out herein, Dr. Krop failed to communicate or failed discover, through lack of expertise or lack of support from Mr. Withee and his investigator, mitigation which could have been presented. Instead of further investigation to assist the expert or seeking a second opinion on the critical mitigation phase of trial, Mr. Withee had Dr. Krop rewrite the March 26, 1999, letter to say there were no mitigating factors, a direct contradiction to the original findings of learning disability and memory deficit. That letter was dated March 31, 1999, five days before trial, and bears Mr. Withee=s note that he had Dr. Krop redo the letter to state there were no mitigators. ROA IV 625. A learning disability and memory

deficits are mental health mitigators, and the fact Mr. Withee and Dr. Krop ignored those indicates their inability to comprehend or present proper mitigation evidence.

All of the mental health mitigation evidence presented in the post-conviction hearing was available or could have been developed for trial. Instead, Mr. Withee threw in the towel when a single expert, days before trial, backed out of testifying. Competent counsel would have gone with the learning disability and memory deficit, at the least, and should have sought out a second opinion. Competent counsel would have also developed the records they failed to develop for trial which assisted post-conviction experts to formulate their extensive mitigation findings. The post-conviction Amended Order relying on Dr. Krop=s testimony and correspondence to find adequate preparation for the penalty phase is grounded on no factual basis, given Dr. Krop=s loss of his records and his lack of any recollection of the case beyond his correspondence.

Trial counsel's performance was prejudicially deficient under standards set by *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); and the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (1989). "Prevailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable". *Strickland*, 466 U.S., at 688-689, 104 S.Ct. 2052. "[T]rial counsel [in a capital case have an] obligation to conduct a thorough investigation of the defendant's background." ABA Standards for

Criminal Justice 4-4.1 cmt. at 4-55 (2d ed. 1980), cited in *Williams v. Taylor*, 529 U.S. 362 (2000) (defense counsel deficient in investigation into client's background, finding that the AEDPA requirements for relief had been met). While " it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test . . . the undiscovered "mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [the defendant=s] culpability, and the likelihood of a different result if the evidence had gone in is sufficient to undermine confidence in the outcome actually reached at sentencing." *Rompilla v. Beard*, 125 S.Ct. 2456, 2469 (2005).

(ii) Failure to present available mitigation evidence on Mr. Floyd=s behalf at either the penalty phase before the jury, or at the *Spencer* hearing before the trial court was deficient and prejudiced the defense.

This Court has consistently held that the failure to present available expert opinions of the defendant=s mental and emotional condition in support of mitigating circumstances constitutes substantial deficiencies in the performance of counsel. In *Rose v. State*, 675 So.2d 567 (Fla. 1996), the Court held that counsel was ineffective for failing to present mental mitigators, including ones established in the evidentiary hearing exist in Mr. Floyd=s case, e.g. organic brain damage, a longstanding personality disorder , the defendant met the criteria for the statutory criteria of being under the influence of an extreme emotional or mental disturbance at the time of the offense and that his ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired at the time of the offense. The *Rose* Court

stated: A We find counsel=s performance, when considered under the standards set out in *Hildwin* and *Baxter*, to be deficient. It is apparent that counsel=s informed choice of strategy during the guilt phase was neither informed nor strategic.@ *Id.* at 572.

> In evaluating the harmfulness of resentencing counsel's performance, we have consistently recognized that **severe mental disturbance is a mitigating factor of the most weighty order**, *Hildwin*, 654 So.2d at 110; *Santos v. State*, 629 So.2d 838, 840 (Fla.1994), and the **failure to present it in the penalty phase may constitute prejudicial ineffectiveness.** *Hildwin*, 654 So.2d at 110. . . . Indeed, the substantial mitigation that has been demonstrated on this record is similar to the mitigation found in *Hildwin* and *Baxter* to require a resentencing proceeding where such evidence may be properly presented.

Id. at 573 (emphasis added) (*see also Holmes v. State*, 429 So.2d 297 (Fla. 1983); *Hildwin v. State*, 654 So.2d 107 (Fla. 1995); *State v. Michael*, 530 So.2d 929 (Fla. 1988); *Phillips v. State*, 608 So.2d 778 (Fla. 1992).

