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

REPLY BRIEF OF THE APPELLANT

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STATEMENT OF THE CASE AND FACTS

The state misrepresents the procedural status of the motion to depose J.J. as being an oral motion. Answer Brief at 13-14. The motion was in a properly filed written motion, and only error by the court resulted in it being termed an oral motion, as explained in the Argument on Claim I, *infra*.

The state asserts, Answer Brief at 18, that prosecutor Gary Wood testified "he did not receive any communications from the children's counselor that pertained to privileged information," citing to ROAS II 237. In fact, Mr. Wood said Ms. Hoffrichter spoke freely with him and that he could not recall "one way or the other" whether she discussed privileged information. ROA-S II 237.

The state misrepresents Mr. Floyd's testimony about the leg brace. The state says he testified in the evidentiary hearing that "The leather strap at the bottom of the brace was visible because his pants leg was above it." Answer Brief at 25. The state omits the critical description of the large silver locking device at the ankle which the jury saw. Asked if his pants leg would rise up when he pushed up on the brace release, Mr. Floyd said:

A . . . . Well, they were already risen up anyway.
Q Your pants were?
A Yes, sir. **Well, they was riding on top of the little leather brace right there.**
Q So to your knowledge, the leather strap with the silver buckle exterior was visible at all times that you were in the courtroom?
A Yes, sir.

Q Did you hear the device click whenever you operated it?
A Yes, sir. Every time.

ROAS II437-38 (emphasis added). The defendant relies on the evidence of the leg brace before the trial and this Court as to the obvious bulk and shininess of the locking device, which sat on the exterior side of Mr. Floyd's ankle, exposed below his pant leg.

While the state goes on for more than two pages, Answer Brief at 25-27, about Dr. Krop' testimony at the post-conviction evidentiary hearing, the appearance of substantive testimony about Mr. Floyd's pretrial evaluation is refuted by the distinction between what Dr. Krop said in his letters and what he testified he inferred from his common practice and what was said or left unsaid in the letters. Essentially, the only evidence of Dr. Krop's work is the letters themselves, as Dr. Krop testified he had no recollection of the case beyond the letters. ROAS II 314.

The State writes that the trial judge "indicated that defense counsel was asking for records which surprised the State." State's Answer Brief at 10. The state only complained that it had received the routine Motion for Limited Discovery only that morning, ROA VIII 1460. The state already knew that the defense intended to investigate the mental health and competence of the child witnesses because of the prior motion to depose the children already denied by the court after full argument at the April 7, 2005, hearing. While the court "indicated

that defense counsel was asking for records which surprised the State," the only surprise the state indicated was simply that it received a routine motion for discovery the day of the hearing. The state's argument in the Answer Brief at 10 therefore implies surprise by putting the accusation in the mouth of the trial judge, when, in fact, it does not appear that the state actually suffered from or complained of surprise about the matters sought to be discovered.

ARGUMENT

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.

A. Counsel's performance regarding the testimony of the child eyewitnesses and bolstering was deficient and resulted in prejudice to the defense.

The Child Witnesses

The state argues that the record is devoid of evidence that defense counsel's lack of preparation of the child witnesses resulted in prejudice. Answer Brief at 43. The problem, is, the record is absent such evidence because the trial court

repeatedly denied all reasonable efforts to contact or depose the children, or to otherwise determine their competence at the time of trial.[1]

As to whether J.J. was not wearing glasses the night of the murder but needed them to see clearly, the defense was prevented by the court's rulings from obtaining records which would show when the glasses were prescribed and for what condition, or from even asking J.J. Jones personally about the glasses. If proper investigation and access to medical records showed that J.J. was prescribed glasses before the shooting, and needed them because of some condition which could have impaired his eyesight at the time of the shooting, those facts would have shed light on his ability to identify Mr. Floyd, i.e. his competence as a witness to observe the incident, The prosecutor's lack of knowledge of glasses or

[1] The state notes that the trial court entered its order on pre-hearing motions November 18, 2005, well before the February 2007 date asserted in the Initial Brief. Answer Brief at 46 n.10. Actually, the order was signed by the trial judge November 16, 2005. ROA VII 1232-34. While a copy to collateral counsel was postmarked November 22, 2005, a week after it was signed, the order was received in collateral counsel's Tampa office November 28, 2005, two weeks after signing. Receipt was on the day the evidentiary hearing began across the state from the Tampa offices, and collateral counsel was unaware of the order at the hearing. Collateral counsel called Trelane Jackson to testify that same day, November 28, 2005, not because he had received the order, but only because he knew the court's oral ruling and had to move forward without waiting for the written order. The defense also notes that paragraph 6 of the order mistakenly rules that the purported oral motion to depose LaJade Evans was denied. The motion was to depose J.J. Evans, and it had been properly filed in written form, as argued herein.

examinations only indicates a negative – if J.J. needed the glasses but was not compliant, prosecutor Wood would never have known.

The state faults the defendant for failing to call J.J. at the evidentiary hearing, but the court had already repeatedly denied all access to J.J. Part of the denied motion to depose J.J. included the request to have the option to have him testify at the post-conviction evidentiary hearing. ROA IV 708 (T 59). Mr. Floyd notes that the state never called J.J. to the hearing, either, to explain about his glasses.

