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

APPELLANT'S INITIAL BRIEF, PURSUANT TO FLA. R. APP. PRO. RULE 9.210

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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PRELIMINARY STATEMENT

Appellant, RONNIE FERRELL, will be referred to as "Appellant." The State of Florida will be referred to as "Appellee." Attorney(s) Frank J. Tassone and Rick A. Sichta, who are representing Appellant in this matter, will be referred to as the "undersigned counsel." Counsel at the time of trial will be referred to as "Mr. Nichols".

References to the Record on Appeal will be designated "ROA." followed by the page number indicated on the Index to the Record on Appeal. Citations to the trial transcripts will be designated "TT" followed by a page citation. Citations to the Evidentiary Hearing transcripts will be designated as "EH" followed by a page citation.

STATEMENTS OF THE CASE AND FACTS

On June 7, 1991, Mr. Richard Nichols was appointed to represent Appellant in his First Degree Murder case. Over the span of Mr. Nichols appointment to Appellant's trial on March 10-12, 1992, little more than one year, Mr. Nichols attended depositions of only 3 of a possible 27 witnesses with information pertinent to this case. Mr. Nichols failed to take the depositions of key state eyewitnesses, Robert Williams, Sidney Jones, and Juan Brown. Mr. Nichols did not attend approximately 28 of 40 scheduled pre-trial hearings on defendant's case, including the date the state persuaded to the court to serve notice to client that he would be tried as a habitual offender, and the initial date for jury selection which forced the judge to toll the running of speedy trial without counsel present. (TT. pgs. 128-129). Moreover, Mr. Nichols did not present call any witnesses or introduce any evidence in either the guilt or penalty phases of Appellant's trial.

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 (R.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 (R. 197, 199, 201).

On March 20, 1992, with a vote of 7 to 5, the jury recommended a sentence of death (R. 1037). The circuit court conducted a sentencing hearing on this case

on December 17, 1993[1] 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 (R. 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 (R. 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 (R. 237); and the instant crime was committed in a cold, calculated, and premeditated manner (R. 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 (R. 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 (R. 240).

The Florida Supreme Court affirmed Mr. Ferrell's conviction and sentence of death on September 19, 1996. *See* *Ferrell v. State*, 686 So. 2d 1324, 1326 (Fla.

[1] Mr. Ferrell had two co-defendants in this case, each of whom were tried separately. Mr. Ferrell's own sentencing was delayed until his co-defendants were tried and convicted (R. 229). Kenneth Hartley was also sentenced to death for his first degree murder conviction, which the Florida Supreme Court affirmed. See Hartley v. State, 686 So. 2d 1316, 1318 (Fla. 1996). Sylvester Lopez Johnson was sentenced to life for his first degree murder conviction, see Ferrell v. State, 686 So. 2d 1324, 1326 (Fla. 1996), which the First District Court of Appeal affirmed. See Lopez v. State, 652 So. 2d 1294, 1294 (1st DCA Fla. 1995).

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 3-5, 2006, after Appellant's request pursuant to Motion to Reopen Testimony, a 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. (ROA pg 714) The trial court upheld Appellant's guilt however, and cited reasons in his order as to why Appellant did not deserve a new trial.

As a result of the trial court's denial of Appellant's claim(s) that he is entitled to a new guilt phase trial, this initial brief follows:

STANDARD OF REVIEW

Appellate courts review a circuit court's resolution of a *Strickland* and *Cronic* claim under a mixed standard of review, because both the performance and the prejudice of the Strickland test present mixed questions of law and fact. Appeals courts defer to the circuit court's factual findings, but appellate courts review de novo the circuit courts legal conclusions. *Sochor v. State*, 883 So. 2d 766 (2004 Fla. LEXIS 985)

However, though the trial court's factual findings are to be given deference, said trial court decisions must be supported by competent, substantial evidence in order for an appellate court to give same. *Id.; See also Oceanic International Corp v. Lantana Boatyard*, 402 So. 2d 507 (Fla. 4th DCA 1981)[*Holding that "when a appellate court is convinced that an express or inferential finding of the trial court is without support of any substantial evidence, is clearly against the weight of the evidence, or that the trial court has misapplied the law to the established facts, then the decision is clearly erroneous and the appellate court will reverse because the trial court has failed to give legal effect to the evidence in its entirety."]; Holland v. Gross*, 89 So. 2d 255 (Fla. 1956)

STATEMENTS OF THE ISSUES INVOLVED

ISSUE ONE:

WHETHER THE TRIAL COURT ERRED NOT HOLDING THAT APPELLANT BE GIVEN A NEW TRIAL BASED ON MR. NICHOLS INEFFECTIVE ASSISTANCE DURING APPELLANT'S PRETRIAL, GUILT, AND PENALTY PHASES OF TRIAL, AS SAID CONDUCT WAS VOLITILE OF BOTH PRONGS IN STRICKLAND AND/OR A VIOLATION OF U.S. v. CRONIC.

ISSUE TWO:

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM THAT A VIOLATION OF GIGILIO V. UNITED STATES OCCURRED AS THE RESULT OF THE PROSECUTION'S IMPROPER CLOSING ARGUMENTS

ISSUE THREE:

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM THAT THE STATE IMPROPERLY WITHELD MATERIAL EVIDENCE IN VIOLATION OF BRADY V. MARYLAND

ISSUE FOUR:

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM OF NEWLY DISCOVERED EVIDENCE AND NOT GRANTING A NEW TRIAL AS A RESULT OF SAID NEWLY DISCOVERED EVIDENCE.

ISSUE FIVE:

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM THAT APPELLANT'S CULMATIVE TRIAL WAS FRAUGHT WITH ERROR, AND CANNOT BE CONSIDERED HARMLESS ERROR

ISSUE SIX:

WHETHER THE TRIAL COURT ERRED IN NOT FINDING APPELLANT INNOCENT OF THE INSTANT CONVICTIONS

ISSUE SEVEN:

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM THAT MR. FERRELL WAS DENIED A PROPER DIRECT APPEAL

ISSUE EIGHT:

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM THAT THE THE FLORIDA SUPREME COURT ERRED IN APPELLANT'S WHEN THE COURT FAILED TO REMAND FOR RESENTENCING AFTER STRIKING AN AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF SOCHOR V. FLORIDA, PARKER V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

ISSUE NINE:

WHETHER THE TRIAL COURT ERRED IN NOT FINDING THAT FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE

ISSUE TEN:

WHETHER THE TRIAL COURT ERRED IN HOLDING THAT APPELLANT CAN BE EXECUTED BY LETHAL INJECTION

ISSUE ELEVEN:

