IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA
500 South Duval Street
Tallahassee, Florida 32399-1927

RONNIE FERRELL

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

Appeal No.: **SC07-92**
L.T. Court No.: 91-8142CFA

PETITION FOR HABEAS CORPUS, PURSUANT TO FLA. R. APP. PRO., R. 9.142 (A)(5)

On Appeal from the Circuit Court, Fourth Judicial Circuit, and For Duval County, Florida

Honorable Charles W. Arnold
Judge of the Circuit Court, Division H

TASSONE AND SICHTA, LLC

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FRANK J. TASSONE, JR. ESQ.
Fla. Bar. No.: 165611
RICK A. SICHTA, ESQ.
Fla. Bar. No.: 0669903
1833 Atlantic Boulevard
Jacksonville, FL 32207
Phone: 904-396-3344
Fax: 904-396-0924
Attorneys for Petitioner

JURISDICTIONAL STATEMENT

The Florida Supreme Court (hereinafter "FSC") has jurisdiction over this "Petition for Habeas Corpus," as this Honorable Court has original jurisdiction, as the instant case is a death penalty case, and the instant Petition accompanies Petitioner/Appellant's Initial Brief from the lower tribunal's order on Appellant/Petitioner's denial of his 3.850/3.851 Motion for Postconviction Relief. Fla. R. App. Pro. R. 9.142(a)(5).

THE FACTS UPON WHICH PETITIONER RELIES

On July 25, 1991, Defendant was indicted on one count of first degree murder, one count of armed robbery, and one count of armed kidnapping (TT pgs.20-21). Defendant was tried on these charges on March 10, 1992 – March 12, 1992. On March 12, 1992 the jury returned a verdict, finding Defendant guilty of first degree murder, robbery and kidnapping (TT pgs. 197, 199, 201).

On March 20, 1992, with a vote of 7 to 5, the jury recommended a sentence of death (TT pg. 1037). The circuit court conducted a sentencing hearing on this case on December 17, 1993 and sentenced Defendant to death on the murder conviction, thirty years on the robbery conviction, and life on the kidnapping conviction, all of which are to run consecutively (TT pg. 242).

The trial court found the following aggravators: the defendant had been previously convicted of a felony involving the use and/or threat of violence to a person (TT pg. 226); the instant crime was committed while the defendant was engaging in the commission of the crime of kidnapping; the instant crime was committed for financial gain; the crime was heinous, atrocious, and cruel (TT pg. 237); and the instant crime was committed in a cold, calculated, and premeditated manner (TT pg. 239). The trial court assigned great weight to the heinous, atrocious, and cruel aggravator but did not specify the weight, if any, that was assigned to the other aggravators (TT pg. 236-39). The only mitigating factor found by the trial court was that the defendant was not the triggerman and thus did not fire the fatal gunshots. The Court assigned this slight weight (TT pg. 240).

Appellant's direct appeal was filed with the Florida Supreme Court June 22, 1995 in case no.: SC-60-83076. In direct appeal counsel raised twelve claims alleging trial court error: 1) Instructing the jury as to the biblical origins of the commandment "thou shalt not kill"; 2) Admitting evidence of a collateral crime; 3) Admitting a purported statement of Gino Mayhew to Lynwood Smith as an excited utterance; 4) Denying motion for acquittal for insufficiency of the evidence to prove first degree murder; 5) Denying Motion for acquittal for insufficiency of the evidence to sustain a

conviction of armed robbery; 6) Sentencing appellant as a habitual offender; 7) Finding that the state proved beyond a reasonable doubt the statutory "Cold, Calculated, and Premeditated" (CCP) aggravator; 8) Finding that the state proved beyond a reasonable doubt the "Crime committed for Financial Gain" aggravator; 9) Finding that the state proved beyond a reasonable doubt the statutory "Heinous, Atrocious, or Cruel" (HAC) aggravator; 10) Trial court's Jury Instructions as to the CCP Aggravator; 11) Trial Court's doubling of the statutory aggravators of "Kidnapping and Pecuniary Gain"; 12) Trial Court's denial of defendant's request for special verdicts.

In an opinion filed September 19, 1995, this Court denied eleven of the twelve claims presented in direct appeal. As to Claim nine, the Court agreed that the trial judge erred in finding that the murder was "Heinous, Atrocious, or Cruel" (HAC). However, the Court found said error to be harmless beyond a reasonable doubt in light of the four remaining valid aggravating factors, and minimal mitigation. *See* *Ferrell v. State*, 686 So. 2d 1324 (Fla. 1996). Mr. Ferrell filed a Petition for Writ of Certiorari with the United States Supreme Court, which was denied on April 14, 1997. *See* *Ferrell v. Florida*, 520 U.S. 1173 (1997).

Appellant then filed his substantive 3.851 Motion for Postconviction relief on September 1, 2004. An evidentiary hearing was held December 5-7,

2006, and on April 17, 2006, after Appellant's request pursuant to Motion to Reopen Testimony, an additional evidentiary hearing was held. After allowing the defense and the state to present written closing arguments in support of their evidence presented at said evidentiary hearings, the trial court ruled that Appellant be granted a new penalty phase hearing, and vacated Appellant's sentence of death. The trial court upheld Appellant's guilt, and cited in the order why Appellant did not deserve a new trial.

Along with Appellant's Initial Brief to the Florida Supreme Court, attacking the trial court's decision and reasons not to grant a new trial, this Petition for Habeas Corpus follows.

NATURE OF RELIEF SOUGHT

Petitioner seeks to have this Honorable Court reverse and remand Petitioner's convictions and sentences and direct the trial court to have a new trial in Appellant's case.

ARGUMENT ONE:

PETITIONER'S DIRECT APPEAL COUNSEL WAS INEFFECTIVE AND DEFICIENT IN REPRESENTATION OF PETITIONER FOR FAILING TO ALLEGE PROSECUTORIAL MISCONDUCT IN BOTH THE GUILT AND PENALTY PHASES OF DEFENDANT'S TRIAL IN DIRECT APPEAL. SUCH A DEFICIENCY IN COUNSEL'S PERFORMANCE COMPRIMISED THE APPELLATE PROCESS TO SUCH A DEGREE AS TO UNDERMINE CONFIDENCE IN THE RESULT

In order to grant habeas relief based on ineffectiveness of counsel, the Supreme Court of Florida must make two determinations: First, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, Second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the result. *Patton v. State*, 878 So. 2d 368 (Fla. 2004)

In the instant case, the prosecutor's gross misconduct throughout Defendant's trial, at both the guilt and penalty phases, made the proceedings presumptively unreliable and unfair. The Florida Supreme Court, subsequent to this case, condemned the exact same closing arguments, made by the same prosecutor, in the cases of *Brooks v. State*, 762 So. 2d 879 (Fla. 2000), and *Urbin v. State*, 714 So. 2d 411 (Fla. 1998); and has held that said misconduct by the same prosecutor to be improper and condemned by Florida case law dating back fifty years (*Brooks* at *62) Moreover, the prosecution's misconduct was so egregious that it cannot be said that fundamental error did not occur.1

1 When counsel fails to object to alleged improper statements made by the State during closing arguments, the improper prosecutorial comments are not cognizable on appeal absent a contemporaneous objection. *Urbin v. State*, 714 So.2d 411 (Fla. 1998) However, the exception to said procedural bar is where the comments constitute fundamental error, defined as error that

Because said comments by the prosecution were so improper and egregious, coupled with the fact that case law from the last fifty years condemning same, Appellant's direct appeal counsel's omission of this issue was of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance. The *Brooks* court reversed for a new trial on the premise that the same prosecutor's misconduct was sufficient enough to warrant prejudice, *(Brooks at *79 holding that, "The prosecutor in this case exceeded the bounds of proper conduct and professionalism and provided a "textbook" example of overzealous advocacy. This type of excess is especially egregious in this, a death case, where both the prosecutors and courts are charged with an extra obligation to ensure that the trial is fundamentally fair in all respects.")*

This issues and facts pertaining to prosecutorial misconduct have been a part of Florida case law for over a half century. Given the prosecution's numerous improper and egregious remarks to the jury in guilt and penalty

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reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. *Id*. *See also* *Ross v. State*, 726 So.2d 317 (2nd DCA 1998); *Rachel v. State*, 780 So.2d 192 (2nd DCA 2001); *Ross v. State*, 726 So. 2d 317 (2nd DCA 1998); *Rachel v. State*, 780 So. 2d 192 (2nd DCA 2001).

closing, obvious golden rule violations, attempted witness bolstering, failing to allege such an obvious claim is outside the range of professionally acceptable performance.