Federal courts hold that failure to present available mental mitigation evidence can be ineffective assistance of counsel. In *Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988), counsel was deemed ineffective for failing to present psychiatric evidence. *Id*. at 495. In that case, an evidentiary hearing was held during which Dr. Krop testified that Mr. Middleton was under extreme emotional duress at the time of the homicide, and that he had a very limited capacity to conform his conduct to the requirements of the law. *Id*. The Court held that Dr. Krop=s testimony, or testimony substantially similar to it, could very possibly have been obtained at the time of the sentencing. *Id*. The Court explained the importance of mental health mitigation evidence by stating that A this kind of psychiatric evidence, it has been held, has the

potential to totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior@ and Athis psychiatric mitigation evidence not only can act in mitigation, it could significantly weaken the aggravating factors@(*citing Huckaby v. State*, 343 So.2d 29, 33-34 (Fla. 1977); *Elledge v. Dugger*, 823 F.2d 1439 (11th Cir. 1987)) (*emphasis added*).

Due to the ineffectiveness of trial counsel, critical mitigation evidence was not presented on Mr. Floyd=s behalf to the jury and the trial court. Had this evidence been presented, it would have changed the evidentiary picture and balance as to the aggravating and mitigating circumstances. Therefore, the failure to put forth this mitigating evidenced prejudiced Mr. Floyd under the *Strickland* standard as the totality of the ineffectiveness undermines confidence in the judgement and sentence.

Mr. Floyd also claimed that Mr. Withee=s failure to object to the erroneous admission of a critical portion of the mitigation instruction, preventing the jury from considering any nonstatutory mitigator other than Aother circumstance[s] of the offense,@ was ineffective assistance. This Court found the error waived by the failure to object. *Floyd*, 850 So.2d at 402-03. Given the trial court=s refusal to instruct on nonstatutory mitigators of good behavior at trial, the jury, if it followed the instructions, had essentially no mitigation to consider.

Florida=s capital sentencing scheme is constitutional in part because the jury is free to consider all nonstatutory mitigators. The sentencer in a capital case must consider in mitigation, "anything in the life of a defendant which might militate against

the appropriateness of the death penalty for that defendant," *Brown v. State*, 526 So. 2d 903, 908 (Fla. 1988) (*citing Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987)); *see also Thompson v. Dugger*, 515 So.2d 173, 175 (Fla. 1987). When, as here, the instruction limited range of mitigation the jury could consider, the rationale for sustaining Florida=s statute is destroyed, and due process is denied, violating state constitutional protections and the federal Fifth, Sixth, Eighth, and Fourteenth Amendments. The state provided no tactical reason for not objecting to the faulty instruction at the evidentiary hearing. The Amended Order Denying Relief relied on this Court=s finding that the faulty instruction could not have altered the outcome. This ignores the cumulative effect of the other errors in this case, such that a properly presented case would not have been so strong as to render the instructional error harmless.

Failure to seek the instruction for mitigation for age deprived the jury of an important potential mitigator, especially in light of the complete failure of the defense to present any mitigating evidence. Again, Mr. Withee had no tactical reason to not request the instruction, only a mistaken belief it did not apply. The post-conviction court erred in finding no error because the age mitigator did not apply in this case.

E. Trial Counsel Was Ineffective in Jury Selection B Counsel was ineffective during the penalty phase proceedings against Mr. Floyd.

During jury instruction, a venireman volunteered a highly prejudicial comment:

> MR. TANNER: Mr. Wilkinson, you indicated you probably would not make it back to jury duty again. Is there anything in particular

that would interfere with you being a good juror in this case for this week?

VENIREMAN: Well, I don't know about this week or any other week. But the only thing I know for sure is the justice system sometimes works in right ways and other times it don't. If a man is sentenced to die in the electric chair, I feel they ought to go ahead after a certain period of time and go ahead and electrocute the man and get it over with, not give him a lifetime or send them over there for years and years and years, cost the taxpayer. My opinion, too much money.

(Clapping erupted by prospective jurors.)

THE COURT: Please, we need to maintain order. This is not a rooting session.

ROA 2002 VI 1149. The speech, and the outbreak of applause from the venire, fatally tainted the venire. This was a hanging jury, made more so by the speech.