WHETHER THE TRIAL COURT ERRED IN HOLDING THAT THE PROSECUTORIAL MISCONDUCT DID NOT REACH THE LEVEL OF FUNDAMENTAL ERROR, REQUIRING A NEW TRIAL

SUMMARY OF THE ARGUMENTS

1. **THE TRIAL COURT ERRED IN FINDING THAT BOTH PRONGS IN STRICKLAND WERE NOT VIOLATED, AND/OR A VIOLATION OF U.S. v. CRONIC AS MR. NICHOLS WAS INEFFECTIVE IN THE PRETRIAL, GUILT, AND PENALTY PHASES OF TRIAL. DUE TO COUNSEL'S INACTIVITY IN SEPARATE INSTANCES AS WELL AS THROUGHOUT THE ENTIRETY OF THE CASE, DEFENDANT WAS DENIED THE RIGHT TO A FAIR TRIAL IN VIOLATION OF THE 6TH, 8TH, AND 14TH AMENDMENTS.**

A. MR. NICHOLS WAS INEFFECTIVE AND DEFICIENT IN FAILING TO MEET AND/OR CONSULT WITH APPELLANT AND HIS FRIENDS FAMILY, AND OTHER IMPORTANT WITNESSES. MR. NICHOLS WAS INEFFECTIVE UNDER BOTH THE CRONIC AND STRICKLAND TESTS FOR INEFFECTIVE ASSISTENCE OF COUNSEL. THE TRIAL COURT ERRED IN DENYING THIS CLAIM.

B. THE TRIAL COURT ERRED IN HOLDING THAT BOTH PRONGS IN STRICKLAND WERE VIOLATED, AND/OR U.S. v. CRONIC WAS VIOLATED, AS MR. NICHOLS WAS INEFFECTIVE AND DEFICIENT IN HIS REPRESENTATION OF APPELLANT DUE TO HIS COMPLETE FAILURE TO PARTAKE IN THE DISCOVERY AND INVESTIGATION PROCESSC. THE TRIAL COURT ERRED IN NOT FINDING THAT BOTH PRONGS IN STRICKLAND WERE VIOLATED, AND/OR A CRONIC ERROR OCCURRED, AS MR. NICHOLS WAS INEFFECTIVE AND DEFICIENT IN HIS REPRESENTATION OF APPELLANT DUE TO HIS FAILURE TO ATTEND AND APPEAR IN NUMEROUS PRE-TRIAL, TRIAL, AND SENTENCING HEARINGS.

C. THE TRIAL COURT ERRED IN NOT FINDING THAT BOTH PRONGS IN STRICKLAND WERE NOT VIOLATED, AND/OR A CRONIC VIOLATION OCCURRED, AS MR. NICHOLS WAS INEFFECTIVE AND DEFICIENT IN HIS REPRESENTATION OF APPELLANT BECAUSE HE FAILED TO IMPEACH STATE WITNESSES WHEN RELEVANT IMPEACHMENT EVIDENCE WAS AVAILABLE TO HIM

D. THE TRIAL COURT ERRED IN FINDING THAT BOTH PRONGS IN STRICKLAND WERE NOT VIOLATED, AS DEFENSE COUNSEL WAS INEFFECTIVE AND DEFICIENT IN HIS REPRESENTATION OF APPELLANT BECAUSE HE FAILED TO OBJECT TO THE PROSECUTION'S CONTINOUS MISCONDUCT, WHICH CONSTITUTED FUNDAMENTAL ERROR, AND PREJUDICED APPELLANT

E. DEFENSE COUNSEL WAS INEFFECTIVE AND DEFICIENT IN HIS REPRESENTATION BECAUSE COUNSEL CONDUCTED AN INADEQUATE VOIR DIRE. APPELLANT WAS PREJUDICED AS THE RESULT OF JURORS BEING ALLOWED TO BE STRUCK FROM THE JURY POOL WHEN THEY COULD HAVE BEEN REHABILITATED

F. DEFENSE COUNSEL WAS INEFFECTIVE AND DEFICIENT IN HIS REPRESENTATION BY ALLOWING AND/OR RECOMMENDING TO APPELLANT NOT TO PRESENT ANY EVIDENCE OR WITNESSES IN EITHER THE GUILT OR PENALTY PHASE(S) OF THE TRIAL IN ORDER FOR COUNSEL TO HAVE TWO CLOSING ARGUMENTS.

G. DEFENSE COUNSEL WAS INEFFECTIVE AND DEFICIENT IN HIS REPRESENTATION BY ARGUING A DEFENSE BASED ON PROPOSED WITNESS TESTIMONY IN OPENING STATEMENTS, THEN PRESENTING NO SUCH WITNESS TESTIMONY OR EVIDENCE OF THE DEFENSE THROUGHOUT THE TRIAL. AS A RESULT OF SAID INEFFECTIVENESS, THE JURY NEVER HEARD SAID DEFENSE, ALLOWING THE PROSECUTION TO COMMENT ON THE FACT THAT MR. NICHOLS SAID HE WOULD PRESENT A DEFENSE AND DID NOT, THEREBY PREJUDCING APPELLANT

H. DEFENSE COUNSEL WAS INEFFECTIVE AND DEFIECIENT IN HIS REPRESENTATION OF DEFENDANT BY FAILING TO OBJECT TO JURY INSTRUCTIONS REGARDING (1) IMPROPER AGGRAVATORS (2) BURDEN SHIFTING TO DEFENDANT TO PROVE DEATH IS NOT APPROPRIATE

I. DEFENSE COUNSEL WAS INEFFECTIVE AND DEFICIENT IN HIS REPRESENTATION OF DEFENDANT BY FAILING TO ARGUE INSUFFICIENCY OF THE EVIDENCE IN

EITHER A JUDGMENT OF AQUITTAL OR A MOTION FOR NEW TRIAL

J. APPELLANT'S WAIVER OF ALL PRETRIAL HEARINGS WAS NOT KNOWINGLY, INTELLEGENTLY, AND VOLUNTARILY WAIVED. DEFENSE COUNSEL WAS INEFFECTIVE IN NOT INFORMING OR ASKING DEFENDANT FOR HIS APPROVAL BEFORE WAIVING HIS PRESENCE, AND AS A RESULT APPELLANT WAS PREJUDICED BY NOT BEING ALLOWING TO ATTEND PRETRIAL PROCEEDINGS

K. DEFENDANT'S COUNSEL WAS DEFICIENT IN HIS REPRESENTATION OF APPELLANT BECAUSE HE FAILED TO FILE MOTION FOR A CHANGE OF VENUE, AS THE DEFENDANT'S CASE WAS WIDLEY PUBLICIZED

L. THE CULMATIVE EFFECT OF COUNSEL'S NUMEROUS ERRORS AND DEFICIENCIES PREJUDICED DEFENDANT

ARGUMENT TWO:

THE STATE PRESENTED KNOWINGLY FALSE MATERIAL INFORMATION, WHICH PREJUDICED THE DEFEDANT AND THEREBY WAS A VIOLATION OF GIGILIO V. UNITED STATES.