This omission by appellate counsel compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. The nearly identical facts and case law decided in *Brooks*, for which the Florida Supreme Court reversed Defendant's conviction and awarded a new trial, is based on the nearly verbatim conduct of the very same prosecutor. It would be improbable that if this claim had been alleged in Appellant's case, that it would have been determined to be dissimilar, as the improper comments from the same prosecutor are one in the same. A new trial should be granted because a guilty verdict would not have been obtained without the assistance of the alleged error. *See Bonifay v.* State, 680 So. 2d 413 (Fla. 1996)

As stated previously, the prosecutor in the instant case has previously been admonished by the Florida Supreme Court in both the *Urbin* and *Brooks* opinions for conduct that was repeated, in some cases literally verbatim, in the instant case.[2] At evidentiary hearing for Defendant, held

[2] The following are direct citations to the Trial transcripts of appellant's case where the prosecutor committed misconduct identical to the examples condemned in both the *Brooks* and *Urbin* opinions.

Guilt Phase:

Prosecutor used the word "execute" or a variation of it 13 times during guilt phase closing arguments. (TT 842-872)
Prosecutor accused Defendant of lying 5 times in guilt phase (character attacks). (TT 870-71, 877)
Golden Rule Violations (2 total) (TT 842, 854)
Improper comments on evidence not introduced in trial:

1. The "Gold Chain" that Williams stated Ferrell told him about, but was never recovered or introduced at trial. (TT 840)
2. Sydney Jones statement that he saw that the gun didn't have a "cylinder" (attempting to corroborate Williams statement that the gun had a "clip", no gun was ever introduced at trial) (TT 854)
3. Argument to the jury as to why drugs were supposedly left at the scene (TT 865) Williams never stated in trial or in sworn statements that Ferrell told him that they left drugs at the scene. It was his *opinion* that the drugs were left there to throw off the cops. Mr. Bateh is essentially passing off the opinion of a five time felon looking for a reduced sentence as *fact* in this case.

Bolstering credibility of the state's witnesses:

Gene Felton	(TT 851)
Sidney Jones	(TT 852-853, 856-859)
Juan Brown	(TT 859, 861-862)
Robert Williams	(TT 862, 865-866, 873, 876)
All Witnesses	(TT 877-878)

Improper attack on Defense counsel and case (claiming alibi in opening, then not presenting evidence) (TT 872)
Bateh's "I didn't choose the witnesses" argument (TT 877)

Penalty Phase:

Used the word "execute" or a variation of it 11 times during penalty phase closing arguments. (TT 985-1012)
Prosecutor dehumanizes the defendant (TT 993, 996, 1000, 1001, 1007)
Golden Rule Violations (6 total) (TT 997-1000)

December 5-7, 2005, the state attempted to combat defendant's comparison of the instant case to the previous rulings in *Urbin* and *Brooks* by stating,

> *"The issue is whether counsel was ineffective for failing to object. And obviously the State believes that cases that were decided in 1991 and 2000 aren't relevant…can't be charged with being clairvoyant and anticipating seven or eight years down the road these arguments would be considered improper…But the point is that cases that are decided seven or eight years after trial can't be predicted by counsel to object to them."* (Evidentiary Hearing transcripts, pg. 612-13)

However, a closer inspection of the *Brooks* opinion clearly addresses this exact argument by the state:

Inviting Jury to disregard the law if they didn't vote for death (the "do your duty" argument) (TT p. 1011); and continually stating the age of the victim (6 times total) (TT 985-1011

Improperly arguing that age does not apply as a statutory mitigating factor. (TT 1007)

Denigrating Mitigation of defendant (TT 1007)

Incorrectly instructing the jury that it "has to recommend death" if aggravating factors outweigh mitigating factors. (TT 988)

Improperly attempting to justify the imposition of the death penalty (Prosecutorial "expertise") (TT 986-987)

"Same Mercy" given to victim
argument (as condemned in *Urbin* and *Rhodes*) (TT 1012)

Arguing personal beliefs about evidence ("Case cries out loud for death") (7 times total) (TT 994-1004)

Improper comments on Evidence not introduced at trial:

1) Proclaiming his opinion on what order shots were fired and inflaming the jury with his "description" (TT 999, 1000)
    a. Dr. Lipovic testified that there was no way he could ascertain the order of the shots (TT 512-513)

Arguing how each statutory mitigator "does not apply" to Ferrell's case (TT 1005-1008)

> *"Indeed, the almost verbatim incantation of these comments in both Urbin and this case is remarkable given this Court's unambiguous pronouncements over the last 50 years. See* Gore v. State, 719 So. 2d 1197, 1201 (Fla. 1998); King v. State, 623 So. 2d 486, 488 (Fla. 1993); Garron v. State, 528 So. 2d 353, 359 (Fla. 1988); Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985); Adams v. State, 192 So. 2d 762, 763 (Fla. 1966); Stewart v. State, 51 So. 2d 494, 495 (Fla. 1951)."

Continuing in *Brooks*, the FSC stated at *65:

> *"Although this sampling of the case law (as listed above) is by no means exhaustive, it demonstrates that this Court has clearly and consistently condemned improper prosecutorial argument through the generations.* ***For that reason, the State's argument that 'to the extent that Urbin arguably set forth a new rule of law which is to be given prospective application does not apply to those cases which have been tried before the rule is announced', is meritless on its face. Urbin simply reiterated what this court's decisions have declared time and time again.*** *Clearly the state ignores the extensive case law citations throughout the Urbin opinion, as well as the penultimate paragraph which begins, 'The fact that so many of these instances of misconduct are literally verbatim examples of conduct we have unambiguously prohibited in Bertolotti, Garron, and their progeny."*

Again in Brooks, the FSC states the following:

> *"This court has so many times condemned pronouncements of this character in the prosecution of criminal cases that the law against it would seem to be so commonplace that any layman would be familiar and observe it."* (Quoting from Stewart v. State, 51 So 2d 494, 494 (Fla. 1951)

As clearly stated by this court in previous rulings, the line of argument taken by the state at Evidentiary Hearing, in defense of its actions in defendant's trial, has been deemed without merit. As argued by the

undersigned at Evidentiary Hearing, and presented in ROA pgs 456-525, the instant case contains examples of every aspect of inappropriate conduct as ruled on by the court in both *Urbin*, *Brooks*, and the 60 plus years of preceding case law. Each example will be discussed individually, with the appropriate record citations where applicable.