This Court has held that AA venire member's expression of an opinion before the entire panel is not normally considered sufficient to taint the remainder of the panel.@ *Johnson v. State*, 903 So.2d 888, 897 (Fla.), *cert. denied*,546 U.S. 1064 (2005), citing to *Brower v. State*, 727 So.2d 1026, 1027 (Fla. 4th DCA 1999). However, it is the citing case, *Brower*, which explains what is necessary to ensure the taint is not sufficicent to require a new trial:

During voir dire, defense counsel alerted the court that a witness for Appellant overheard some of the prospective jurors making remarks assuming Appellant's guilt, such as Ahang him,@ Athey ought to just hang him,@ and AWhy are we going through this? Where I come from, we would have just strung him up.@ The court took testimony from the witness, who identified certain individuals as having made the offending comments, including one who said, A›They're going to have to prove to me that he did not do it.:,@ and **then questioned venire members about what they had heard and said**. . . .

[A deputy clerk later] stated that during the individual questioning, other prospective jurors, who had remained unsupervised in the courtroom, were not taking the proceedings seriously; they were talking

> loudly and applauding when one of them was excused.
>
> . . . .
>
> We recognize that the conduct of the prospective jurors in question is not only shocking, but represents sad and cynical attitudes held and demonstrated by certain segments of our citizenry. Nevertheless, Appellant was not deprived of a fair trial by the **trial court's decision to conduct an inquiry** and proceed with those jurors who had not acted offensively and who Appellant has **not shown were otherwise tainted.** To hold otherwise would impose a per se reversal rule, undermine the trial court's discretion, and effectively impugn the integrity of the remaining jurors who were able to disregard their inadvertent exposure to the boorish and insolent antics of their fellow citizens.

Brower, 727 So.2d at 1026-27 (emphasis added). See also *United States v. Hernandez*, 84 F.3d 931, 935 (7th Cir.1996) A((Where venire members made ›explicit comments to the effect that the judicial system was ineffective in apprehending and punishing offenders,: but **only venire members who testified that exposure to the statement would not impair their impartiality remained on venire,** held: "[a]bsent any reasons [beyond speculation] to suspect as untrue the juror's claims of ability to remain impartial despite exposure to improper ... comment, the court should credit those responses."(citation omitted)),@ parenthetical from *Brower*, 727 So.2d at 1027 (emphasis added). Taint was found to not exist in *Brower* and *Hernandez* because the court inquired of the jury and allowed only those who remained impartial to remain.

In the instant case, the outburst was fundamentally prejudicial, and trial counsel failed to object or seek a new panel, which would have required the court to inquire of the venire to winnow out the tainted members. The evidentiary hearing produced no tactical or strategic reason why trial counsel failed to act. This resulted in prejudice to

the defense and denied Mr. Floyd his constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

ISSUE II

MR. FLOYD WAS DEPRIVED OF HIS DUE PROCESS RIGHTS TO DEVELOP FACTORS IN MITIGATION AND A FAIR PENALTY PHASE BECAUSE THE COURT APPOINTED PSYCHOLOGIST FAILED TO CONDUCT THE APPROPRIATE TESTS FOR ORGANIC BRAIN DAMAGE AND MENTAL ILLNESS.

Counsel=s deficiencies on this claim violated Mr. Floyd=s Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and his corresponding rights under the Florida Constitution. At the hearing, Dr. Krop was unable to recall anything about his evaluation of Mr. Floyd, other than to confirm his authorship of certain correspondence and the apparent truthfulness of those letters. The fact that he lost Mr. Floyd=s file, when he takes special measures to preserve death penalty files, is indicative of the lack of care and diligence devoted to Mr. Floyd=s case. Dr. Krop found a learning disability which, as argued herein, is a nonstatutory mitigating factor. That alone refutes his revised and final letter to Mr. Withee opining that no mitigation existed in this case **B** obviously a ACYA@ letter for all involved. ROA-S II 310-47.

ISSUE III

CUMULATIVE EFFECT: MR. FLOYD WAS DENIED THE RIGHT TO A FAIR TRIAL AND PENALTY PHASE. WHILE EACH ERROR ABOVE DEMANDS RELIEF INDIVIDUALLY, WHEN THE ERRORS IN THIS CASE ARE CONSIDERED TOGETHER THE COURT SHOULD GRANT A NEW TRIAL.