ARGUMENT THREE:

THE STATE IMPROPERLY WITHELD MATERIAL EVIDENCE IN VIOLATION OF BRADY V. MARYLAND AND THEREFORE DENIED DEFENDANT OF HIS CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

ARGUMENT FOUR:

DEFENDANT HAS NEWLY DISCOVERED EVIDENCE OF SUCH NATURE TO PRODUCE AN ACQUITTAL OR RETRIAL. THEREFORE, DEFENDANT'S CONVICTIONS ARE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

ARGUMENT FIVE:

THE DEFENDANT'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE VIEWED AS HARMLESS WHEN VIEWED AS A WHOLE. THE COMBINATION OF ERRORS DEPRIVED DEFENDANT OF A FAIR TRIAL GUARANTEED BY THE 6TH, 8TH, AND 14TH AMENDMENTS.

ARGUMENT SIX:

DEFENDANT IS INNOCENT OF FIRST-DEGREE MURDER. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT HIS CONVICTION AND SENTENCE.

ARGUMENT SEVEN:

MR. FERRELL WAS DENIED A PROPER DIRECT APPEAL FROM HIS JUDGMENTS OF CONVICTION AND SENTENCES OF DEATH IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ART. 5, SEC. 3(b)(1) OF THE FLORIDA CONSTITUTION, AND SECTION 921.141(4) OF FLORIDA STATUTES, DUE TO OMISSIONS IN THE RECORD. MR. FERRELL IS BEING DENIED EFFECTIVE ASSISTANCE OF POSTCONVICTION COUNSEL BECAUSE THE RECORD IS INCOMPLETE

ARGUMENT EIGHT:

THE FLORIDA SUPREME COURT ERRED DURING THE DIRECT APPEAL IN MR. FERRELL'S CASE WHEN THE COURT FAILED TO REMAND FOR RESENTENCING AFTER STRIKING AN AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF SOCHOR V. FLORIDA, PARKER V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

ARGUMENT NINE:

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED FOR FAILING TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY AND FOR VIOLATING THE GUARANTEE AGAINST CRUEL AND UNUSUAL

PUNISHMENT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TO THE EXTENT THIS ISSUE WAS NOT PROPERLY LITIGATED AT TRIAL OR ON APPEAL, MR. FERRELL RECEIVED PREJUDICIALLY INEFFECTIVE ASSISTANCE OF COUNSEL.

ARGUMENT TEN:

MR. FERRELL MAY NOT BE EXECUTED BY LETHAL INJECTION WITHOUT VIOLATING THE CONSTITUTIONS OF THE UNITED STATES AND FLORIDA. THE LAW ENACTING LETHAL INJECTION IS UNCONSTITUTIONAL. THE WAIVER PROVISION IS UNCONSTITUTIONAL. IT IS AN UNCONSTITUTIONAL SPECIAL CRIMINAL LAW. IT VIOLATES THE PROHIBITION AGAINST EX POST FACTO LAWS.

ARGUMENT ELEVEN:

IN LIGHT OF THE AFORMENTIONED EVIDENCE, THE PROSECUTION COMMITTED PROSECUTORIAL MISCONDUCT THROUGHOUT THE GUILT AND PENALTY PHASES OF DEFENDANT'S TRIAL, AND SUCH MISCONDUCT ROSE TO THE LEVEL OF FUNDAMENTAL ERROR, AND THEREFORE SUCH ERROR DENIED DEFENDANT'S DUE PROCESS RIGHTS AND RIGHT TO A FAIR TRIAL IN VIOLATION OF THE 6^{TH}, 8^{TH}, 14^{TH} AMENDMENTS OF THE U.S. CONSTITUTION

CLAIM ONE:

THE TRIAL COURT ERRED IN FINDING THAT BOTH PRONGS IN STRICKLAND WERE NOT VIOLATED, AND/OR A VIOLATION OF U.S. v. CRONIC AS MR. NICHOLS WAS INEFFECTIVE IN THE PRETRIAL, GUILT, AND PENALTY PHASES OF TRIAL. DUE TO COUNSEL'S INACTIVITY IN SEPARATE INSTANCES AS WELL AS THROUGHOUT THE ENTIRETY OF THE CASE, DEFENDANT WAS DENIED THE RIGHT TO A FAIR TRIAL IN VIOLATION OF THE 6TH, 8TH, AND 14TH AMENDMENTS.

A. MR. NICHOLS WAS INEFFECTIVE AND DEFICIENT IN FAILING TO MEET AND/OR CONSULT WITH APPELLANT AND HIS FRIENDS FAMILY, AND OTHER IMPORTANT WITNESSES (THAT APPELLANT MENTIONED TO COUNSEL) IN REGARDS TO HIS CASE BEFORE AND DURING THE TRIAL, DESPITE THE FACT THAT APPELLANT AND HIS FRIENDS AND FAMILY HAD ASKED AND TRIED TO TELL DEFENSE ABOUT THE NUMEROUS PROOF(S) OF EXCULPATORY, CHARACTER, AND IMPEACHMENT EVIDENCE. THIS LACK OF PRETRIAL INVESTIGATION AND BLATANT DISREGARD OF APPELLANTS REQUESTS WAS A VIOLATION OF APPELLANT'S 6TH, 8TH, AND 14TH AMENDMENT CONSTITUTIONAL RIGHTS. MOREOVER, BY COMMITTING THE AFOREMENTIONED ERRORS, MR. NICHOLS WAS INEFFECTIVE UNDER BOTH THE CRONIC AND STRICKLAND TESTS FOR INEFFECTIVE ASSISTENCE OF COUNSEL. THE TRIAL COURT ERRED IN DENYING THIS CLAIM.

The trial court erred in denying this sub-claim based on the portion of the argument pertaining to the guilt phase of appellant's trial as the court made no specific ruling on these issues. The court avoids ruling on this statement in it's entirety by stating at ROA pg. 654 that:

> "…contentions (1) and (9), the defendant contends that family members were willing to testify to his location the night of the murders and provide other alibi witnesses for the defendant…these claims are raised in claim one, subclaim two, and shall be addressed by this court in that subclaim."