Collateral counsel was denied the right to depose J.J. because the court failed to follow its own procedure for deposing the child. At the April 28, 2005, hearing on the motion for limited discovery, the court ruled that if the defense sought to depose the children, he would appoint an attorney ad litem:

> THE COURT: It seems to me what I ought to do, just to be safe, is to require that you not take the deposition of the children until they -- I'm going to suggest something, I'll run it by the State as well, that **there be no deposition of the children without further order. And if you decide to take the deposition, I would appoint them an attorney ad litem to begin with, to give them a chance to defend whatever you're going to try to do, and then I would appoint a guardian ad litem just for the -- to talk to them and make them comfortable for the deposition purposes.** The victim advocate usually does -- Putnam County victim advocates are really quite good, ad litem. Do you have any objection to that process?
>
> MS. DAVIS: Judge, that's wonderful with the State.
>
> THE COURT: Then if it's wonderful, they would probably object.
>
> MS. DAVIS: It's acceptable to the State.

THE COURT: Okay.

MR. GEMMER: And I can't believe that's probably what I anticipated it was going to shake out as, your Honor. Just an additional reason that we would want to depose the children, normally in this post-conviction status, we're allowed to talk to anybody just to see if there is any newly discovered evidence. Children can't be spoken to on the cuff, so to speak, or off the cuff. They do require a deposition. And so that would be one of reasons that we probably would be anticipating doing a deposition, but we're not -- **we don't have a specific subpoena out on any of the children at this time, and so any ruling on that would be premature, which is what I understand the Judge, your Honor, is doing is holding off.**

THE COURT: . . . . **So what I'm going do on my own motion is, I'm just going to indicate that you're not to take the deposition of the three children who are the decedent's grandchildren without further Court order. And I want the opportunity to give them --at least see if I can find someone that will act as an attorney ad litem.I think I have enough grace that I can get somebody to do that. And if you'll check with the victim ad litems, the victim advocates, and see if they would just be available for that limited purpose. I wouldn't think that would take a lot of time.**

ROA VIII 1478-80 (emphasis added).

Based on the court's ruling, collateral counsel expected that seeking the subpoena for deposition would trigger appointment of the attorney ad litem for purposes of receiving the subpoena and representing the child. To trigger the procedure outlined by the court, collateral counsel requested to depose the

children in the Renewed Motion to Allow Psychological Examination of Child Witnesses, ROA III 452-55. The Motion at paragraph 9 prayed "The defendant also respectfully requests the court provide for the deposition of the children should the results of the psychological evaluation require such deposition." The immediately following closing prayer for relief specified: "Wherefore, the defendant, Maurice Lamar Floyd, move this Court to provide for the evaluation of the three children by the expert and, if necessary, their subsequent deposition." *Id*.

Despite the fact that deposition of the children was sought in the written motion, the state improperly implies that the defendant only made an oral motion to depose J.J. Jones, the child witness most critical to the case, when it argues that "Floyd requested orally to depose J.J. Jones . . . . V4, **P707**). The State objected to the deposition of J.J. Jones because it was not properly pled in the motion to depose Trelane. (V4, **P703**)." Answer Brief at 12 (emphasis added).

The State had been arguing the written motion to depose J.J. since the beginning of the argument at ROA IV 684. Due to changed circumstances, counsel indicated he was narrowing the deposition request solely to J.J.

> MR. GEMMER: I believe at this point [the next motion] would be the highly modified motion for examining the children. At this point I would seek only the elements of that motion which are seeking to depose JJ, the seven-year-old boy, now I believe about 14. And I guess we could combine that with the motion to depose Trelane and have her testify as well.
>
> THE COURT: We have the Defendant's motion to depose Trelane Jackson.

> MR. GEMMER: If Your Honor recalls at the last —
>
> THE COURT: You're asking to depose JJ, too?
>
> MR. GEMMER: Yes, Your Honor.
>
> MS. DAVIS: Judge, we don't object to him deposing Trelane . . . What **we would object to is a subpoena duces tecum to Trelane Jackson and the deposition of JJ.**

ROA IV 684 (Transcript 35 – pagination in ROA is missing in this transcript) (emphasis added).

The State claims that it objected because the request for deposition was not properly pled in a motion to depose the mother, Trelane Jackson. Answer Brief at 12. This is merely an attempt to disguise the manner by which the state misled the court at hearing. When collateral counsel indicated he was going to argue both motions, the state responded that it objected to the deposition of J.J. ROA IV 684 (T35), and the ensuing argument intermixed issues from both motions. ROA IV 684-700.

When the State later objected to hearing the motion to depose J.J., the motion was directed generally to the pleadings before the court that day: "There's no motion before this Court to depose JJ at this time. . . . " ROA IV 700 (T51). The defendant immediately referred the state and the court to paragraph 9 and the prayer for relief in the final paragraph of the Renewed Motion. ROA IV 702. When it became apparent the court was looking at the Trelane Jackson motion, the

defendant again clarified that the motion to depose the children, which would include J.J. Jones, was made in the Renewed Motion to Allow Psychological Examination of Child Witnesses. ROA IV 705. When the court again inquired about the motion to depose J.J., the defendant drew the court's attention once again to paragraph 9 of the renewed motion. ROA IV 709.