Mr. Floyd requests this Court conduct a cumulative analysis of all counsel=s errors when addressing the prejudice prong of *Strickland*. The shortcomings of counsel, *Brady*, *Giglio* and due process violations, and the resulting prejudice to defendant as outlined herein cumulatively lead to relief for the appellant because, even if no single act or omission is deemed sufficient to warrant relief, the cumulative effect of two or more may do so. *Rogers v. State*, 957 So.2d 538, 553 (Fla.,2007); *Suggs v. State*, 923 So.2d 419, 441-42 (Fla.2005); *Friedman v. United States*, 588 F.2d 1010 (5th Cir. 1979); *Griffin v. Wainwright*, 760 F.2d 1505 (11th Cir.1985); *Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir.1982), *cert. denied*, 460 U.S. 1098 (1983).

ISSUE IV

MR. FLOYD=S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HE WAS SHACKLED IN FRONT OF THE JURY AT TRIAL. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO ADDRESS THIS ISSUE.

Mr. Floyd was shackled throughout his capital murder trial, without any determination by the court that shackling was necessary. The evidence in the evidentiary hearing established that the shackling consisted of a leg brace Mr. Floyd

was compelled to wear on his left leg at all times he was in the courtroom and before the jury. ROA-S II 485 (Mr. Floyd testifies he was shackled at all times in the courtroom); ROA-S II 459 et. /n:63seq. (chief courtroom bailiff Mitchell Halbrook[8] testified that all incarcerated felons, without exception, wore leg brace in front of the jury).

Bailiff Halbrook had every defendant put the leg brace on before going into the courtroom. Every defendant walked with a stiff left leg because of the brace. The brace was never oiled. Every defendant would have to pull a pin to break the brace lock to sit down, and they did so in different ways (all visible to the jury). ROA-S II 463. The pin was difficult to pull, defendants could have trouble making the brace collapse, and even Mr. Halbrook, with years of experience with the race, had trouble figuring out how to release the pin. ROA-S II 462. The brace was large, starting with a strap at the upper thigh in the crotch area, a strap above the knee, another just below the knee, and a lock at the ankle. The ankle lock was large and shiny, it rode on the outside of the left ankle, and it was easily visible unless covered by clothing or hidden by furniture. ROA-S II 462. ROA III 488, 490 (photographs of brace demonstrated at hearing, identical and probably the brace actually used by Mr. Floyd, ROA-S II 449).

[8] Bailiff Halbrook had retired some time after Mr. Floyd=s trial, after years as the trial judge=s courtroom bailiff. His testimony is as noted in ROA-S III, but the court reporter failed to list him in the table of contents at the start of the volume.

The snap of the brace locking was readily audible to Bailiff Halbrook at the evidentiary hearing as counsel operated the brace from the distance Mr. Halbrook said the jury would have been from Mr. Floyd I the courtroom. The snap was readily audible under various conditions, fast and slow operation, and operation covered by a coat. Mr. Halbrook had never observed the brace to lock into position without making the snapping noise, nor could he envision any condition where the snap would not occur. ROA-S II 466-68.

Bailiff Halbrook testified that the jury had an excellent view of the leg brace because the defense table faced the jury box, so that the open area beneath the table was open to the constant, clear and unimpeded view of most of the jurors. There was no skirting on the table or any other effort to conceal the area below the table. ROA-S II 476-80 (Mr. Halbrook); ROA III 488-96 (photographs of courtroom as it existed at time of evidentiary hearing, used to illustrate Mr. Halbrook=s testimony as to the arrangement at the time of trial). The shiny lock at the ankle was visible on most defendants as they sat because the lock had to be as low as possible and because their pant leg would naturally ride up. ROA-S II 469-70. The jury would have also observed the stiff-legged walk compelled by the brace when Mr. Floyd accompanied counsel to a bench conference.

Mr. Floyd testified at the evidentiary hearing that the brace locked into an extended position forcing Mr. Floyd to limp including when he approached the bench. He rose every time the judge entered the courtroom, causing the brace to lock and

forcing him to bend forward, reach back, and release the latch. He had trouble with the latch sometimes. He had to hitch up his pant leg to grab the latch. The brace at hearing was like the one he wore at trial. The shiny locking device at the ankle was visible at all times because his pant leg came to rest above the device, and the pant leg rode up as he pulled the latch pin. The brace clicked every time he operated it. No one ever advised him to try to conceal the brace. ROA-S II 486-88.