The court however, never rules on the merits of Mr. Nichols failure to investigate or speak with these persons, as it pertains to these claims as presented in the 3.850 anywhere in its order, be it in Claim one, sub-claim two, or anywhere. This ruling therefore ignores the claim as presented to the court, and is in contrast to the facts in the record and existing case law. It is clear from the record that Mr. Nichols was both ineffective and deficient in his representation, and that said deficiency undermined confidence in the outcome. Wherefore, Appellant requests this Court to remand the instant case back to the trial court for a ruling on the instant issue, and/or reverse and remand Appellant's conviction's and sentences and ordering a new trial be had.

B. THE TRIAL COURT ERRED IN HOLDING THAT BOTH PRONGS IN STRICKLAND WERE VIOLATED, AND/OR U.S. v. CRONIC WAS VIOLATED, AS MR. NICHOLS WAS INEFFECTIVE AND DEFICIENT IN HIS REPRESENTATION OF APPELLANT DUE TO HIS COMPLETE FAILURE TO PARTAKE IN THE DISCOVERY AND INVESTIGATION PROCESS. THESE ACTIONS RESULTED IN MR. NICHOLS BEING FULLY INCOHERENT OF THE FACTS OF APPELLANT'S CASE, INCOHERENT AS TO THE SUBSTANCE OF THE STATE WITNESSES' TESTIMONY,

AND INCOHERENT AS TO AVAILABLE DEFENSES TO APPELLANT.

1. Counsel did not attend the majority of depositions taken by the state, he did not conduct any depositions of his own, and he failed to read the State's provided discovery.

The trial court erred in denying this sub-claim based on the court's confusion as to what depositions Mr. Nichols attended, the erroneous belief that Mr. Nichols set and attended the depositions of Robert Williams, Juan Brown, Sidney Jones, and Gene Felton, and the belief that Mr. Nichols was aware of the potential exculpatory testimony available through Deatry Sharp. This ruling is contrary to the facts and the case law, and it is clear from the record that Mr. Nichols was ineffective and deficient in his representation, and that said deficiency undermined the confidence in the outcome of the trial.

The Order of the trial court (ROA pg. 654) erroneously asserts that Appellant claims Ineffective Assistance of Counsel in the Amended 3.850 for failure to take the deposition of Robert Williams and Juan Brown only. The Order then in the next sentence asserts that Appellant conceded that trial counsel attended the depositions of Williams and Brown. This statement by the trial court is an erroneous finding of fact, leading to a finding without support of the weight of the evidence, requiring reversal. *Oceanic*

International Corp. v. Lantana Boatyard, 402 So. 2d 507 (Fla. 4th DCA 1981).

In Appellants' Amended 3.850 Motion it is clearly stated that trial counsel did not set, attend, or ever depose Juan Brown and Robert Williams: *"Despite being the only witnesses who claimed knowledge of Defendant's involvement, defense counsel did not take Mr. Williams' or Mr. Brown's deposition, nor did he attend the depositions of Sidney Jones and Gene Felton."* (See ROA pg 56) Nor did Appellant ever concede that he did in any subsequent argument or pleading in this case. (See ROA pg. 363 'Written Closing Argument'; ROA pg. 632 of 'Reply to State's Closing Argument'; see also transcript of evidentiary hearing, December 7, 2005, pg. 652 quoting: *"Counsel failed to take deposition of the state's main witnesses. State's main witnesses in any opinion were Sidney Jones, Mr. Williams, Mr. Brown, and Mr. Felton…"*) The state does not address the failure of trial counsel to depose Robert Williams or Juan Brown in their written closing argument to evidentiary hearing; nor in their response to the Defendant's 3.850 (see ROA 198-233).

Additionally, the trial court record does not reflect a deposition being taken of Robert Williams at any time. Juan Brown's deposition occurred on January 20, 1993, in relation to the case of co-Defendant Hartley, nearly one

year after the completion of Appellant's trial, and Mr. Nichols certainly wasn't in attendance for this deposition. (See ROA pg 550, Defense evidentiary hearing exhibit #32, See also ROA pg. 595)

In conclusion, Appellant not only *did not* concede that the deposition of Robert Williams was taken by trial counsel, but argued forcefully that said deposition was not taken, and presented evidence at the evidentiary hearing in support of same.

As stated in Appellant's 3.851 Motion, said witnesses were crucial state witnesses who allegedly were eyewitnesses and/or jail-house snitches that testified at Appellant's trial. The failure to depose these individuals was a clear deficiency in representation. Appellant would additionally refer the court to original argument as presented in the 3.851 (ROA pgs. 73-75), and the individual power points presented on each individual (ROA pgs. 580-625)

Wherefore, Mr. Nichols representation was in violation of both prongs of *Strickland*, and Appellant's convictions and sentences should be vacated, and a new trial granted.

2. Failure to investigate and call witnesses

The trial court dismisses Appellant's claim of IAC presented in the Amended 3.850 (See ROA pg. 57) that Nichols didn't attempt to set, take, or

attend depositions pertaining to the alleged previous "Saturday robbery" of Gino Mayhew (ROA pg. 654) by Appellant stating, *"Since counsel attended Williams' deposition the claim is without merit."* The court here solely relies on the erroneous fact that Nichols attended a deposition of Robert Williams prior to trial in making its ruling. Again, as evidenced from the various records associated with this case, Nichols did not set, take, or attend at any time a deposition of Robert Williams. As such, this ruling is an erroneous finding of fact, requiring remand. *Holland v. Gross*, 89 So. 2d 255 (Fla. 1956); *See also Dorton v. Jensen*, 676 So. 2d 437 (Fla. 2nd DCA 1996).

Had Mr. Nichols deposed Robert Williams, he would have had an opportunity to question Mr. Williams as to the validity of appellants alleged "jailhouse confession", and would have had another source of testimony with which to impeach his testimony at trial. A proper investigation into Mr. Williams' statements would have revealed a number of impeachment and reliability issues, and is covered by appellant extensively herein, and in prior pleadings and hearings. The appellant would direct the court to ROA pgs. 74-75, 611-625, and the instant brief in Claim One, sub-claim E, section 7.

Had Nichols deposed Deatry Sharp, or simply read the two statements he gave to police, (as entered by Appellant as exhibits at evidentiary

hearing) he would have had a witness who admitted to participating in the robbery with Hartley and Johnson, not the defendant.