(1) **State's Prosecutorial Misconduct, by making numerous improper closing arguments in both the guilt and penalty phases, in an attempt to inflame the mind and passions of the jury. Said misconduct constituted fundamental error.**

In sum, the State characterized the murder as an execution, and used the word "execute" or a variation of it 11 times during guilt phase closing arguments. (TT pgs. 842-872) The prosecution described Mayhew's murder as follows:

> "*That these are wounds of an execution. He* (Dr. Lipkovic) *told you this bullet wound right behind Gino's right ear and went into his brain and it was a fatal shot but that defendant and his partners didn't stop at just one fatal shot, they wanted to make sure that their plan, that their premeditation was carried out so then they fired more shots into Gino's brain to make sure their plan, that their execution was fully carried out. And this shot right here the Doctor said because of powder burns around it, the scorching around the hair on the scalp in his opinion was fired at about an inch or so away from Gino's head. That is an execution shot. That bullet traveled all the way through Gino's brain and went out the other side. That is an execution, that's what this is, Gino Mayhew was executed*." (TT pg. 850)

The prosecution continued on page 860:

> *"The reason he didn't stop is he was being kidnapped, he had a gun pointed at him and he was being taken to the scene of his execution."*

Again on page 872:

> *"You may think that Gino was a sympathetic person but under the law what the defendant and his partners did was murder, they had no right to put three bullets in his head."*

The prosecution continued inflaming the minds and passions of the jury during the penalty phase by referring Gino's murder as an execution an additional 13 times, as the following demonstrates:

> "*On April 22nd, 1991 that defendant participated in the execution of Gino Mayhew. He helped carry out that murder in which Gino was shot three times in the head. Two of those bullets went into his brain. One went into his face. We will never know what kind of human being or man Gino Mayhew would grow into, the defendant took care of that.* (R. p. 985). And further, *"If ever there was a murder committed in a cold, calculated and premeditated manner it's this one. This was an execution. This was an execution. Three bullets into the back of the head, two into the brain, one into the face, that's an execution*." (TT pg. 1002)

The language used by the prosecution in both the guilt and penalty phases of Petitioner's trial has been previously condemned by the Florida Supreme Court. In *Urbin v. State*, the Court reversed Defendant's death sentence because this same prosecutor's comments to the jury were full of "emotional fear" and efforts to dehumanize the Defendant. The Court stated the prosecution had used the word "executed" or "executing" at least 9 times, and described the Defendant as a "ruthless killer" among other things.

Urbin v. State, 714 So.2d 1178 (Fla. 1998); *See also* *Brooks v. State*, 762 So. 2d 879 (Fla. 2000)

In the instant case the prosecution referred to Gino's murder as being an execution 27 times during Petitioner's trial, 11 of which came during guilt phase closing arguments, 13 during the penalty phase closing arguments. This is nearly twice the amount of times that this same prosecutor committed this error in *Urbin* and *Brooks* combined, and occurred during both the guilt and penalty phase closing arguments.

(2) State's Prosecutorial Misconduct by making repeated attacks on Defendant's character in an attempt to convince the jury to convict Defendant for reasons other than alleged guilt. Said misconduct constituted fundamental error.

The prosecution made efforts to dehumanize Petitioner during the guilt phase of trial by repeatedly making attacks on his character. For example, the prosecution repeatedly accused Petitioner of lying:

> "*Are those the words of an innocent man … I submit to you that those are the words of deception, that those are the words of a guilty man caught in his own lies,*" "*More lies more deceit … more lies, more deceit, "* and "*a web of guilt, a shred of guilt that bury that defendant.*" (TT pgs. 871, 877)

See *Pacifico v. State*, 642 So.2d 1178 (Fla. 1994), where the Court held that when the case against a Defendant is weak or tenuous, a prosecutor's contentions that the Defendant is a liar could rarely, if ever, be construed as harmless error.

The prosecution continued arguing matters not in evidence and attacking Petitioner by making such statements as:

> "*They show you that this is a defendant with a long history of violence. They show you that the act of murdering Gino Mayhew in April of 1991 is not a life style changed to this defendant, that's not nothing, violence isn't new to this defendant.*" (TT pg. 993)

Petitioner was never convicted, charged, or connected with any murder prior to Gino Mayhew's death. This is clearly an example of an improper closing argument by the prosecution and should have been raised in direct appeal.

(3) State's Prosecutorial Misconduct when it violated the "Golden Rule" by creating an imaginary script to explain the events of Gino's murder. Said misconduct constituted fundamental error.

In *Urbin* the Florida Supreme Court condemned this same prosecutor's conduct when it stated he "*went far beyond the evidence in emotionally creating an imaginary scripts demonstrating the victim was shot while pleading for his life*." *Id*. *Urbin* further held the prosecution's comments constituted a subtle "golden rule" argument by literally putting imaginary words into the victim's mouth, i.e. "*Don't hurt me. Take my money, take my jewelry. Don't hurt me*," whereby the prosecution was trying to unduly create, arouse, and inflame the sympathy, prejudice, and

passions of the jury to the detriment of the accused. *Id*. *Barnes v. State*, 58 So.2d 157 (Fla. 1951), *Garron v. State*, 528 So. 2d 359 (1988)

In the instant case, the prosecution's conduct was exactly the same as that condemned in *Urbin*, and occurred repeatedly in both the penalty and guilt phases of Petitioner's trial. In the guilt phase the prosecution created the following imaginary script for the jury:

> *"They made sure, they show you in graphic detail that their intent was—is that Gino Mayhew would not live, the did all they could see that he died. That shows what was going on in their minds, to execute him."* (TT pg 842)

Continuing in the guilt phase closing arguments:

> *"Gino knew, had an idea what was going to be happening. That was the start of the kidnapping."* (TT p. 854)

The following is the imaginary script the prosecution presented for the jury in the penalty phase of Petitioner's case,

> "*To think what was going through Gino's mind that night from the time the gun was pulled on him. I would submit to you that Gino was more than scared, he was scared in the worst sort of scared, he was experiencing the most – the worst kind of fear that a human being can experience… I would submit to you that Gino Mayhew may have thought well, it's another robbery, last Saturday, two days before, they beat me up, they shot at me, they took my property, it's happening again … But Gino was very frightened … He began to realize they're doing something different than they did Saturday … I would submit to you that Gino is asking himself "what's happening" … "what's going on." "They want my drugs, let them have my drugs, they want my money, let them have it." "Where are they taking me"… I would submit to you that during that ride Gino's fear rose to*

> *the level of terror … Where are they taking me … Gino began to realize that he was being forced to live through a living nightmare. Gino began realizing that that Blazer that he was driving, he was driving his own hearse, he was driving to the place of his death. Those are the thoughts that began to run through his mind. When they got to that lonely field … He hoped against hope that it wasn't going to occur. He was being forced to live through a torturous nightmare. He was being tortured in the worst sort of way. It was mental torture in the worst way. I would submit to you, that at some point during that ride before he was executed he began to hope, hoping against hope that the Defendant would show him some mercy, would not kill him… Gino was forced to live through in living horrific nightmare of terror*." (TT pgs. 997-1000).

This conduct is in some places verbatim with the conduct previously condemned in the *Urbin* case. Said misconduct inflamed the passions and minds of the jury and constituted fundamental golden rule error.

(4) State's Prosecutorial Misconduct, when he openly invited the jury to disregard the law by claiming the jury would be breaking the law if they did not vote for death. Said misconduct constituted fundamental error.

Urbin found it improper for the prosecutor to assert that any jury's vote for a life sentence would be irresponsible and a violation of a jury's lawful duty. This Court also condemned the prosecutions comments inviting the jury to disregard the law when he said, "*my concern is that some of you may be tempted to take the easy way out, to not weigh the aggravating circumstances and the mitigating circumstances and not want to fully carry out your responsibility and just vote for life*."

In the instant case, the prosecution committed the exact same violation condemned in *Urbin* when he stated,

> "*Some of you may be tempted to take the easy way out, and by that I mean not to carefully weigh all of these aggravating circumstances and to consider the mitigating circumstances. That you may not want to carry out your full responsibility under the law and just decide to take the easy way out and to vote for… life*." (TT pg. 1011)

The Prosecution was also condemned by the *Urbin* ruling when he inappropriately attempted to convince the jury to vote for death by arguing a non-statutory aggravating factor at trial. Again, the same error was committed at Petitioner's trial when Gino's age was repeatedly brought forth,

> "*Gino Mayhew is dead. On April 22, 1991, he was a living, breathing seventeen year old student at Paxon Senior High School… He didn't care that Mayhew was a seventeen year old young man just starting out in life… That Defendant murdered Gino Mayhew, a seventeen year old Gino Mayhew for what… That the value that he placed on the life of seventeen year old Gino Mayhew… He didn't care that Gino was only seventeen years old… He wants you to overlook this conscienceless, pitiless, unnecessarily tortuous murder of seventeen year old Gino Mayhew…* (TT pgs. 985-1011)

Said misconduct constituted fundamental error as it has previously been condemned by the Florida Supreme Court for the aforementioned reasons.