Despite being directed to the request to take deposition in the written motion three times, the court found the motion's title failed to expressly list the request for deposition and therefore denied the motion because it was not enumerated in the title of the motion. ROA IV 709-11. The motion was intended to trigger the court's procedure as outlined in it ruling at the earlier hearing, ROA VIII 1478-80.

The defendant immediately sought an emergency hearing on the motion to depose J.J. After the state proposed to address the motion orally rather than scheduling it for the next day (which would have allowed the defense to file a written motion), the trial court heard and denied the motion. ROA IV 711-22. The defendant explained why it would be important to ask J.J. how he came to believe the shooter was his stepfather (he testified he did not see the actual shooting), what were the lighting conditions and could he see clearly (another witness said the lighting was too dim to see the face of the man in the house before the shooting), whether the child might have concluded the attacker was his stepfather because he

knew Mr. Floyd had been fighting with his mother, and Mr. Floyd had been at the victim's house earlier in the evening. *Id*.

The trial court erred in initially denying the motion to depose J.J. "[T]he character of a motion will depend upon its grounds or contents, and not on its title." *Jones v. Denmark*, 259 So.2d 198, 200 n. 1 (Fla. 3d DCA 1972). While the court eventually cured the error of refusing to hear the motion by taking the motion as an oral motion on an emergency basis, the characterization by the state and the court as an un-noticed surprise motion heard only because of the good graces of the state and the court, is simply false.

The trial court also erred when it refused to allow the defendant to amend to permit a psychologist to be present at the deposition because it was, as the court characterized it, on"rebuttal of an oral motion." ROA IV 722. The defendant had tried to inform the court of standards promulgated by the National Prosecutors' Association and the United States Department of Justice that child witnesses be handled by a multi-disciplinary team, including mental health professionals, specifically to protect the children. ROA IV 700 & 722. The judge dismissed such advisories as "an executive branch question," ROA IV 701, and denied the motion to amend to permit the involvement of a psychologist at deposition on the erroneous basis that it was an amendment to an oral motion.

The state asks why Mr. Floyd would want defense counsel to vigorously cross examine J.J. Mr. Floyd isn't claiming that trial counsel should have vigorously cross-examined J.J. Jones on the stand, despite the state's repeated touting of this horrible. Had the state not concealed the mental health issues that the children suffered after the shooting, Mr. Withee would have sought to speak to the mental health counselor, Ms. Hoffrichter, especially since she was listed as a guilt phase witness. Had Mr. Withee been diligent, he would have discovered from the mother, or from his own client, that J.J. wore glasses, a fact that could weigh heavily on J.J.'s ability to identify Mr. Floyd. The state argues the defense failed to elicit any testimony from Trelane about why J.J. needed glasses. Answer Brief at 43. This misrepresents the record. Trelane testified that "They just say one of his eyes was weak. His vison was off." ROA-S I 103.

Had Mr. Withee acted competently, he would have explored J.J.'s opportunity to see and hear what occurred in the brief moments between the time he was awakened from sleep and the time he fled to the neighbor's house. Counsel already knew another eyewitness could not make out who was in the house because of the dim lighting. If J.J. was indeed suddenly awakened and sent running from the house, he would have had little opportunity to observe who was in the house. [2]

[2] The state also speculates that J.J.'s eyewitness testimony proves he is not sight impaired. Answer Brief at 44. (J.J. said he did not see his grandmother shot – only

While the state listed Mickey Hoffrichter as a guilt phase witness, trial counsel Withee testified he had no idea who she was. Prosecutor Wood claims he told Withee about the counseling, but Withee had no recollection that he was every told about mental health counseling or issues. The state claims there is no evidence Hoffrichter prepped the children, but the state attorney's own handwriting asserts they were prepped. While Wood naturally denies improper prepping, he recalled no specifics about his conversations with Hoffrichter. Hoffrichter may have prepped the children beyond what was proper, without informing prosecutor Wood. Even if Wood did not direct her to improperly prep the witnesses, without being able to speak to Hoffrichter or otherwise conduct discovery, there is no way for anyone to know the degree to which Hoffrichter's work with the children affected their trial testimony, properly or not..

Because of the wrongful barring of access to Hoffrichter or her records, the defendant was unable to develop any evidence which might have required psychological examination of the children. The state claims the defendant waived psychological examinations of the children during the post-conviction hearings,

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his sister, LaJade, said she saw the actually shooting.) To the contrary, almost any near-sighted individual knows he or she would able to tell that someone was standing on the porch and that someone ran across the street and beside the Figuero house, but the detail, especially the identification of a figure at night from across the street, would be impossible because of the eye condition. Discovery on the matter could have revealed the extent of J.J.'s sight impairment and permitted gentle questioning to inform the jury of the problem vis-a-vis reasonable doubt in a non-confrontational manner.

Answer Brief at 45, but the defense was forced to abandon the requests because of the court's refusal to allow access to Hoffrichter or other counselors and the counseling records.