The state's case in chief at trial rested on the idea that Gino Mayhew was killed in retaliation for his "putting a hit out" on the streets for Hartley, Johnson, and appellant after being robbed by these three men on the Saturday (April 20, 1991) previous to the murder. Without defendant actively participating in the robbery, the state had no motive as to why Ferrell would have reason to kill Mayhew. As counsel (who was present at the deposition of Lead Detective William Bolena when he stated that Hartley, Johnson, and Sharp robbed Mayhew on the prior Saturday, and not defendant) did not depose or investigate Deatry Sharp, the state was able to claim at trial (TT p. 840) that defendant assisted Hartley and Johnson in the robbery in place of Sharp, thereby reinforcing their case against Appellant by claiming that Appellant killed Mayhew before he himself was killed. This error allowed the prejudicial introduction of Williams Rule testimony of said prior robbery, all of which could have been prevented had counsel been effective.

Had Mr. Nichols deposed and called Deatry Sharp to testify at trial, it cannot be said that some measure of reasonable doubt as to the validity of the state's case would not have been raised. This failure to depose and/or

call Deatry Sharp to testify by defense counsel cannot in any way be viewed as a Strategic Decision. The fact that he was made aware of this potential witness (i.e. through his attendance of Lead Detective William Bolena's deposition), and still chose to ignore this potentially exculpatory witness, further evidences the overall indifference shown to Appellant's case by trial counsel. Sharp's testimony would have called into question the validity of both Robert Williams and Gene Felton's testimony through direct contradiction, and at the very least would have left the decision as to who was being truthful to the appropriate persons, the jury.

The trial court dismisses Sharp's admittance to the robbery as (ROA p 696) it differed slightly from that of Lynwood Smith, in chief because Smith states that Mayhew told him that he was robbed by two men who took his money and drugs (TT 556-57), and "not three as Sharp stated". However Smith is not inconsistent with Sharp's testimony. In both of his statements to police Sharp states that Johnson set up the robbery, while he and Hartley robbed Mayhew. Mayhew then would have *only been aware of two people* robbing him, not three. Sharp states that Johnson walked up to he and Hartley only after Mayhew had left the area. (See Sharp 6/21/91 sworn statement at pg. 12)

Nor was Deatry Sharp the only witness that counsel failed to speak with regarding the incident on the Saturday preceding the murder. Jerrod Mills was the only person to directly witness the 'Saturday Robbery' of Mayhew. (ROA pg. 60) Mills gave a sworn statement to police that recounted the robbery nearly verbatim to the statements given by Detective Bolena in deposition and Sharp in his 6/21/91sworn statement. Mills states that he saw Hartley and a "brown skinned guy" whom he later identifies as Deatry Sharp. (See 4/20/91 sworn statement of Jerrod Mills) He also states that he overheard Johnson plan the robbery, but that he did not directly participate, which is exactly the same statement that Sharp gave in his statement.

Had Mills and Sharp been deposed, or more importantly called to testify at trial, the defense would have had an admitted participant to the Robbery, an eyewitness to the robbery, and a lead detective for the state to confirm their testimony. Most importantly, these witnesses would have exonerated the Appellant of the motive used by the state to convict him for the retaliatory murder of Mayhew.

What is interesting to note here is that the trial court gives great deferment to the State's witnesses who did not actually witness the event in question, while simultaneously dismissing the statements of a person who

admitted his involvement in the event, and a witness who actually witnessed the event, both of whose testimony was never presented to the jury due to the complete failure of trial counsel to investigate and subject the state's case to a meaningful adversarial testing. This subject was addressed in great detail and explanation by defendant in Final Written closing arguments to evidentiary hearing (See ROA at 401-403) in addition to the Amended 3.850. The trial court either did not read, or did not consider, Appellant's written closing arguments on this subject in arriving at its decision.

Additionally, the court fails to address the catch-22 that it finds itself in regarding this issue Mr. Sharp. If in fact Mr. Nichols was aware of the exculpatory evidence that Mr. Sharp would present and still chose not to present it at trial, he would be in direct violation of first prong of *Strickland*.

It cannot be considered to be a decision made from reasonable professional judgment for Mr. Nichols not to present exculpatory testimony on behalf of the appellant, both for common sense, and the fact that the state presented no evidence or testimony at any time in the proceedings that this was a reasonable decision made by Mr. Nichols. This is a violation of the second prong of *Strickland*. The court offered no explanation of this apparent contradiction that it finds itself in.

Another interesting observation is that the trial court devotes an entire 2 ½ pages of its order (ROA 696-98) to pointing out discrepancies between testimony of the state's witnesses and Mr. Sharp when ruling in favor of the state. However the trial court does not devote any analysis, anywhere in its order, to addressing the discrepancies between the testimony of the state's Category A witnesses Sidney Jones, Juan Brown, and Robert Williams (that Appellant presented at evidentiary hearing through Power Point presentations and as exhibits) and that went completely unexplored by trial counsel.

As such, the trial court erred in denying said claim, as Mr. Nichols violated both prongs of *Strickland*, requiring a vacation of Appellant's convictions and sentence, and a granting of a new trial.

C. THE TRIAL COURT ERRED IN NOT FINDING THAT BOTH PRONGS IN STRICKLAND WERE VIOLATED, AND/OR A CRONIC ERROR OCCURRED, AS MR. NICHOLS WAS INEFFECTIVE AND DEFICIENT IN HIS REPRESENTATION OF APPELLANT DUE TO HIS FAILURE TO ATTEND AND APPEAR IN NUMEROUS PRE-TRIAL, TRIAL, AND SENTENCING HEARINGS.

The trial court erred in denying this claim based on the court's segmented approach to appellant's claim in its ruling, the vouching of the trial court for Mr. Nichols failure to attend scheduled pre-trial hearings, and its failure to address the claim under a *Cronic* analysis. This ruling is

contrary to the facts and case law and it is clear from the record that Mr. Nichols was both ineffective and deficient in his representation of appellant at trial and that said deficiency undermined confidence in the outcome of the trial.

In denying the instant claim, the trial court breaks down the Appellant's claim into the pretrial, the guilt phase and the penalty phase, and addressed each phase separately as regards to whether "the standard for ineffective assistance of counsel claims as set out in *Strickland* and *Cronic* applies. (Order, p. 11) However, as discussed below, the trial court's analysis of what is a *Cronic* violation is incorrect. The trial court views the only way a *Cronic* error occurring is if there is a complete breakdown in the adversarial process.2 Because the trial court did not evaluate Appellant's claim that Mr. Nichols violated *Cronic* in that counsel failed to be present for "critical" stages of Appellant's proceeding(s), i.e. pretrial hearings, trial, serving of H.O. notice on Appellant, etc., this claim should be remanded

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2 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): (1) A defendant is actually or constructively denied counsel at a critical stage of the proceeding (2) Defense counsel fails to subject the State's case to meaningful adversarial testing. *Fennie v. State*, 855 So. 2d 597 (Fla. 2003). (3)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.]*

back to the trial court, as said finding is without support of any substantial evidence, clearly against the weight of evidence, and a misapplication of law to the established facts.