(5) State's Prosecutorial Conduct my misstating the law and mitigation. Said conduct constituted fundamental error.

Continuing with another violation of *Urbin*, the prosecution argued forcefully to the jury that Petitioner's age at the time of Gino's murder did not apply as a statutory mitigating factor. Prosecution stated, "*There is absolutely no evidence – this could apply to someone that's very young, 14, 15 years old, maybe 16 years old, someone had no life experiences, someone that very young, I would submit to you that that just does not apply in this case*." (TT pg. 1007) This argument is a clear misstatement of the law.

There is no per-se rule defining a specific number which age can be considered in statutory mitigation. Cases involving Defendant's ages of 21 and 23 have been ruled to be statutory mitigation. *See also* *Blackwood v. State*, 777 So.2d 399 (Fla. 2000), *Hurst v. State*, 819 So.2d 689 (Fla. 2002), and *Cannady v. State*, 427 So.2d 723 (Fla. 1983). In the instant case, Petitioner was 22 when the crime was committed. Therefore, the comment by the prosecution misstated the law in violation of *Urbin*.

The prosecution continued attacking possible mitigation by arguing and attacking Petitioner's character when trying to convince the jury that Petitioner could appreciate the criminality of his conduct, as evidenced by "*There is absolutely no evidence that this defendant is anything other than mean and doesn't respect the rights of others*." (TT pg. 1007) The prosecution incorrectly instructed the jury that it has to recommend death if

aggravating outweighs mitigation. (TT pg. 988) This was another misstatement of the law. Regardless of the aggravation or mitigation, a jury can vote for mercy. *See* Brooks v. State, 762 So. 2d 879 (Fla. 2000)

(6) **State's Prosecutorial Misconduct by arguing the Death Penalty was not sought in all cases, but Defendant's case "Cried out Loud for it." Said misconduct constituted fundamental error requiring reversal.**

The Prosecution attempted to justify the death penalty for Defendant's case by making the following arguments to the jury during Penalty Phase closing arguments, "*The State doesn't seek the death penalty in all first degree murders, it's not always proper to do that… But where the facts, where there are facts surrounding the murder that demand the death penalty, the state has an obligation to come forward and seek the death penalty. This is one of those cases*." (TT pg. 986-987)

This type of argument has been found improper by the Florida Supreme Court. *See* Brooks v. State, 762 So.2d 879, holding that arguing a case deserved the death penalty was "*irrelevant and tends to cloak the State's case with legitimacy as a bona-fide death penalty prosecution, much like an improper vouching argument.*"

The Prosecutor argued matters of "prosecutorial expertise" and penalty phase mechanics in the exact same manner as those found in *Brooks*. For example, in *Brooks* he argued the State would not seek the death penalty

for a case involving a 16 year old kid. The prosecution made identical comments in Defendant's case: *"There is absolutely no evidence—this could apply to someone that's very young, 14, 15 years old, maybe 16 years old, someone had no life experiences, someone that very young, I would submit to you that that just does not apply in this case."*(TT pg. 1007)

Such comments have been found improper and misleading because the death penalty in Florida is not a possibility for someone under 17 years old. (TT pg. 986-987) When combined with Prosecutions numerous references to aggravating circumstances having the ability to voice opinions that cry out loud for the death penalty, these types of statements had a clearly detrimental and inflammatory effect on the minds of the jury.

(7) State's Prosecutorial Misconduct by repeatedly trying to vouch for witness credibility. Said misconduct constituted fundamental error.

During closing arguments in both the guilt and penalty phases, prosecution made repeated efforts to justify the credibility of State witnesses while simultaneously making repeated references to Defendant being full of lies and deceit. The introduction of this argument by the state was prejudicial to Appellant, requiring a new trial *See* Gorby v. State, 630 So. 2d 544 (Fla. 1993), [Holding "*It is improper to bolster a witness' testimony by vouching for his or her credibility*."] In the instant case, the State constantly tried to

justify the credibility of witnesses by arguing their reasons for telling the truth, or by making repeated references to matters not introduced into evidence.

For example, the prosecution made numerous references to witness being scared to come forth due to fear of Kenneth Hartley, i.e. the "Wall of Silence" that was "created" in the Washington Heights apartment complex argument. This line of argument had nothing to do with matters in evidence. Moreover, these arguments attempting to establish witness credibility were not isolated occurrences pertaining to one witness, as prosecution attempted to bolster nearly all of the state's witnesses' credibility in the closing arguments of the guilt phase of defendant's trial. (TT pgs. 846-879)

An example of this bolstering of witness credibility is found at pgs 852-853 of the trial transcripts in relation to the State's Category A eyewitness Sidney Jones:

> *"You heard from Sidney Jones. Sidney told you, now, I'm not here to tell you that Sidney Jones is a great leader of men. I'm not here to tell you that he's the type of person you would like or that you'd even want living next door to you. But I'll tell you this: I broke through that wall of silence that surrounded Washington Heights, he had the courage to come forward and tell you what he saw out there at Washington Heights. And he admitted to you candidly, yeah, I'm a convicted felon, he told you yes, I sell drugs, but he's got eyes and he saw. And he told you he's scared. He told you just that the other people out there are scared but he came forward and he broke this case."*

Later, on pg. 856 of the trial transcripts, the prosecution continues in reference to Sidney Jones:

> *"I would submit to you that he has come in here, he may not be a model citizen and I'm not here trying to tell you that he is. But—again he broke through that wall of silence, he found the courage to come forward and tell you what he saw. And I would submit to you that it is the truth."*

Again on pg. 859 in reference to Jones:

> *"…he told you that he himself is scared. But nevertheless he found the courage to come forward as I stated a amont(sic) ago earlier that broke this case. I would submit to you that he's come forward, and the fact that he is a convicted felon, that fact in and of itself I would ask you to not automatically block out his testimony…you will see that he is telling the truth."*

A closer look at Sidney Jones real history shows him in a rather less courageous light. Jones admitted at trial for co-defendant Hartley that he had been a paid informant for the JSO "as far back as 74-75". (ROA pg. 585) In deposition for co-defendant Johnson he states that he was an informant for JSO at the time of Mayhew's murder, and that it was his intention to turn Gino Mayhew over to police himself. (ROA pg. 585) Additionally, the defendant entered pay slip receipts at evidentiary hearing from the JSO documenting numerous payments to Sidney Jones in exchange for functioning as a CI over the course of his life.

This precedent of bolstering witness credibility continued in the guilt phase closing argument with commentary from the prosecution regarding the testimony of state witness Juan Brown:

> *"Juan told you the next morning when he found out that Gino had been killed, he didn't call the police, he circled himself in that wall of fear and silence that exist(sic) out there in Washington Heights. He maintained that silence because he was afraid until Detective Bolena went to him in late May…I would submit to you he's been truthful, he also has shown courage to come forward and tell you what he saw. And what he saw was the truth and he's presented it to you under oath….He has nothing to gain by coming in here and telling you a lie."* (TT pg. 861)

Juan Brown's "evolving" testimony has been addressed at length in the Initial Brief accompanying this petition. Defendant would refer the court to the argument presented in the Initial Brief regarding the failure to impeach witness testimony argument found in Claim One, sub-claim D of that pleading. Given the weakness of Brown's testimony, which was shown to be nearly impossible through testimony at defendant's evidentiary hearing, and that Mr. Brown's testimony changed significantly over time as to the location that he claims to have seen the vehicle and to the descriptions of the occupants, it seems that the Prosecution felt it necessary to legitimize his testimony by describing a fictional construct ("Wall of Silence") and by asserting his own beliefs as to why Juan Brown testified against the defendant.

The most egregious example of this misconduct is in relation to the testimony of State Witness Robert Williams. Notably, on page 849 of the trial transcripts the prosecution states the following while discussing the testimony of Robert Williams and stating that he could not have gotten the "facts" of his testimony from anywhere but the defendant,

> *"Those were all points of truth, points of truth that Robert Williams, Robert Williams got from that defendant in the Duval County Jail that he could only have gotten from someone that was there actively involved in that armed robbery with a firearm, armed kidnapping with a firearm, first degree murder. That's why I asked the witness those questions."*

Every single detail of Robert Williams' testimony (as evidenced at ROA pgs. 611-625, and articles entered by defense as an exhibit at evidentiary hearing) was given in the many articles printed in the Florida Time's Union prior to Defendant's trial. Some details of the case were even printed prior to William's arrest for dealing in stolen property, indicating that he initially could have learned details of this case outside of the jail environment.