The state argues that the defendant abandoned his efforts to depose J.J. because he never requested that J.J. be a witness at the hearing. Answer Brief at 46. However, the defendant had moved to call J.J. for the post-conviction evidentiary hearing as one of the requests contained in the denied motion to depose J.J. ROA IV 708 (T 59). Given the denial of the request to call J.J. for the hearing, collateral counsel could not in good faith persist in seeking his appearance in complete ignorance of the matters for which J.J.'s testimony might have been relevant. By the court's own orders, collateral counsel was prohibited from contacting J.J. and therefore was prohibited from serving any subpoena for him to appear at the evidentiary hearing. When the request to call him was presented to the court, it was denied.

Every argument the state makes that the defendant waived claims regarding the children arise from the defendant being constrained by, and abiding by, the trial court's wrongful orders prohibiting any of the actions the state now claims constitute waivers by the defendant. The trial court refused to hear or receive a proffer of national standards formulated by prosecutors and the U.S. Department of Justice which recommended the use of mental health professionals at all stages of

court proceedings to protect the children, dismissing such standards as "executive function." ROA IV 698-99 (T 49-50). Collateral counsel in this case at all times sought to abide by such standards, and to otherwise minimize any risk that the child witnesses would suffer unnecessary stress or trauma. Calling J.J. to testify at the evidentiary hearing if collateral counsel overcame the repeated prohibitions of access to the child, without any access to the records or people necessary to ascertain what, if any, areas required inquiry, would have borne a serious risk of trauma to the child. And, of course, the trial court denied the request to call J.J. to the hearing.

The State offers little argument that access to the counseling records for the child witnesses was properly denied other than to assert that they were privileged. Answer Brief at 45 (four lines of argument). This is not responsive to the five pages of argument offered by the defendant in the Initial Brief at 35-39. The trial court repeatedly prevented any discovery of the counseling records, even after it was ultimately established at the post-conviction evidentiary hearing, the legal guardian of the children, Trelane Jackson, their mother, had no objection to allowing collateral counsel access to the records. ROA-S I 104-06, 110. This establishes the prejudice suffered when the court repeatedly improperly denied issuance of subpoenas which would have placed the privilege at issue for the relevant persons.

At the very least, the lower court should have permitted collateral counsel to contact and speak with Mickey Hoffrichter. Hoffrichter was the mental health counselor at the Children's Home Society. The state attorney and that office's victim advocate program directed Trelane Jackson to the Society for counseling. Prosecutor Wood said he spoke freely with Hoffrichter, she never exercised any privilege, and he could not rule out whether she discussed matters protected by the psychotherapist privilege. ROA-S II 237. He certainly had enough information about the mental health status of the children to write the letter to Donna Watson Lawson advising her of the children's pretrial mental health problems and seeking an evaluation by her, presumably for the exclusive use of the prosecutor's office. ROA III 457-58 (the letter), ROA-S II 245-46 (Wood's testimony).

Wood's own handwritten memo indicated Hoffrichter had "prepped" the children. ROA-S II 256. While he denied impropriety, the fact that Hoffrichter's role was characterized as prepping, as well as her free communication with Wood with no indication what privileged information was not shared, constitutes good cause to be able to speak with, depose, and seek records relating to Hoffrichter's role. Hoffrichter would, of course, be obligated to raise the privilege as to anything which was privileged. Should she attempt to exercise privilege to avoid disclosing matters she disclosed to the state attorney or other state agents, the court

would be obliged to conduct an in camera inquiry to determine whether the interests of justice required disclosure.

Of course, Trelane Jackson's waiver of the privilege as to the Children's Home Society opened the door to full discovery of these matters. Trelane was the legal guardian at all times. Yet the trial court refused, even with the waiver made in open court at the post-conviction evidentiary hearing, to permit the defendant to discover potentially critical information.

Trial counsel, never having been made aware of the Home Society involvement due to the state's *Brady* violation, never had the knowledge necessary to seek Trelane's permission to discover the Home Society information, which she would have freely offered granted as demonstrated at the post-conviction hearing. If Wood's claim that he disclosed the counseling to the defense is an accurate recollection, then defense counsel was ineffective for failing to make the requisite inquiries.

But the state is estopped from arguing that there is no prejudice shown resulting from the claim as to competency of the child witnesses and the prosecutorial misconduct in prepping the children (by the state attorney's own handwritten note and LaJade's testimony that the prosecutor told her what to say). No prejudice could have been shown because the state blocked every effort by the defendant to discover whether prejudice existed.

The state's argument that defense counsel was not incompetent because he would not "attack" children is over the top and in no way characterizes the failures of trial counsel claimed by Mr. Floyd. The state asked Mr. Withee "Do you think it is a good policy to viciously attack children?" ROAS II 405. Collateral counsel objected that the question was irrelevant to the proceedings, but the trial judge overruled the objection and Mr. Withee was allowed to make his declarations of abhorrence at attacking children quoted by the state in the Answer Brief at 48. Collateral counsel was already on record announcing his own abhorrence of causing the children undue distress. *See, e.g.*, ROA II 236-37, 252-53 (collateral counsel arguing psychological examination best way to avoid harming the children).