The court and the bailiffs considered the brace to be a shackling device restraining the movements of the defendant. ROA 2002 XI 2015-16. Immediately prior to the sentencing hearing before the jury, the Court, counsel, and bailiffs had a discussion regarding security. ROA 2002 XI 2011-17. An unsubstantiated report from the jail suggested Mr. Floyd allegedly said after conviction that he was not going to go to prison. The Court indicated it intended to leave Mr. Floyd in handcuffs before the jury. However, Bailiff Halbrook indicated that Mr. Floyd had been wearing a leg brace during the guilt phase and he was satisfied that the leg brace would be sufficient shackling for the penalty phase. Although Mr. Withee objected to the handcuffs, he readily agreed to the continued shackling by leg brace. He told the court he always supported bailiffs, peace and quiet and security in the courtroom ROA 2002 XI 2011-12. Mr. Withee noted without contradiction that Mr. Floyd had demonstrated exemplary behavior during the trial. ROA 2002 XI 2013. While he demanded a proper hearing on the unsubstantiated report if the court was going to

handcuff Mr. Floyd in front of the jury, ROA 2002 XI 2014-15, he readily acquiesced to the continued shackling by leg brace without hearing, ROA 2002 XI 2015-17.

Trial counsel Withee was ineffective in his representation by acquiescing to the continued shackling of his client, wherein the fact of shackling was overtly visible to the jurors. The shiny locking mechanism was always visible, the jury observed the stiff-legged stance of the defendant whenever he rose and when he approached the bench, and the jury observed the necessity for Mr. Floyd to release the shackling mechanism in order to take a seated position, and the noises arising therefrom.

Defense counsel failed to object at any time in trial. At the evidentiary hearing, counsel Withee testified that he did not recall Mr. Floyd being forced to wear a leg brace at trial. He did not recall the discussion before the penalty phase when he agreed to continuation of the leg brace which had been in place throughout the trial to that point. ROA-S II 388-89. He said the issue of shackling was Apretty elementary defense counsel stuff,@ ROA-S II 390, yet he remained oblivious to the problem at the evidentiary hearing. The hearsay allegations from the jail were never substantiated, despite defense counsel=s demand that the accusers be brought into court for examination. There was, therefore, no basis for the trial court to have made a valid ruling that the leg brace shackling was needed for either the guilt or penalty phase. The state at the evidentiary hearing never brought in the jail deputy who purportedly made the accusation of possible trouble, which would have been for naught regardless since the allegation arose only after the verdict of guilt.

The Court never polled the jurors to determine whether any of them had been prejudiced by the sight of Mr. Floyd in shackles. Even if the leg brace had been properly determined to be necessary for the penalty phase, the court never gave a specific cautionary instruction to the jurors. Given that there is not even a suggestion of a security risk for the guilt phase (beyond the security concerns arising in any capital trial, which could never alone justify shackling or all capital defendant would be tried in shackles), no cautionary instruction could have possibly cured the unconstitutional shackling of Mr. Floyd in the guilt phase.

The shackling prejudiced Mr. Floyd because, when the jury saw Mr. Floyd in shackles, they were led to believe that the court had evidence of future dangerousness and uncontrollable behavior and that if he was unmanageable and dangerous in the courtroom, he would be dangerous in prison, leaving death as the only proper decision. He was chilled in his ability to participate fully and without hindrance in his defense. And the dignity of the courtroom was impaired by the unnecessary shackling.

Routine Shackling Prohibited

Shackling a defendant in view of the jury is an Ainherently prejudicial practice,@ *Bello v. State*, 547 So.2d 914, 918 (Fla. 1989), see *Holbrook v. Flynn*, 475 U.S. 560 (1986), in violation of state and federal constitutional protections. The prohibition on penalty phase shackling was recognized in Florida even earlier: ASince at least 1987, the law in Florida has been that shackling a defendant during the penalty phase without ensuring that his due process rights are protected is a sufficient ground for reversing a death sentence. *See Elledge v. Dugger,* 823 F.2d 1439, 1450-51 (11th Cir.1987).@ *Hill v. State*, 921 So.2d 579, 585 (Fla. 2006) (rejecting a shackling claim as untimely despite *Deck v. Missouri*, 544 U.S. 622, 633 (2005)). And the constitutional protection against shackling has always been considered by this Court to apply the guilt phase as well. *State v. Diaz*, 513 So.2d 1045 (Fla. 1987) (the defendant apparently wore a leg brace the trial court had advised the defendant to try to conceal by keeping his pants legs pulled down or placing a box in front of his feet **B** the shackling was deemed appropriate because of the defendant=s demonstrated history as a security risk).