Robert Williams was incarcerated awaiting sentencing for dealing in stolen property conviction, facing a maximum of 15 years. In exchange for testimony against Defendant, Williams worked out a deal with the State Attorney's office where he would be capped at 10 years at sentencing. The

prosecution used this in his attempt to bolster the credibility of Williams to the jury at guilt phase closing arguments:

> *"He told you the maximum penalty was 15 years in prison and in return for his truthful testimony in this case he told you that it's agreed that he won't get more than ten years, ten years in Florida State Prison for trying to sell a stolen camera…But he told you this: when he first came forward and talked to the police and talked to the State Attorney's office, he never asked for any help. He told you that he has not been sentence(sic) yet by Judge Tygart, Judge Tygart is going to sentence him and the agreement is he must give truthful testimony and Judge Tygart will decide if he was truthful or not. I would submit to you that he has every incentive in the world, he has ten years worth of incentiveness(sic), of reasons to tell the truth."* (TT pg 862)

On pages 865-866, and 876 of the trial transcripts, the prosecution continues:

> *"…defendant admitted to Robert Williams that they left the drug paraphernalia there, no one knew about that, that are matters that this defendant knew about because he was involved in the murder…and it bothered Robert Williams, he has a 17 year old step-son himself…his PD negotiated this agreement that he would get no more than ten years in prison if he would be truthful…I would submit to you that Robert Williams has been very candid and has been very truthful…(Defense) may even argue to you that Robert Williams is lying, even though he's got ten years worth of reasons to tell you the truth."*

The prosecution continues to comment regarding Williams testimony on pg. 869 of the trial transcripts:

> *"…because the only way that Robert Williams could have gotten that information was from that defendant who was there actively participating in that murder kidnapping and robbery."*

As evidenced by defendant herein through the media releases, this is a complete falsehood by the prosecution. On pages 875-876 the prosecution again misrepresents the validity of the witness testimony, stating that,

> *"And then Robert Williams told you about matters that this defendant told him that only the murderer or one of the murders would have known, that the shooter sat in the back seat, Gino was in the front, Gino was shot four or five times, gun with a clip was used, and drug paraphernalia was left on the seat. Points of truth, indications of truth about what Robert Williams said because there was no other way he was gong to find out those matters…"*

Using the statement by prosecution quoted immediately above from the trial transcript pages 875-876 where the Prosecution reiterates exactly what details Williams "could only have learned from someone present", we can prove that:

1) It was printed that the "shooter sat in the backseat" in the Florida Times Union (hereafter FTU) article released on May 18, 1991, released ten days prior to Williams' first statement to police given on May 28, 1991.

2) The information that "Gino was in front" was listed the first printed FTU article regarding this event on April 24, 1991. It must be noted that Williams wasn't arrested on the dealing in stolen property charge until April 29, which indicates that he could have learned about this case and many of the facts prior to his incarceration.

3) That Gino was shot “four to five times” was printed in the first article as well (April 24, 1991). This article additionally mentions that at least one shot was to the head.

4) That a “gun with a clip was used” was never proven at trial as no weapon was every recovered or entered into evidence at trial in relation to this crime. Rather, it was assumed that since shell casings were found in the vehicle that a clip-fed handgun was used in the murder rather than a revolver as clip-fed handguns eject the shell casings whereas in revolvers the shell casings remain in the cylinder until manually emptied.

5) That drug paraphernalia was found in the vehicle was stated in the FTU article printed April 29, 1991. Again, this article was printed roughly 2 weeks prior to Williams’ incarceration.

The prosecutions “points of truth”, as framed at trial, are in fact a clear embellishment upon what the actual truth was at the time this case went to trial. Armed with only a newspaper, any opportunistic convict awaiting sentencing could have gleaned enough information from the articles necessary in order to testify as a witness against the defendant. It is not unreasonable to at least entertain the idea that Williams, a 42 year old (at time of trial) multiple convicted felon, facing 15 more years in State Prison, may have used the materials that he had readily at hand in order to broker

himself a better outcome. Combine this with the fact that defendant was housed in the same cellblock as Williams prior to trial, the familiarity of the case due to the extensive media coverage, and recognized history of jailhouse snitching and this result seems even more likely.

The prosecutions "10 years worth of reasons to be truthful" argument should have been re-cast as "5 years worth of reasons to lie". It also must be noted that Williams served 18 months total regarding the conviction in which he testified against Ferrell for leniency, not ten years as prosecution inferred to the jury.

To summarize, for all three state witnesses discussed herein, the prosecution sought at all times to bolster their credibility with the jury at trial by discussing his personal opinions of the witnesses, their courage to break the "wall of silence" image that the prosecution constructed in the minds of the jurors, and by labeling as true many "facts" contained in testimony that simply were not.

(8) **State's Prosecutorial Misconduct by Arguing for the "Same Mercy." Said argument constituted fundamental error.**

Another *Urbin* violation committed by Mr. Bateh in Defendant's case resulted when he inappropriately suggested Defendant be shown the same mercy he shown the victim of the murder. *Id*. *See also* *Brooks v. State*, 762 So.2d 879 (2000)

In *Urbin*, the prosecutor improperly concluded his closing argument by stating, *"If you are tempted to show this Defendant mercy, if you are tempted to show him pity, I'm going to ask you to do this, to show him the same amount of mercy, the same amount of pity that he showed the victim… and that was none.*" *Id*. The *Urbin* ruling held that said argument was blatantly impermissible under *Rhodes v. State*, 547 So.2d 1201, 1206 (1989); finding the same mercy argument improper because it was "an unnecessary appeal to the sympathies of the jurors calculated to influence their sentence reduction." The prosecution violated this condemned argument of both *Urbin* and *Rhodes* when he concluded his penalty phase closing argument with, "*I'll leave you with one final thought, I'm going to ask you to show this Defendant the same sympathy, the same mercy he showed to Gino Mayhew and that was none.*" (TT pg. 1012)

(9) **State's Prosecutorial Misconduct by arguing personal beliefs about evidence, even arguing for evidence that did not exist to gain a conviction. Said misconduct constituted fundamental error.**

Prosecution committed misconduct when he sought to obtain a conviction by arguing personal beliefs about evidence, even arguing evidence that did not exist. The following demonstrates this atrocious conduct. During closing arguments, the prosecution stated that various aggravating circumstances "*calls out for death*," or "*cries out loud for a*

recommendation of death." (TT pgs. 994-1004). Obviously aggravating circumstances do not posses oral faculties, so exclaiming statements such as these seven different times during his penalty phase closing argument was clearly an attempt to influence the jury's vote on matters not based upon evidence. He then proclaimed to the jury on numerous occasions the pain Gino must have felt as he was shot. The following clearly demonstrates this,

> "*He* (Gino) *turned around, he had given them their property, he turned around and he was shot in the fact through the eye glasses, the doctor told you that bullet that was shown here went through his face, through his eye glasses into his cheek down into his neck. I would submit to you that was painful, this was not a fatal shot, he was still alive… In futile self-defense his hand goes up, he was shot through the finger into his brain. He slouches over, second shot into his head behind his ear, he's losing conscious he's losing consciousness, the third shot, the back of the head that went – tore all the way through his brain and out the front of his head."* (TT pgs. 999, 1000)

This is yet another egregious example of the prosecutor arguing his personal beliefs to the jury for the sole purpose of obtaining a death conviction. After prosecution questioned Dr. Lipkovic about the order the gunshot wounds were inflicted, Dr. Lipkovic testified to the following, *"I numbered the gunshot wounds in the order I examined them. The numbering system does not reflect the order that they were inflicted because I have no way of knowing, that is just the order I examined them.*" (TT pgs. 512-513).