In its ruling, the trial court first states that counsel was not ineffective for missing many pretrial dates, because it was the presiding judges 'standard practice was to hold pre-trial conferences in cases weekly or bi-weekly until the case was disposed of, and on numerous occasions nothing occurred during the pre-trials except that the case was merely passed to next week for another pre-trial conference." (ROA pg. 660) However, the Court did not consider that pre-trials are more than just showing up, rather, pre-trials give counsel the opportunity to speak with opposing counsel to obtain facts of the case, retrieve discovery, set depositions, and most importantly, discuss the case with his client and establish a bond and guide his client through the process3 (though Mr. Nichols waived Appellant's presence at said pretrials less than twenty days after his appointment, and without any discovery and or depositions taken). *See* Powell v. Alabama, 287 U.S. 45, 69 (1932); *Smith v. Wainwright*, 777 F. 2d 609 (11th Cir. 1985).

In conclusion, in light of the numerous absences from the critical stages of Defendant's case, this Court should find that Defendant was

actively and constructively denied his 6th Amendment right to effective counsel under *Cronic*. His convictions and sentences should be reversed, and a new trial granted.

Though Mr. Nichols did not show up for Appellant's initial trial[4], the trial court dismissed such gross inaction by counsel by stating that Appellant did not make a claim of prejudice to this claim, and that also the record demonstrates the defendant is not entitled to any relief (ROA pg. 664) because the trial judge acknowledged that Mr. Nichols had "planned" to file a motion to continuance on said trial date, as the other co-defendant's were filing same. (ROA pg 661; TT, p. 128-129) The trial court ignores several key facts. First, Appellant did argue prejudice occurred as a result of Mr. Nichols failure to attend trial. (ROA pgs 66-72)

Second, a motion for continuance was never filed at any point for this November 12, 1991 date. Despite the fact that the trial court hypothesized that one would have been filed, one was not filed, no one knew the whereabouts of counsel nor could they reach him, his client had not waived

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[4] 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. 128-9).

his speedy trial rights, and was set for jury selection without a trial counsel.

This gross misrepresentation can only be construed as prejudice per se under *Cronic* and cannot be considered harmless. Lastly, the trial court's speculation as to what might have happened is not a correct approach to decide whether a defendant's *Strickland* or *Cronic* rights have been violated.[5]

The trial court never discussed Appellant's claim that missing said trial was a critical stage of the proceedings under *Cronic*, and thus this claim was not ruled upon and should be remanded for the court's consider of the claim as presented in his 3.851 (ROA pg. 66)

The trial court made the following erroneous rulings without a proper examination of the record. Initially the trial court, using the holding in *State v. Nixon*, 543 U.S. 175 (2004)(Court's Order, p. 15) held that, "defendant has failed to allege or present evidence that establishes the counsel's failure

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[5] The trial court found trial counsel ineffective for missing a February 13, 1992, court date whereby Appellant was service a notice of intent to seek a Habitual Felony Officer sentence. (R. 164-165). However, the court found that Appellant was not entitled to relief because the Strickland prejudice prong was not established, as "Defendant does not contend that counsel missed the meeting in the trial judge's chambers, nor does Defendant contend that by failing to object on this date, counsel was precluded from filing objections to the Habitual Offender Notice. Again, this is pure speculation, as there is no record and/or transcripts in the record to show that Mr. Nichols filed in objections to said notice and/or went to the judge's chambers regarding this issue.

to attend the pre-trial hearings resulted in counsel entirely failing to subject the state's case to meaningful adversarial testing as required by *Cronic*. Again, this ruling is contrary to the facts and evidence presented during Appellant's trial court postconviction proceedings. (See ROA pg. 557; 3.850 ROA pgs. 66-71, and in final written closing argument ROA pgs. 386-393)

Second, the trial court also held that according to *Nixon*, "*Cronic* does not apply to allegations of specific errors by counsel and that such claims are to be evaluated under the *Strickland* test. Again, this is incorrect, and as stated above, *Cronic* violation can occur as the result of specific trial counsel errors. (See ROA pg 557; 3.850 ROA pgs. 66-71; and in final written closing argument ROA pgs. 386-393)

Lastly, the court notes that counsel filed "numerous pretrial motions" in the instant case, which rebuts the Defendant's contention that trial counsel entirely failed to subject the state's case to meaningful testing." (ROA pg. 664) Appellant notes that these "numerous pretrial motions" were un-substantive general death penalty motions that are filed in every case. If filing boilerplate motions with the trial court is enough to circumvent a *Cronic* violation, every criminally accused death-eligible defendant in Florida should cringe, as they would now be in the position of having there

attorney do virtually nothing except filing motions without merit and still be found effective in their representation.

Guilt Phase

In addressing the guilt phase of Appellant's trial, the court states that, "*The defendant lists no specific instance of Counsel's alleged ineffectiveness during the guilt phase of his trial in this sub claim.*" (ROA pg. 664) Again the Appellant would disagree with this statement. Defendant has consistently asserted throughout the various pleadings and transcripts accumulated thus far in his proceedings that counsel's performance during the guilt phase was deficient, listing specific instances in every pleading and transcript since the appointment of the undersigned.

In the 2nd Amended 3.850 Claim One (Entitled *"Defendant's Counsel was Ineffective in the pretrial, guilt, and penalty phases of trial"),* subsections 4, 5, 6, 7, 8, 10, and 13 all specifically address issues pertaining to IAC of trial counsel in both Guilt and Penalty phases of Defendant's trial (ROA pgs. 73-110). Subsection 4 addresses IAC for failure to impeach state witnesses during the guilt phase, specifically Robert Williams, Sidney Jones, Robert Williams, and Gene Felton (ROA pgs. 73-78). Subsection 5 addresses IAC for failure to object to prosecutor's continuous misconduct in both guilt and penalty phases of trial (ROA pgs. 78-86). Subsection 6

discusses IAC for failure to conduct an adequate Voir Dire in the beginning of the guilt phase of trial (ROA pgs. 86-90). Subsection 7 (1) discusses IAC for waiving the presentation of testimony in guilt without the decision first being an informed one (ROA pgs. 91-93). Subsection 7 (3) discusses this waiver as not being made knowingly and voluntarily by defendant (ROA pgs. 96-97). Subsection 8 discusses IAC for arguing a defense based on witness testimony and then failing to present any testimony in guilt phase (ROA 97-98). Subsection 10 addresses IAC for failure to argue insufficiency of the evidence, move for a new trial, or move for a judgment of acquittal (ROA pg. 103). Finally, Subsection 13 is a cumulative effect of error claim, which incorporates all listed claims of IAC in pre-trial, guilt, and penalty phase proceedings.