Shackling a defendant diminishes the presumption of innocence by affecting how the jury views the defendant - the shackles make the defendant look guilty. Shackling allows the jurors to convict based on mere suspicion rather than evidence proven in court and subject to cross-examination. Shackling also limits the defendant=s ability to participate in the proceedings, and it is an affront to the dignity and decorum

of the courtroom. In the penalty phase, Athe use of shackles can be a >thumb [on] death=s side of the scale.= *Sochor v. Florida*, 504 U. S. 527, 532 (1992) (internal quotation marks omitted); see also *Riggins*, 504 U. S., at 142 (KENNEDY, J., concurring) (through control of a defendant=s appearance, the State can exert a >powerful influence on the outcome of the trial=).@ *Deck v. Missouri*, 544 U.S. 622, 633 (2005).

In *Deck*, the Supreme Court settled the shackling question as to all phases of a jury trial, announcing that the prohibition against unnecessary shackling extends to every moment the jury is in the courtroom or otherwise is free to view the defendant, both guilt and penalty phase. *Deck v. Missouri*, 488 U.S. at 629-35.

In the instant case, the trial judge=s observation at the start of the penalty phase as to why restraint were necessary is indistinguishable from Missouri=s rejected justification in *Deck*, 544 U.S. 634-35, that the mere fact of conviction allowed shackling in the penalty phase:

> THE COURT: The information that I get over is over the transom in the sense that I don't necessary have a logical nexis because it's one of my responsibilities is to be concerned about security, not only for the bailiffs, but for the court staff as well as the jury and the witnesses.
>
> **I am concerned that he now has had some of his options foreclosed, he feels even more more [sic] cornered than he might have before and I'm afraid that he might act out.**
>
> The advice I've received is that he probably needs to remain cuffed during the proceeding.

ROA 2002 XI 2012 (emphasis added).

More damning of the fairness in this case is the *Deck* Court=s rejection of the Missouri=s claim that there was no evidence how much the jury was aware of the shackling or any record that the shackles interfered with the defendant=s ability to participate in the proceedings: AThis statement does not suggest that the jury was unaware of the restraints. Rather, it refers to the degree of the jury=s awareness, and hence to the kinds of prejudice that might have occurred.@ 544 U.S. at 634. Similarly, the state in this case cannot be heard to argue that the jury was only minimally aware of the shackling, or that the defendant must show he was hindered in his participation. The burden is on the state to prove there was no prejudice whatsoever, not that the prejudice was minimal: A[T]he defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove >beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.=@ *Deck*, 544 U.S. at 635.

The question is not how much the jury was aware that Mr. Floyd was shackled the by leg brace during the trial. The jury heard plenty of testimony of an able-bodied defendant, when he fled the sheriff=s office for instance. There was never evidence he was handicapped. The evidence showed the shooter escaped on foot, something a brace-wearing suspect would have great difficulty in accomplishing, and which would have been impossible to disguise.

The jury in this case clearly was aware that Mr. Floyd was shackled for purposes of restricting his mobility during the trial, raising all of the evils the *Deck*

Court seeks to eliminate. It is for the state to prove that this violation of Mr. Floyd=s constitutional rights, state and federal, did not prejudice Mr. Floyd, beyond a reasonable doubt.[9]

Leg Braces are Shackles

The *Deck* court was concerned with Avisible restraints.@ The brace mechanism extended down to the ankle and was visible at all times. The outlines of the brace were visible through the fabric of Mr. Floyd=s pants as he sat, stood, or walked in the courtroom. The sound of the brace clicking into a locked position echoed in the courtroom at the evidentiary hearing, and Bailiff Holbrook said it snapped every time in like manner when used in trial.