Since the stated testimony from the doctor performing the autopsy could not reveal the order the gunshot wounds were inflicted, there is no possibility of the prosecution being able to ascertain the order, pass it off as fact, and then proclaim Gino's reactions to the various shots fired. This is pure speculation on behalf of the prosecutor and not a legitimate comment on evidence. In fact, Dr. Lipkovic's testimony refutes the prosecutor's inflammatory and imaginary script entirely. Therefore, it was grossly improper for the prosecution to create this image in the minds of the jury describing Gino's reactions to what it was like being shot, and was solely done to gain a conviction and death sentence.

Mr. Bateh argued Defendant's eventual aggravating circumstances of committing the murder for pecuniary gain by stating, "*…that defendant admitted to Robert Williams that he was the one that took that gold chain, that necklace from Gino Mayhew. There is clear evidence of robbery; there is clear evidence that financial gain was a part of this murder*." (TT pg. 995) This is a blatant false misrepresentation. In every statement Robert Williams gave he said drugs and money were taken from Gino. Robert Williams never specified which defendant took the drugs and money, and he never even mentioned the existence of a gold chain being taken until the time he testified at trial, let alone that Defendant was the one who took it.

There are absolutely no statements, depositions, or physical evidence in existence that ever claimed Defendant was seen with more money, any drugs, or a gold chain after Gino's murder.

10) The State committed prosecutorial misconduct by improperly attack on the Defense Attorney and Appellant by suggesting to the jury in its guilt phase closing argument that the Defendant's attorney had lied and misled them, and arguing personal beliefs.

Finally, it should be noted that Prosecution stressed before the jury that he was forced to use the witnesses that "the Defendant chose" in this case,

> *"This defendant chose the witnesses that we had in this case…I wish—I wish I could bring forward his witnesses in this case, priests, ministers, leaders of this community, heads of major businesses in this community but you don't find people like that hanging out in the first lane of Washington Heights apartments, they just don't hang out there. This defendant chose who those witnesses were going to be and that's who we've brought forth…I'm forced to take the witnesses that that defendant chooses." (TT pg. 878)*

The Prosecutor stated this during closing arguments in one of his many efforts to justify the credibility of the State's witnesses.

If this was truly the case, the following questions must be posed: Why did the Prosecution then "choose" not to put forth a witness (Deatry Sharp) who admitted partaking in the alleged Saturday robbery that was brought in as the motive for Gino Mayhew (a seventeen year old high school

student) putting out a "hit" on Defendant, Johnson, and Hartley, which then supposedly led to the pre-emptive murder of Mayhew at their hands? (According to the State's case at trial)

The statement (entered into evidence at evidentiary hearing) of Deatry Sharp (who confessed to the robbery of Mayhew on the preceding Saturday) was taken on the same day as State Witness Gene Felton and Jerrod Mills. At that time, Felton testified to overhearing Defendant describing the robbery, Sharp confessed to the Robbery stating that he acted as a lookout for Johnson and Hartley, Jerrod Mills verified seeing Sharp on the day of the Robbery. Why then did the prosecutor "choose" to ignore the only witness who willingly admitted to committing the robbery and a person who verified seeing him at Washington Heights (Jerrod Mills, see deposition pg. 42), choosing instead to rely on a witness who allegedly overheard people talking?

Why did the Prosecution choose not to ask the lead homicide detective about his investigation on the robbery? Detective Bolena stated the following in response to questioning on Pg. 77 of his deposition:

> *"Q: As you sit here now on September 18, 1991 from your information, what is your conclusion as to what the motive was to kill Gino Mayhew?"*
>
> *"A: Drug Money"*

"Q: To take drugs or money or both?"

"A: They robbed him on Saturday prior, Kip, Kenneth Hartley robbed him on the Saturday prior. Him and Deatry Sharp."

Why would the prosecution "choose" to ignore the lead investigator for the state's case, sworn statements admitting involvement, and corroboration by another witness in Deposition? Why did he bury this testimony of actual involvement and investigation in favor of the testimony of Lynwood Smith to convince them of Defendant's involvement instead of the person who actually admitted doing it?

The answer is that without the defendant's involvement in the previous Saturday robbery, the state had no motive for defendant to murder Gino Mayhew. Without any physical evidence and relying on "testimony" from witnesses who were not credible by any stretch of the imagination, the state's case was weak at best. Given that the defendant was appointed defense counsel that failed to investigate, read, take, or set depositions, and essentially did not subject the state's case to any form of meaningful adversarial testing, this was a way to strengthen the case against defendant.

Mr. Bateh was not "forced to use the witnesses the defendant chose"; he himself chose to use the witnesses that could provide the best odds of a conviction, regardless of the truth. These actions were a direct violation of the prosecution's code of ethics. *See* *Goddard v. State*, 143 Fla. 28 (Fla.

1940) [*Holding that*, "*it is well established that the State should seek justice, not a conviction unfairly obtained. No conviction is warranted except upon convincing evidence fully and fairly presented*."].

Essentially every statement and rule that was deemed improper under *Urbin* and *Brooks* was violated repeatedly during Defendant's case, with the prosecutor using almost the exact language and arguments condemned in said cases. The prosecution's closing arguments were meant to, and did, inflame the minds of the jury, and were fundamental error.

As held in *Urbin v. State* and *Garron v. State*, "these considerations are outside the scope of the jury's deliberation and their injection violates the prosecutor's duty to seek justice, not merely 'win' a death recommendation." *Id*. As held in *Urbin* and *Garron*, misconduct by prosecution in the instant case are verbatim examples of what the Florida Supreme Court has prohibited and ruled as fundamental error type closing. In light of the egregious arguments made by the prosecutor, and defense counsel's failure to object, there is a reasonable probability the outcome would have been different. The fundamental error created by the prosecution in Defendant's case allowed the jury to convict Defendant for reasons other than his alleged guilt.

Whether viewed as a whole, or individually as separate instances, this conduct by the prosecution cannot be considered harmless error. By not including these claim(s) in Appellant's direct appeal, Appellant's direct appeal counsel's omission of this issue was of such magnitude as to constitute as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance. Moreover, said omission by appellate counsel compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.[3]

ARGUMENT TWO

PETITIONER'S DIRECT APPEAL COUNSEL WAS INEFFECTIVE AND DEFICIENT IN REPRESENTATION OF PETITIONER FOR FAILING TO ALLEGE DIRECT APPEAL THAT MR. NICHOLS' CONDUCT CONSTITUTED ERROR UNDER *U.S. v. CRONIC.* SUCH A DEFICIENCY IN COUNSEL'S PERFORMANCE COMPRIMISED THE APPELLATE PROCESS TO SUCH A DEGREE AS TO UNDERMINE CONFIDENCE IN THE OUTCOME

In order to grant habeas relief based on ineffectiveness of Appellate counsel, the Supreme Court of Florida must determine: First, whether the alleged omissions are of such magnitude as to constitute a serious error or

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3 Following the *Urbin* decision, the Florida Bar opened a disciplinary file related to Mr. Bateh's actions in Urbin. The Bar declined to formally discipline Mr. Bateh, though the Bar did issue a letter of rebuke, specifying that his actions were not consistent with the standards of the legal profession.

substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the result. *Patton v. State*, 878 So. 2d 368 (Fla. 2004)

Petitioner's appellate counsel's omission of a claim pursuant to *U.S. vs. Chronic* 466 U.S. 648 (1984) from Petitioner's direct appeal was of such magnitude as to constitute a serious error that was also outside the range of professionally acceptable performance. The instant case was fraught with numerous unexplained absences by his trial counsel, Mr. Nichols, and this was readily apparent from the record. In fact, a brief glance at the record shows that Mr. Nichols missed approximately twenty-eight pre-trial dates out of forty (ROA pg. 557), did not take the depositions of several main state witnesses who were either eyewitnesses or overheard alleged confessions by Appellant, failed to show up for Appellant's trial with no explanation and no way to reach him, failed to show up for court when Appellant was given his H.O. notice, to name a few examples. The deficiency in appellate counsel's performance in failing to allege this claim has comprised Petitioner's appellate process to such a degree as to undermine confidence in the result. The record shows that a number of dates set by the trial court were missed, without excuse or explanation, by trial counsel. Coupled with the facts that

counsel did not take or attend numerous depositions of the state's main witnesses, and the failure to object to the state's egregious guilt and penalty phase closing arguments, the confidence of the result in the instant case is undermined. Wherefore, Appellant respectfully requests this court to reverse and remand Petitioner's convictions and sentences and grant Petitioner a new trial.