In Appellant's Evidentiary hearing, the undersigned presented argument and evidence relative to a plethora of IAC claims involving the guilt phase of the Defendant's trial, including (but not limited to): 1) Failure to object to continuous prosecutorial misconduct, (EH pg. 646) 2) Failure to subject the State's case to a meaningful adversarial testing, "*Counsel failed to take deposition of the State's main witnesses*(EH pg. 652, with further analysis of this statement continuing on pgs. 652-661) 3) A cumulative effect of IAC argument traversing all stages of case, (EH Transcripts pg 684,

continuing through pg. 685) Appellant presented an entire power point presentation at the Evidentiary Hearing dedicated entirely to showing ineffective assistance of counsel. This presentation alleged specific instances of IAC occurring during the guilt phase of Appellant's trial. This presentation was entered as part of the record for the evidentiary hearing, and the specific slides addressing IAC in the guilt phase can be found at pages 559-567.

In the written closing arguments submitted after the conclusion of the evidentiary hearing, the undersigned again addressed specific instances of alleged IAC during the guilt phase of defendant's trial. In fact, claim one of Appellant's written closing arguments was segmented into trial sections for the convenience of the court, stating *"At Defendant's evidentiary hearing, the following instances of deficient performance and prejudice were conclusively proven (broken down into case segments for the ease of explanation and organization.)"* (ROA pg. 362) Following that statement the Appellant lists 22 specific instances of IAC occurring during the guilt phase of trial, (as were presented in the power point presentation at the evidentiary hearing) (ROA pg. 368-372) which essentially summarizes the claims of IAC during the guilt phase raised initially in the Amended 3.850.

Finally in the Reply to state's closing arguments, the Appellant again addresses specific instances of IAC occurring in the guilt phase of defendant's trial, touching on and summarizing briefly, the arguments as presented in the numerous pleadings, documents, and hearings previously (ROA pgs. 631-639).

For the court to attest that Appellant makes no specific allegations of Ineffective Assistance of Counsel during the guilt phase of defendant's trial is both peculiar and constitutes an erroneous finding of fact that is clearly demonstrated simply by looking at any of appellants pleadings in the ROA. As clearly demonstrated herein and throughout the entirety of Appellant's post conviction proceedings, Appellant has maintained specific allegations of IAC during the guilt phase of his trial.

Accordingly, the trial court erred in making an erroneous finding not supported by substantial facts and/or case, and Appellant's case should be reversed and remanded back to the trial court for a ruling consistent with same, and/or Appellant's convictions and sentences should be vacated and a new trial awarded.

D. THE TRIAL COURT ERRED IN NOT FINDING THAT BOTH PRONGS IN <u>STRICKLAND</u> WERE NOT VIOLATED, AND/OR A <u>CRONIC</u> VIOLATION OCCURRED, AS MR. NICHOLS WAS INEFFECTIVE AND DEFICIENT IN HIS REPRESENTATION OF APPELLANT BECAUSE HE FAILED

TO IMPEACH STATE WITNESSES WHEN RELEVANT IMPEACHMENT EVIDENCE WAS AVAILABLE TO HIM

The trial court erred in denying this claim based on the courts opinion that Mr. Nichols effectively impeached the State's witnesses at trial and that appellant has failed to demonstrate inconsistencies and effective impeachment materials available to trial counsel. This ruling is contrary to both the facts and case law as it is clear from the record that Mr. Nichols was both ineffective and deficient in his representation of appellant at trial, and that said deficiency undermined confidence in the outcome of trial.

The trial court states that it "took exception" to appellant's claim that Nichols did not read or utilize sworn statements and depositions during his cross examination of the state's witnesses. As noted in the exhibits at evidentiary hearing (ROA pgs. 552-55) of the roughly 27 depositions taken of persons with knowledge of the murder of Mayhew, counsel attended 3. Counsel would have been able to impeach Detective William Bolena, Gladys Ferrell (the mother of appellant), and Rene Jones. He would not have been able to impeach the prosecution's main Category A witnesses Robert Williams, Juan Brown, or Gene Felton through statements made in deposition, as none were taken for this case.

The trial court next asserts (ROA pg 656) that Defendant, *"failed to explain what cross* (examination) *should have been used and* (what)

impeachment materials (presented)" pertaining to trial counsel's cross examinations of Sidney Jones and Robert Williams at trial. The Appellant would again assert that this is a finding based on erroneous fact. The issues of available materials for an effective cross examination were first raised and presented at length first in Defendant's 2nd Amended 3.850 (See ROA pgs 73-77), addressed again on the record briefly at the evidentiary hearing (Evidentiary hearing transcript pgs 647, *"I have three other power point*(s), *except this one is very short. I'm not going to introduce them to the Court, they are inconsistent statements of all the state's witnesses from all the sworn statements, previous testimony, depositions. And I urge this Court just to look at them and to see that these witnesses couldn't get their story straight."*; See also ROA 661-665), discussed at great length in written closing arguments (ROA pgs 399-409), again in Defendant's reply to state's closing arguments (ROA pgs. 632-635), and finally summed up concisely and thoroughly in the power point presentations relating to each individual witness (ROA pgs. 594-625).

In all of the citations to the ROA listed herein, the corresponding sections of the ROA are entirely dedicated to impeachment material pertaining to Robert Williams, Sidney Jones, and Juan Brown. These sections address in great detail the discrepancies and inconsistencies in the

various statements and testimony from each witness listed, and clearly prove incorrect the courts assertion that Appellant failed to demonstrate what effective impeachment could have been presented.

The Appellant has contended from the outset of his post conviction proceedings that no effective form of impeachment pertaining to Williams, Jones, and Brown was conducted by trial counsel, and has conclusively demonstrated what could have been ascertained and utilized by a diligent and effective trial counsel through the pleadings and testimony cited herein.

After ruling that Appellant had failed to explain and show what materials should have been used in cross-examination, the trial court next asserts that counsel has, *"failed to demonstrate how 'effective' cross-examination would have affected their trial testimony and, ultimately, the outcome of his trial"* in reference to our claims concerning Juan Brown, Robert Williams, and Sidney Jones. (ROA pgs 666-671) To the contrary, this issue has been addressed at length in prior pleadings, and the Appellant addressed the impeachment material available to counsel at trial at length in three separate power points, each one dedicated to one of the three main witnesses mentioned by the court.