However, the jury need not actually see the restraining mechanism if the restraint, i.e. the artificial hobbling and restricted mobility, is clearly visible. The prohibition against the jury seeing Avisible restraints@ can be fairly construed to prohibit the jury from seeing the defendant is Avisibly restrained,@ the natural result of physical restraint. The *Deck* court noted that at Mr. Deck=s first trial, Astate authorities required Deck to wear leg braces that apparently were not visible to the jury.@ 544 U.S. at 624. Later in the opinion, the Court rejected Missouri=s argument that the trial judge acted within his discretion, holding that the trial judge never made a finding that

[9] Although not the burden of the defense, post-conviction counsel sought to poll the jurors but the motions were denied by the court. ROA VII 1233.

some sort of restraint was necessary, A[n]or did he explain why, if shackles were necessary, he chose not to provide for shackles that the jury could not see B apparently the arrangement used at trial.@ 544 U.S. at 634-35 (emphasis added). The Court assumed that the leg braces used in the first trial Aapparently@ had not been visible. No record had been developed on the visibility of the leg braces as the defense never challenged their use in the first trial.

The bottom line is that the *Deck* Court considered leg braces to be a shackles. To impose leg-brace-shackling on a defendant, the trial court must make a valid finding of Aadequate justification.@ No such finding, nor any circumstances which would have allowed such a finding, existed in this case. Further, the *Deck* Court found shackling by a leg brace to be acceptable on the assumption that the leg brace was not visible to the jury. The evidence in this case is uncontroverted, that the jury saw part of the leg brace at all times during the trial, would have heard the click of the brace locking and would have observed the movements required to release the hinge to sit.

A focused concern for concealed restraints was raised by the Eleventh Circuit three years prior to *Deck*, wherein the court found the use of a stun belt, even though concealed, to raise all of the concerns the United States Supreme Court later found controlling in *Deck*. As to the fact that a stun belt might not be seen by the jury, the Circuit court found:

> ("[T]he single major analytic thrust of all the guilt-innocence phase cases is ... **whether the defendant's right to a presumption of innocence was infringed by the security measure adopted by the trial court**" (footnote omitted).). **In the case of stun belts, this would seem to be less of a concern than it generally is with other physical restraints. . . . Nonetheless, if the stun belt protrudes from the defendant's back to a noticeable degree, it is at least possible that it may be viewed by a jury.** If seen, the belt "may be even more prejudicial than handcuffs or leg irons because it implies that unique force is necessary to control the defendant." *State v. Flieger*, 91 Wash.App. 236, 955 P.2d 872, 874 (1998).

United States v. Durham, 287 F.3d 1297, 1305 (11th Cir 2002) (emphasis added).

Even when mechanical restraints are concealed, the threshold requirement is that the court must make findings sufficient to justify the use of the restraint at trial. Further, the government has the burden to demonstrate that the unjustified use of a restraint is harmless, beyond a reasonable doubt. *Durham*; *Deck*.

Concealed restraint devices, no less than more overtly visible restraints, are, indeed shackles and can be imposed only after the appropriate weighing process and a need is found to impose such restraint.

This Court recently relied on the fact that the jury never saw **or heard** the ankle shackles the defendant was compelled to wear to deny relief on an ineffective assistance of counsel claim for failure to object to the shackles. *Hendrix v. State*, 908 So.2d 412, 425 (2005). In this case, the hobbling was clearly visible to the jury, and the sound of the operation of the shackling echoed in the courtroom.

A Minnesota court of appeals found that a leg brace required the same analysis as any other visible restraint. *State v. Houston*, 2002 WL 31892561 at 4 (Minn. App.

Dec. 31, 2002), *rev. denied*, (Minn. March 18, 2003), quoting *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986). The trial court had found the brace necessary for security, but specifically provided that the jury would never see the effect of the hobbling by requiring that Athat the jury would not be present at any time that appellant had to move.@ *Id*. (emphasis added). Thus, the *Houston* trial court clearly considered that the possibility that the jury would see the effect of the leg brace was sufficiently prejudicial that the jury should never be allowed to see the defendant move, lest the jury become aware of the restraint. A leg brace is a restraint and, as with any other, there must be case-specific reasons justifying its use. The routine use of leg braces violates a defendant=s federal constitutional rights outlined in *Deck*. The Supreme Court=s sole exception to a restraint-free trial **B**

> The constitutional requirement, however, is not absolute. It permits a judge, in the exercise of his or her discretion, to take account of **special circumstances**, including **security concerns**, that may call for shackling. In so doing, it accommodates the important need to **protect the courtroom and its occupants**. But any such determination must be **case specific**; that is to say, it should reflect particular concerns, say **special security needs or escape risks, related to the defendant** on trial.