In *Cronic*, "the Supreme Court created an exception to the *Strickland* standard for ineffective assistance of counsel and acknowledged certain circumstances are so egregiously prejudicial that ineffective assistance of counsel will be presumed." *Id.* *See also* *Stano v. Dugger*, 921 F. 2d 1125, 1152 (11th Cir. 1991). If a court finds that a *Cronic* error has occurred, a defendant's conviction must be automatically reversed, because it is a per se constitutional violation, which does not require the defendant to preserve the error below. *See also* *Powell v. Alabama*, 287 U.S. 45 (1932); *Hunt v. Mitchell*, 261 F. 3d 575 (6th Cir. 2001).

The *Cronic* decision lists three ways an attorney's performance can be deemed a *Cronic* violation. *Fennie v. State*, 855 So. 2d. 597 (Fla. 2003). The first way a violation of *Cronic* occurs is when a defendant is actually or constructively denied counsel at a critical stage of the proceeding, which can include egregious deficient performance by trial counsel. *See* *Fennie v.*

State, 855 So. 2d 597 (Fla. 2003). Additionally, "critical stages" of the proceeding have been found in the following circumstances: (1) At sentencing, *Tucker*, 969 F. 2d 155 (5th Cir. 1992); (2) Pre-trial period, *Mitchell v. Mason*, 325 F. 3d 732 (6th Cir. 2003); (3) Pre-trial preparation, *Id.*; (4) Failure to investigate defendant's background, *Appel v. Horn*, 250 F. 3d 203 (3rd Cir. 2000); (5) Offering no assistance at plea proceedings, *Childress v. Johnson*, 103 F. 3d 1221 (5th Cir. 1997); (6) Jury voir dire, *Gobert v. State*, 717 S.W. 2d 21 (Tex. Crim. App. 1986); (7) Failing to file an interlocutory appeal, *Thomas v. O'Leary*, 856 F. 2d 1011 (7th Cir. 1988); (8) Closing arguments, *Hunter v. Moore*, 304 F. 3d 1066 (11th Cir. 2002); (9) Filing a motion for new trial, *King v. State*, 613 So. 2d 888 (1993 Ala. Crim. App.); (10) Preliminary hearings, *Thomas v. Kemp*, 796 F. 2d 1322 (11th Cir. 1986); (11) Absence of defense counsel at the return of the jury verdict, *Wilson v. State*, 764 So. 2d 813 (Fla. 4th DCA 2000); (12) Failing to call witnesses that are beneficial to defendant's case, *States v. Swanson*, 943 F. 2d 1070 (9th Cir. 1991); (13) Penalty phase, *Blake v. Kemp*, 758 F. 2d 523 (11th Cir. 1985).

The second way a violation of *Cronic* can occur is when defense counsel fails to subject the State's case to meaningful adversarial testing, like counsel remaining silent and refusing to participate at trial.. *Fennie v.*

State, 855 So. 2d 597 (Fla. 2003); *See* *Reyes-Vasquez v. U.S.*, 865 F. Supp. 1539 (U.S. Dist. Ct. S. Dist. Fla. 1994); *Bell v. Cone*, 535 U.S. 685 (2002).

The last way a violation of *Cronic* can occur is when circumstances are such that even competent counsel could not render assistance. *See* *Davis v. Alaska*, 94 S. Ct. 1105 (1974). [*Holding that because the Defendant was denied the right to effective cross-examination, no specific showing of prejudice was required.]*

Counsel's ineffectiveness started from his initial appointment to the case. On June 26, 1991, counsel waived Defendant's presence at all pretrial proceedings. (TT pgs. 17-18) This occurred 19 days after counsel was appointed to represent Defendant. Defendant was unaware of this waiver and did not consent to it.

Defendant's counsel demonstrated a complete lack of professional representation and interest in the case by repeatedly missing scheduled court dates. The following demonstrates this fact: On November 12, 1991, trial was scheduled to begin with jury selection. On said date counsel failed to appear, providing no explanation or warning. The Court and State tried to establish contact with counsel but only reached an answering machine, leaving the court with no alternative but to postpone the proceedings. *"But Mr. Nichols was not in chambers this morning, he hasn't been here today,*

he hasn't called anyone that I'm aware of to have let us know why he is not here today to select a jury in the Ronnie Ferrell case." (TT pgs. 128-129)

Counsel missed numerous other pre-trial dates as evidenced by the following: November 21, 1991, *stating to the trial judge's secretary that he was out of town and would be back on November 25.* (TT pg. 132) December 5, 1991, "*And it should have been on today's calendar. I assume that Mr. -- I assume that Mr. Nichols does not know about it today.*" (TT pg. 140) December 17, 1991. "*The case is already set for trial. Mr. Nichols was not in chambers this morning and he's not here at this time. So I'll just pass that to the next scheduled date which is 1-7.*" (TT pg. 143).

January 7, 1992. "*Mr. Nichols was not in chambers this morning but he called my secretary and told my secretary he had a sick child and he had to stay at home. Pass to the next scheduled date*." (TT pg. 144) January 24, 1992, less than two months before the trial was scheduled to begin: "*It was set this afternoon for 3 o'clock to hear motions, there are no motions, the attorney was not in chambers this morning, we have received no motions.*" (TT pg. 151) February 2, 1992, "*Mr. Nichols was not in chambers this morning. It's already set for trial… We will pass till that day.*" (TT pg. 155)

February 13, 1992, on this date the State was able to serve a Habitual Offender Notice on Defendant with no objections. "*At this time, Mr. Ferrell,*

your attorney, I don't know, he wasn't in chambers this morning and I don't know if you've heard from him or not, but at this time the State is serving upon you … notice of intent to have you classified as an habitual felony offender under Florida Statute 775.084. " (TT pg. 164) Finally, February 20, 1992, with no apparent excuse per the record. (TT pg. 166)

Unfortunately this deficiency continued to be displayed after the guilt and penalty phases of trial. At the subsequent penalty phase of Petitioner's trial, counsel waived all presentation of evidence and testimony. (TT pgs. 983-984)

Mr. Nichols: "Your Honor, we'll offer no testimony."

The Court: "Now, Mr. Nichols, before you made that announcement, have you conferred with the defendant and advised him of his right to testify or put on witnesses?"

Mr. Nichols: "Yes sir, I have. And I have – he has instructed me that he does not want to testify himself, taken the position he's not guilty and wasn't there and there [is] nothing to offer by way of mitigation. And consequently there are no other witnesses to call."

This waiver made by counsel on behalf of Petitioner was not a knowingly and voluntary waiver.

Counsel conducted no penalty phase investigation whatsoever. In light of the aforementioned evidence that character witnesses were available to testify, it cannot be said that counsel informed Petitioner of his options

before said waiver was made. *See* Thompson v. Wainwright, 787 F. 2d 1447 (11th Cir. 1986) [*Holding that "the 11th Circuit case law rejects the notion that the lawyer may blindly follow the commands of his client. Although a client's wishes and directions may limit the scope of an attorney's investigation, they will not excuse a lawyer's failure to conduct any investigation of the defendant's background for potential mitigating evidence*."]; Spann v. State, 2003 Fla. LEXIS 465 [*Holding that "before a trial court may grant a defendant's request to waive the presentation of mitigation, the court is obligated to ensure that the defendant's waiver is knowing, uncoerced, and not due to defense counsel's failure to fully investigate penalty phase matters*."]