The defendant at all times sought to avoid any vicious attack on the children. The defendant never advocated that trial counsel should have viciously attacked the children before or at trial. To discover what might have been found if trial counsel had conducted a proper investigation, collateral counsel at every step sought to protect the interests of the children by involving mental health professionals.

The defendant sought access to the counselors and records from the time of the trial which could well have mooted the claims without the children ever being aware of the inquiry. See, e.g., ROA VIII 1477-78 (argument at 4/28/05 hearing

on initial Motion for Limited Discovery – defendant argued that anticipation of deposition fo children was premature until counseling records and other records to be discovered necessitated or obviated deposing the children "Obviously, we don't want to put them through that experience."). The defendant sought expert evaluations by mental health professionals best qualified to develop any information with the least risk of trauma. He tried to educate the court about the standards recommended by the National Prosecutors' Association and the U.S. Department of Justice, which would include mental health professionals in the inquiry to protect the children, only to have the standards cavalierly dismissed by the court: "Well, I don't have any control over that. . . . I don't care about the multiprosecutorial whatever evaluation. With all due respect, that's an executive branch question." ROA IV 698-99 (T 49-50).

Ironically, the trial judge indicated he knew the correct law on this issue – he related a hearing in which he determined that the mental health records of a medical examiner who performed an autopsy could be discovered to the extent that they were relevant to the medical examiner's ability to perform the autopsy or his ability to testify in court. ROA IV 93-94 (T44-45). Those were the only records ever sought by collateral counsel in this case, only the records which would show the ability of the children to have observed the incident, and their ability to testify

about it at trial. ROA IV 93-94 (T45). Even knowing that such mental health records were discoverable, the trial judge denied all relief in this case.

Failure to Preserve Issues Regarding Impermissible Hearsay Testimony and Bolstering

The state persists in characterizing this claim as a complaint that defense counsel failed to object at all. Setting up this straw man, the state purports to strike it down by pointing to two objections made by Mr. Withee. The state also argues that Mr. Withee "clearly stated his strategy on objecting fruitlessly." Answer Brief at 49.

Mr. Floyd would respectfully remind this Court that Mr. Withee's "strategy" was not that he avoided fruitless objection, but that he did not want to antagonize the jury by making repeated objections. "I 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, "We 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 defendant makes no claim that Mr. Withee failed to make fruitless objections. Rather, evidence was impermissibly admitted because of lack of objection or because of failure to raise the proper ground for objection.

Certainly, the hearsay statements which were admitted without objection should have been preserved by objection. But counsel also failed object to the totality of the hearsay statements of J.J.'s identification of Mr. Floyd as a needless presentation of cumulative evidence and unfairly prejudicial, inadmissible under section 90.403. For this failure, Mr. Withee had no tactical reason, and conceded the trial court's repeated overruling of objections lead to his failure to continue to object to the cumulative hearsay: "Would 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 (emphasis added).

The state avoids the point when it says "Floyd slights the trial judge for making credibility determinations, (IB46[sic]-49) . . . ." The arguments at that portion of the brief have nothing to do with the lower court making credibility determination. The arguments are: (1) The trial court's ruling that no one saw J.J. wearing glasses ignores the testimony of J.J.'s mother that J.J. was prescribed glasses about the time of the shooting, but she could not recall when – not one witness contradicted this testimony; (2) The trial court's acceptance of prosecutor Wood's denial of coaching LaJade inherently impeached LaJade's trial testimony, a principle eyewitness at trial, undercutting the sufficiency of the evidence.; (3) The court's finding that Mr. Withee was not deficient for avoiding "spurious"

objections ignores the claim, which is that evidence was improperly admitted because of a lack of substantive objections, amplified in depth elsewhere in this Reply Brief and the Initial Brief; and (4) The court's finding that Mr. Withee reasonably avoided "attacking" the children likewise misses the mark –"attack" is not synonymous with "impeach" or "raise a reasonable doubt," and the defendant has always sought ways to investigate possible impeachment matters without attacking or harming the children. These arguments are not slights directed at the trial judge for making credibility determinations.

The state finds it "inconceivable that Floyd would want an attorney to vigorously cross-examine a child . . . ." and to do so would be "preying on a child who could react emotionally." Answer Brief at 44. The only time an attorney might be forced to blunder into such blunt tactics would be if he failed to fully prepare for the examination so that he could tease out the truth without such heavy-handed tactics. The claim in this case is that preparation was not adequate, so that an attorney averse to brute force cross-examination had no option at trial but to throw in the towel.