Deck, 544 U.S. at 633 (emphasis added) The Florida courts recognize that shackling is permitted only of no lesser security measure is sufficient. *Shelton v. State*, 831 So.2d 806, 807 (Fla. 4th DCA 2002) (discussing alternate security measures available which rendered shackling impermissible)..

This Court has already approved a trial court=s rejection of a leg brace specifically because the brace would limit mobility, when it concluded that a stun belt was the best way to ensure security when a defendant was proceeding pro se. *Weaver v. State*, 894 So.2d 178, 194 (Fla. 2004), *cert. denied*, 125 S.Ct. 2297 (2005). *Cf. Griffin v. State*, 866 So.2d 1(Fla. 2003), *cert. denied*, 125 S.Ct. 413 (2004) (trial court sustained defense counsel=s objection to leg brace despite knowledge the defendant was planning an escape, and increased courtroom security instead).

Leg braces and other contemporary shackles are not the Dickensian chains of a Jacob Marley, massive and clanking chains cutting through flesh, but the courts have found that a finer sensitivity prevails today. Though the restraints be of silk, the jury must not know of that compelling symbol of guilt, the defendant must not suffer the substantial loss of his presumption of innocence and the mental and physical restraints it imposes on his ability to defend himself, and the dignity of the proceedings shall not be besmirched.

The shackling in this case was per se impermissible and alone requires retrial. Defense counsel=s ineffectiveness in failing to protect Mr. Floyd=s rights in this manner compounds the constitutional infirmity and likewise compels retrial.

The post-conviction Order ignored the unrebutted evidence presented at the evidentiary hearing. The judge found AThe device is under the pants leg of the defendant and is not visible.@ ROA VII 1275 (p.17). To the contrary, the judge=s

own bailiff testified that the shiny locking mechanism at the outside of the ankle was frequently visible, and Mr. Floyd testified that it was visible at all times because his pants legs didn=t cover the device. The trial judge persisted in deeming the leg brace to not be a Ashackle@ when it is clear that the *Deck* Court considered it a shackle, and this Court in *Diaz* considered it to be a shackle which was visible unless special efforts were taken to conceal it.

The court apparently found the limping imposed by the leg brace would not be visible to the jury since prisoners are not routinely walked in or out of the courtroom in the presence of the jury. This overlooks the fact that Mr. Floyd rose every time the jury or the judge entered or left the courtroom, and at each occurrence the jury would have seen and heard the leg brace lock straight, and would have seen and heard Mr. Floyd work at releasing the locking pin to permit him to return to his seat.

The trial court ignores the truth of the testimony and evidence when he characterizes the shiny ankle lock, substantial in size and shape and protruding from the ankle by an inch or two, as Aan ankle wrap.@ The trial court also relied on defense counsel Withee=s complete lack of memory about the leg brace. If anything, the lack of memory and lack of action at trial proves that counsel was accustomed and insensitive to the routine violation of his incarcerated felony clients= rights when every one of them wore the leg brace into the courtroom in front of the jury. The enforcement of constitutional protections never bows to the defense that AThat=s the way we have always done it around here.@

CONCLUSION

Based on the numerous constitutional violations which occurred in this case, the *Brady* and *Giglio* violations, and the ineffective assistance of counsel, operating outside the norms for capital representation as set out by the ABA Guidelines and the testimony and facts of this case, a new trial is required to assure confidence in the integrity of this State=s capital trial and sentencing scheme.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of the Appellant has been furnished by United States Mail, first class postage prepaid, to Barbara C. Davis, Senior Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118-3958, and Maurice Floyd, Union Correctional Institution, on this 9th day of October, 2007.

_____

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Fla.R.App.P. 9.210, that the foregoing was generated in Times New Roman 14-point font.

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