Despite counsel's lack of investigation and presentation of no mitigating circumstances in during the penalty phase, the jury still recommended a 7-5 death recommendation. With mitigation evidence available to counsel, said recommendation for life would surely have resulted had counsel presented any mitigation to the jury.[4]

On April 22, 1992, counsel failed to attend a hearing to discuss the pending sentencing hearing, "*On the Ferrell case – according to my notes on my green page here we are going to discuss the sentence hearing date today*

4 The trial court, after Appellant's evidentiary hearing, granted Petitioner a new penalty phase

and he is represented by Mr. Nichols. Has anyone seen Mr. Nichols? … I am going to pass the case on the defendant Ferrell to 4/7 and I will have – advise Mr. Nichols to be here on that date." (TT pgs 1044-45)

September 25, 1992: "*On the Defendant, Ronnie Ferrell, has been convicted of murder in the first degree… We have discussed this in chambers – we have with Mr. Bateh. His attorney Mr. Nichols was not present at that time.*" (TT pg. 1059) On November 5, 1993, defense counsel stated he was still not ready for sentencing hearing because "*At that time Mr. Nichols advised me he was – because he was in trial all this week in that case, he was unprepared to proceed to with this sentencing hearing*." (TT pg. 1077)

The following three weeks were provided for defense counsel to prepare for Petitioner's sentencing hearing. However, counsel's deficient conduct was again displayed during the November 29, 1993 proceedings:

> "*In the case on the defendant Ronnie Ferrell, George* (the State), *Mr. Nichols represents this defendant and he was in chambers this morning. He advised, and he said I could state this on the record, that he had on, the sentence hearing which is scheduled for today, that he had nothing additional to say other than that – those matters he brought out when we had the advisory sentence before the jury and he said he had nothing else to say. I assumed he was going to come back and put that on the record*." (R. p. 1083)

The preceding was followed by comments from Mr. Bateh, and sentencing was passed to December 17, 1993. Defense counsel had nearly 9 months since the end of trial to establish some form of mitigation for the court's consideration. However, on the date of sentencing, December 17, 1993, the court asked *"Do you have anything to say or any cause to show Mr. Ferrell or you, Mr. Nichols in his behalf why the Court should not impose sentence upon him at this time*?" Mr. Nichols's years of representing Petitioner and knowledge of the case were brought to a conclusion with, "*No legal cause, Your Honor*."

Throughout Defendant's case, there were no motions were filed beyond the boilerplate constitutional motions normally filed in capital cases. Counsel made one oral motion to have Defendant examined for competency. (TT pg. 48) The competency examination consisted of an hour long question and answer session, nothing more. The examination did not test Defendant's I.Q., mental deficiencies, or any other information that would be pertinent in a possible penalty phase.

Counsel was also absent when the State served its notice to qualify Petitioner as a habitual offender.

It may be considered harmless error when one or two scheduled court dates are missed. However, when counsel misses well over half of the

scheduled dates, and waives his client's rights to attend them, this cannot be considered harmless error. *See* Powell v. Alabama, 287 U.S. 45, 69 (1932) [*a person accused of a crime "requires the guiding hand of counsel at every step in the proceedings against him," and that the constitutional principle is not limited to the presence of counsel at trial... "It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.*"]

Absences from Petitioner's proceedings by his counsel are exactly the actions the U.S. Supreme Court declared constituted ineffective assistance under Chronic. Counsel was deficient under Cronic by being constructively and actively absent during critical stages of Defendant's proceedings, and by failing to subject the State's case to meaningful adversarial testing. Fennie v. State, 855 So. 2d 597 (Fla. 2003) Counsel was absent from a least thirteen of Petitioners's pre-trials, which have been considered "critical stages of the proceedings." *See also* Bell v. Cone, 535 U.S. 685 (2002); Powell v. Alabama, 287 U.S. 45 (1932). *See* Id. [*Holding that "the pre-trial period is perhaps the most critical period of the proceedings… that is to say, from the time of their arraignment until the beginning of their trial, when*

consultation, thorough-going investigation and preparation were vitally important."]; *Thomas v. Kemp*, 796 F. 2d 1322 (11th Cir. 1986)

Actions taken by Petitioner's counsel during the pre-trial period, including his regular absences during pre-trial, trial and sentencing proceedings, lack of investigation, failure to take depositions, and failure to read provided State discovery, were errors that fit under the umbrella of the *Cronic* ruling. Therefore, counsel's actions are presumed to have been prejudicial to Defendant. *See Rickman v. Bell*, 131 F. 3d 1150 (6th Cir. 1997) [*Stating that counsel's errors have the effect of not providing Defendant with a defense counsel, but with a second prosecutor. The Court based this opinion on the fact that defense counsel: only presented a defense at the sentencing hearing, did not interview any witnesses, conduct legal research, obtain or review records, communicate with defendant, and didn't investigate a defense*.]; *Tucker v. Day*, 969 F. 2d 155 (5th Cir. 1992)[*Holding that the sentencing proceeding is a critical stage under Cronic, and because of defense counsel's actions of remaining silent and offering nothing by way of mitigation at the sentencing hearing and thereby not representing client's interests, defendant was constructively denied the right of counsel*.].

The actions taken by defense counsel and remediable under *Cronic* cannot be considered harmless. *See* *Burdine v. Johnson*, 231 F. 3d 950 (5th Cir. 2000) [*Holding that "once it is determined a constructive denial of counsel has occurred, and prejudice is presumed, it is inappropriate to apply the harmless error analysis."*]. Also, *Cronic* error of this magnitude is per se constitutional error and requires automatic reversal of a defendant's conviction. *Id.* Lastly, per se constitutional errors such as the aforementioned does not require the Defendant to preserve the error on direct appeal. *See also* *Fennie v. State*, 855 So. 2d 597 (Fla. 2003); *Hunt v. Mitchell*, 261 F. 3d 575 (6th Cir. 2001).

The alleged *Chronic* claim should have been raised by Appellant's appellate counsel on direct appeal, as the absences were as clear from the record as the unexcused explanations that supported them. Wherefore, Petitioner requests this Court to grant a new trial.

CONCLUSION:

In the instant case, Appellate counsel was deficient in his/her performance by failing to raise as claims of (1) Prosecutorial Misconduct in the guilt and penalty phase closing arguments, and (2) *Cronic* error. Both claims are clear from the record and have substantial case law supporting them. Both claims remain un-rebutted that improper and egregious

arguments were made by the prosecution and numerous court dates, including Appellant's trial date, was missed by Mr. Nichols, without explanation. This in and of itself should have put Appellant's direct appeal attorney on notice that meritable claims existed which had the possibility to grant Appellant a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via U.S. Mail to all counsel of record, on this ___ day of September, 2007.

RESPECTFULLY SUBMITTED,

TASSONE & SICHTA, LLC.

FRANK TASSONE, ESQUIRE
Fla. Bar. No.: 165611
RICK SICHTA, ESQUIRE
Fla. Bar. No.: 0669903
1833 Atlantic Boulevard
Jacksonville, FL 32207
Phone: 904-396-3344
Fax: 904-396-0924
Attorneys for Defendant

Copies furnished to:

Stephen Wayne Siegel, Esq.
Assistant State Attorney
Office of the State Attorney
330 East Bay Street
Jacksonville, FL 32202-2921

Meredith Charbula, Esq.
Assistant Attorney General
Office of the Attorney General
PL-01 The Capitol
Tallahassee, FL 32399-1050

George Bateh, Esq.
Assistant State Attorney
Office of the State Attorney
330 East Bay Street
Jacksonville, FL 32202-2921

CERTIFICATE OF COMPLIANCE AND AS TO FONT

I HEREBY CERTIFY that this brief is submitted by Appellant, using Times New Roman, 14 point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure, Rule 9.210(a) (2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

TASSONE & SICHTA, LLC.

_____

FRANK J. TASSONE, ESQUIRE
Fla. Bar No.: 165611
RICK A. SICHTA, ESQUIRE
Fla. Bar No.: 0669903
1833 Atlantic Boulevard
Jacksonville, FL 32207
Phone: 904-396-3344
Fax: 904-396-0924
Attorney(s) for Appellant