The state's argument that "collateral counsel could supply no answers to the trial judge's questions regarding relevance" when seeking to depose J.J. Answer Brief at 46, ignores the record of that hearing, and the totality of the matters asserted as relevant to the discovery of the children's mental health records and

deposition of Mickey Hoffrichter. Although set out at length elsewhere, among the relevant matters to be examined in a deposition would be: the glasses, how he identified Mr. Floyd, what was the lighting, what did Ms. Hoffrichter advise him during her preparation of him for trial, what did prosecutor Wood advise him before the trial, did Wood tell him what to say, what were his feelings about Mr. Floyd before and after, what did his mother tell him when he repeatedly brought up the shooting incident before trial (as stated in Wood's letter to Watson-Lawson), how did he know about matters which he did not witness, such as the allegation that Mr. Floyd intended to kill Trelane and the children, and, since LaJade is the only one who saw the victim shot, did J.J. rely on LaJade for other facts such as the identification of the shooter. Most if not all of this information could probably have been obtained from the mental health records and deposition of Hoffrichter, but the motion to depose J.J. came after every other avenue to discover these matters had been blocked by the judge.

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.

The state waived any claim that Mr. Floyd personally had to testify that he would have plead to the aggravated assault charge. Not once during the

proceedings on the 3.851 motion did the state ever question that Mr. Floyd would have plead straight up on the aggravated assault charge.

The only challenge the state made to the claim in its response to the 3.851 motion was that "Floyd fails to allege that severance was feasible. In order to properly allege deficient performance, Floyd needs to allege more than just 'counsel should have severed the count.'" ROA I 92-93.

At the hearing at which the parties argued which claims should be heard at the evidentiary hearing, the state didn't even address the claim of the failure to plead out the aggravated battery charge. The closest it came was to argue about the claim that defense counsel failed to move to sever the two charges (a claim separate from the "pleading out" issue):

> We're not agreeing that the allegations that counsel is ineffective for failure to move to severe the aggravated assault charge requires a hearing because we're asserting that it was conclusory and facially insufficiently pled. So that's the distinction we're making there.

ROA VIII 1530-31. Collateral counsel took that challenge to be a challenge to the sufficiency of the "pleading out" issue and addressed the prejudice specifically pled in the 3.851 motion. ROA VIII 1531-33. The state responded to that argument as follows, addressing the merits, not the sufficiency of the pleading:

> MS. DAVIS: Judge, that would have given us a prior violent felony, bam, what attorney would plead out a prior violent felony before a first degree murder?
> MR. GEMMER: An attorney who wants to keep out extremely prejudicial statements.

ROA VIII 1533.

In its written closing summation after the evidentiary hearing, the state's argument was devoid of any claim that Mr. Floyd had failed to prove he would have plead out to the aggravated battery charge. ROA VI 1139-47. And in its closing oral argument to the trial court, the state did not address the claim at all. ROA IX 1647-85.

The trial court's order denying relief failed to address the claim that pleading the aggravated battery out would have prevented admission of the statement otherwise protected by the martial privilege. The only ruling was that the marital privilege did not apply at trial because the aggravated battery charge exempted the statement from the marital privilege. ROA VII 1266. The trial court never ruled on the "pleading out" claim. It only found that because the two cases could be tried together, it was not ineffective to fail to sever pursuant to Florida Rule of Criminal Procedure 3.150. The trial court never ruled on the separate claim of pleading out in order to raise the privilege. ROA VII 1266. If, indeed, the pleading was insufficient, then the trial court should have reached the claim and denied it for insufficiency of pleading.

In its order setting matters for the evidentiary hearing, the trial court expressly ruled:

> 5. The court has accepted the argument by defense that the better practice in this case would be to hear any factual argument appropriate to the evidentiary claims in this case. **The court reserves the right to**

dispose of any claims raised by the defense on a legal basis raised by the State at the time of the evidentiary hearing.

ROA III 418 (Order of May 5, 2005).

Even if the failure to allege Mr. Floyd would have entered a plea, the trial court's order of May 5, 2005, guaranteed that denial of the claim for insufficiency of pleading would be disposed of "at the time of the evidentiary hearing." *Id*. Collateral counsel relied on this promise by the court, rather than attempting to glean what insufficiency the state believed existed in the pleading and amending the pleading. This reliance was justified by the decision of this Court in *Bryant v. State*, 901 So.2d 810 (Fla. 2005), ironically decided April 28, 2005, the same day as the court hearing on the matter in this case. If a post-conviction motion is struck because it is insufficiently pled or suffers other technical deficiencies, *Bryant* requires that the trial court must grant the defendant leave to amend to correct the deficiency.

In this case, the defendant reasonably relied on the trial court's order, which indicated it reserved the right to strike any claims on a legal basis raised by the state at the evidentiary hearing. Had the trial court stricken the "pleading out" claim at the evidentiary hearing, Mr. Floyd would have had the opportunity to amend his pleading to make out a sufficient claim pursuant to *Bryant*. Instead, the trial court ignored the claim entirely in the order denying relief, providing Mr. Floyd no opportunity to cure the pleading defect, if any.

The proper course when the trial court fails to rule on a post-conviction claim is to remand for a ruling.

> [The State admits certain claims were not addressed by the trial court, but] contends that Schrack waived these claims because post-conviction counsel never objected to the trial court's ruling as incomplete. We disagree with the State. A trial court order that does not address all of the claims for post-conviction relief will be remanded for entry of an order that does. *See Barber v. State*, 851 So.2d 911 (Fla. 3d DCA 2003); *Currelly v. State*, 801 So.2d 1000 (Fla. 2d DCA 2001); *see also Gomez v. State*, 948 So.2d 911 (Fla. 2d DCA 2007) (affirming summary denial of defendant's rule 3.850 motion, but reversing with respect to supplemental motion-which the trial court apparently failed to rule on-and remanding for post-conviction court to consider such).

Schrack v. State, 958 So.2d 985, 986 (Fla. 4th DCA 2007).

Further, the state is bound on appeal by the issues it expressly raised below. The state never alleged that Mr. Floyd's claim was insufficiently plead because it failed to allege that he would have actually plead out to the aggravated battery charge.

Obviously, by making the claim that trial counsel failed to realize he could exclude the only real evidence of premeditation by having Mr. Floyd plead out to the aggravated battery charge, it is implicit that Mr. Floyd would have done so. Mr. Floyd swore to the claim when he signed the 3.851 motion under oath:

> . . . . The incident was separate in time and space from the shooting, and **should have been severed or plead out** to render the evidence of the threat inadmissible. . . .
>
> 4. If counsel had plead out or severed the assault on the wife, the threat would have never been introduced in the trial on the murder of Ms. Goss. It was protected by the spousal privilege of Fl. R. Evid 90.504. Had Trelane not testified, additional victim impact testimony would not have gone to the jury

> during the guilt phase. However, the trial included prosecution for the alleged assault on Mr. Floyd's wife, a separate charge made in the indictment. The inclusion of this charge arguably made the evidence admissible when it should have never gone to a jury considering guilt for the homicide. **Severing or pleading out the assault charge** would have eliminated the threat and most if not all of Trelane's testimony. **Counsel was ineffective for failing to address this critical issue in any way.**

ROA I 17, 19. The benefit of removing the key evidence of premeditation from the murder trial was so profound that no reasonable defendant would have refused to plead.

D. Counsel was ineffective during the penalty phase proceedings against Mr. Floyd.

(i) Failure to conduct an adequate investigation.

The state says the defendant "now parades before the court the exact evidence that Mr. Withee made a strategic decision not to present." Answer Brief at 76. To the contrary, most of the evidence "paraded" by Mr. Floyd at the evidentiary hearing was evidence Mr. Withee failed to develop even though he was on notice from Dr. Krop's repeated assertions that there was mitigating mental health evidence. Trial counsel is obligated to fully investigate mitigation evidence before making a competent decision to forego presenting mental health mitigation. *Wiggins v. Smith*, 539 U.S. 510 (2003). It is undeniable that there was valid mitigating evidence – despite Dr. Krop's CYA letter written to redact the mention of mitigating evidence, the fact remains that Dr. Krop found mitigating evidence to

the limited extent we can glean from his skeletal reports, the state's own post-conviction expert readily agreed that much of Mr. Floyd's mental health status was mitigating, and two defense experts readily found statutory mental health mitigation.

The fact is that Dr. Krop withdrew his opinion on the eve of trial, and defense counsel scrambled, not to find an expert who would be able to testify as four experts did in post-conviction to mental health mitigation, but to cover his tracks by having Dr. Krop redact his letter to eliminate the fact that indeed, there was mitigating evidence.

The question is whether trial counsel acted competently when he chose to abandon the mental health mitigation promised by Dr. Krop rather than obtaining assistance from other experts to confirm and expand on the mitigation found by Dr. Krop. That evidence was available as shown by the readiness of even the state's own expert to testify at the evidentiary hearing that there was mental health mitigation. Of course, because Mr. Withee was left dangling by himself to prepare for both phases of trial, abandoning the mitigation was just another indicator of the inability of solo counsel to adequately prepare and present a case for Mr. Floyd, illustrating the reason for the ABA requirement for at least two qualified defense attorneys on every capital prosecution.

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.

As argued in the Reply in the habeas proceeding accompanying this appeal, *Marshall v. State*, 854 So.2d 1235 (Fla. 2003), is the lead case relied upon by the state and the lower tribunal to justify erecting a procedural bar. The *Marshall* court found a procedural bar to a claim that a capital defendant was deprived of his right to an evaluation by a competent mental health expert pursuant to *Ake v. Oklahoma*, 470 U.S. 68(1985). However, the *Marshall* opinion explains why the issue could have been raised on direct appeal – trial counsel's efforts in *Marshall* made a record sufficient to raise the incompetence of the mental health expert in the direct appeal. Trial counsel in *Marshall* had sought an additional expert after the first expert conducted a woefully inadequate evaluation of less than an hour, and failed to communicate to counsel any information about the testing or mitigating evidence. Counsels pleadings and hearings clearly preserved the issue for direct appeal, as the record included the facts necessary for a fair review. In the instant case, there is no such evidence in the record – the letters from Dr. Krop were discovered only during the post-conviction investigation and were not a part of the trial record.

Dr. Krop conceded there was mitigating evidence at the post-conviction hearing, but he had no recollection of what it was beyond the vague assertions in his letters. ROA-S II 312. His advice to not have him testify arose not from a lack of mitigation, but because of potentially damaging evidence outside of the mitigating evidence. However, he could not recall the specifics of that damaging information at the post-conviction hearing. ROA-S II 314. Regardless, a competent mental health evaluator would have communicated his reservations long before trial, to allow counsel time to seek additional opinions. Certainly, none of the experts who evaluated Mr. Floyd for the post-conviction proceeding had any damaging testimony, despite the state's efforts to elicit such testimony. This shows the prejudice created by Dr. Krop's incompetent assistance for trial.

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.

The state seeks refuge in the argument that a leg brace is not a shackle. The trial court's Order Denying Relief distorts the damning testimony of the judge's long-time bailiff, Mitch Holbrook. Mr. Holbrook established that every criminal defendant in his courtroom for many years, including the time of Mr. Floyd's trial,

and including Mr. Floyd, wore the leg brace at all times in the courtroom. The trial judge found that Mr. Holbrook testified that Mr. Floyd did not wear a shackle. ROA VII 1275. This statement can only be truthful if the leg brace was not a shackle. The trial judge has to deny the reality that a leg brace is legally a shackling device, a restraint which falls squarely within the prohibition of *Deck v. Missouri*, 544 U.S. 622 (2005), and the state cases cited by Mr. Floyd in the Initial Brief.

Perhaps the distinction can be understood by considering what would be the legal consequence of the leg brace if it were totally out in the open – perhaps because the defendant wears shorts or the brace is worn outside the clothing.. While the response might be that such a defendant chose to expose the brace, the bottom line is that no response would be necessary but for the simple fact that the brace is a restraint, a shackle, which must be concealed, just as a shock belt or any other restraint/shackle must be concealed from the jury.

Mr. Withee never noticed the leg brace because every felony defendant he ever represented in that courtroom wore the brace. ROA-S II 464 (Bailiff Halbrook testifies there were no exceptions to shackling felony defendants with the leg brace). Not Mr. Withee, not anyone in the Putnam County Courthouse recognized the constitutional implications of the routine use of the leg brace

without a judicial determination of necessity. That does not mean it was not illegal and unconstitutional.

There would be no necessity for the trial court to go on to find that the leg brace was not visible, unless it fell within the shackling protections of *Deck* and the Florida cases cited in the Initial Brief. Even the court's finding that "At best [the jury] saw an ankle wrap around the lower part of the device," ROA VII 1276, supports Mr. Floyd's claim rather than refutes it – the "ankle wrap" includes a bulky, shiny box housing the locking device which secures the "ankle wrap" around the ankle. And the device itself and Mr. Floyd's testimony demonstrates that the way it was worn would place that shiny box on the external side of the ankle, ensuring its clear view to all who could see the defendant's ankle.

The court's order finds that a juror could not conclude that this shiny lock box and ankle wrap was a restraint because that "requires a level of sophistication that is unlikely and clearly has not been established by the proof." ROA VII 1276. This surely denigrates the jurors, an act the trial judge in another context found to be reprehensible.[3] Further, the evidence of what the jurors saw and concluded is

[3] When the defense argued that a jury might reach a plurality verdict when split on premeditated and felony murder theories, the trial court interrupted and advised that "[Y]ou demean the system when you talk like that. . . . I've never seen a juror [in a capital case] other than staggering when they come out with the final decision." ROA VIII 1507.

not in the record because the trial court refused to allow them to be queried on specifically this point.

Further, the trial court argues in its order that the Putnam County Courthouse is small and ancient. ROA VII 1276. But this argument is without conclusion – the implicit conclusion is that small and ancient courthouses, because of their problems with security, justify shackling every defendant. The court also argues that jurors would not expect a criminal murder defendant to stroll freely about. ROA VII 1276. But that is not the purpose of denying the unjustified use of shackles – regardless of the common sense jurors would bring to bear to infer that most murder defendants are not free on bail, the use of a visible shackle at all times implies to the jurors that this defendant is of special danger, beyond the norm of those who are merely incarcerated and brought to court for trial.

The state attempts to justify the use of the leg brace during the penalty phase because of "statements attributed to Floyd about not going to prison after the guilty verdict." Answer Brief at 88. However, no such statements were established – defense counsel demanded that the witnesses to such alleged threats be brought before the court, which was never done. ROA 2002 XI 2014-15. The state cannot rely on these hearsay upon hearsay statements for anything.

The state concedes that the defendant has no burden once he establishes that the restraint was visible to the jury. Answer Brief at 86. The state never attempted

to meet its burden to prove beyond a reasonable doubt that the visible restraint did not affect the jury. Even if the burden is on the defendant to prove the jury saw the restraint, the state cannot hide behind the lack of evidence when the trial court and the state opposed interviewing the jurors to confirm the state's argument that they never saw the restraint.

Mr. Floyd clearly established beyond any possible doubt that he wore a leg restraint which was clearly visible to the jury as, at the very least, a shiny locking institutional strap around his ankle, visible every moment the jury sat, looking at Mr. Floyd's unconcealed ankle beneath the unshielded defense table only yards away from them.

CONCLUSION

Based on the arguments and citations in the Initial and Reply Briefs, as well as the habeas petition and reply, this Court should grant a new trial and any other relief it deems proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief has been furnished to the Barbara Davis as designated below by mail on February 25, 2008.

/s/_____
David Gemmer

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/_____
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