In particular, Robert Williams, the jail house informant that Ferrell allegedly confided in prior to trial, was awaiting sentencing on a Dealing in

Stolen Property conviction that he was promised leniency on in exchange for testimony against the Defendant. As with the two previously discussed witnesses, Brown and Jones, trial counsel did not depose Robert Williams prior to trial.

The Appellant went to great lengths in the initial 3.850 to show that all of the details that Robert Williams claimed to have received from Ferrell could have been obtained by newspaper and media coverage of the event leading up to defendant's trial (See ROA pgs. 112-115). At the evidentiary hearing, as with the previous two witnesses discussed, Defense entered a power point presentation pertaining to the information available to impeach Robert Williams (ROA pgs. 611-625), again in written closing arguments (ROA pgs. 367, 369 footnote 17), and finally in the reply to states written closing arguments (ROA pgs. 632-633).

Impeachment material, available to counsel at time of trial, was clearly explained at length and in great detail at each stage of Appellant's post conviction proceedings. Appellant has went into minute detail in the power point presentation about what material could have been gleaned from media sources by Robert Williams prior to statements given to the state.

Additionally, Appellant entered copies of all the media articles printed in the Florida Times Union involving Appellant's trial in evidentiary hearing

in order to provide factual support to the power point presentation. In summary, Appellant has demonstrated that every single detail of Robert Williams' testimony, taken from every source of his testimony, could have been learned from the media sources. (ROA pgs. 611-625; 177-197; See also herein i.e. "witness bolstering" argument cites Williams media examples)

Additionally, the Appellant called Correctional Officer Tara Wildes to the stand to testify at the evidentiary hearing. (EH transcript pgs. 217-223) Ms. Wildes testified that during the time of Williams' incarceration prior to the Ferrell trial, inmates had complete access to newspaper, television, and other forms of media. In fact, it was a policy of Federal Law at the time of Ferrell's trial that inmates be provided access to media. (EH transcript pgs. 218-219). In further support of this information, in the deposition of Ronald Carn taken on 1/8/92, prior to Appellant's trial, Carn states the following information:

> *"I had seen it on the news and heard it, yes…I seen Gino Mayhew, the little…Blazer he was driving."* To which Mr. Bateh asks, *"Do you get to see the TV everyday they're in Jail?"* Carn responds, *"Yes sir, everyone do, if thay want to look at it."* Further questioning by Mr. Bateh involves, *"When did you first learn that Duck or any of those people were involved with the shooting of Gino Mayhew?"* Ronald Carn replies, *"I first learned of that when I seen his name in the paper and things."* Mr. Bateh, *"So you had the newspaper that you could look at while you were in jail?"* Carn responds, *"Yes sir, Everybody get the paper every day in the cells."* (See ROA

pg. 112-113, see also deposition entered at EH of Ronald Carn)

Ronald Carn was an inmate at the Duval County Jail at the same time Robert Williams was incarcerated. Additionally, it must be noted that these statements were elicited by the Prosecution, and not by defense counsel.

In spite of all the glaring information available to trial counsel prior to trial, counsel proved oblivious to it by not to using it to impeach Williams at trial. This must be clearly viewed as a failure of trial counsel to subject the state's case to meaningful adversarial testing. Defense counsel's cross examination of Robert Williams accounted for a brief 5 pages total of the trial transcripts at trial (TT pgs 682-686, 688) in which counsel *did not at any time* question the source of Williams testimony. As in the case with the previously mentioned witnesses, defense counsel in no way or form conducted a meaningful cross examination of the state's main witnesses at trial.

Regarding the trial court's denial of Appellant's claim that Mr. Nichols was not ineffective in impeaching Sydney Jones, Appellant refers to the Specific Impeachment material of Sidney Jones that is discussed in ROA pgs. 580-592; and even a casual review of this material will show that a plethora of material was available for impeachment of Sidney Jones, even prior to the trials of the co-defendants.

For example, Mr. Jones differs from Mr. Brown (the other only supposed "eyewitness" to the crime) as to the descriptions of the men he allegedly saw in the vehicle with Gino Mayhew (See ROA pg. 588) (Mr. Brown attested in a statement given 6/5/91 that the men in the vehicle were wearing baseball hats, Mr. Jones does not mention this in his description of the individuals in any of his numerous sources of testimony.); Jones also denied being a drug addict in one statement, then admitted at the trial of Sylvester Johnson (under cross examination it should be noted) that he used crack twice per day for "as long as he could remember" (ROA pg. 588); and in deposition, which trial counsel for defendant did not attend, (taken on 1/7/92, and less than one year after the murder occurred) Mr. Jones confused the date of the incident when questioned, stating that it had occurred on September 23, 1991, when the murder had actually occurred April 22, 1991 (ROA pg 588).6

While not a complete listing of impeachment material (See ROA 580-592 for a thorough analysis), these examples show what could have been used to impeach Sidney Jones had trial counsel prepared and effectively functioned as counsel.

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6 Appellant notes that Mr. Jones was previously convicted of perjury (though overturned on unrelated grounds) for lying under oath about being an eyewitness at a murder, when in fact he was locked up in jail at the time of the murder. (ROA pg. 647, footnote 12)

Regarding the trial court's ruling that Mr. Nichols was not ineffective in failing to impeach Mr. Juan Brown, Appellant again refers to the Specific impeachment materials for Juan Brown that were also given in a separate power point entered at Defendant's evidentiary hearing (See ROA 594-609), testimony was presented at evidentiary hearing by Appellant by Dr. Richard Boehme, who was called as an identification expert. Appellant conducted a recreation of the circumstances present the night of the murder (including same location of original identification, lunar cycle, atmospheric conditions, season, time of day, model of vehicle, window tinting of vehicle, number of occupants, stated speeds, etc.) and introduced the video at Evidentiary hearing as Defense exhibit 49-A. Dr. Boehme gave testimony (EH transcripts pgs. 430-468) and explanation of the experiment as well as scientific explanation as to why such an identification, as Juan Brown claimed to have made, was impossible.

Even without addressing all the inconsistencies in Brown's multiple statements and sources of testimony (noting again that counsel did not depose Juan Brown prior to trial), his apparent ability to better recollect the event with each passing statement/testimony, how they differed with Sidney Jones in places, and by simply looking at the testimony given at trial, it is

readily apparent that counsel did not prepare or impeach Mr. Brown effectively.

To summarize, Juan Brown stated that he identified Gino Mayhew and the Appellant in the Victim's vehicle between 11:30 and 11:45 pm the night before victim's body was found. He states that he passed the vehicle traveling at 40 mph and estimated that the victim's vehicle was traveling about 45 mph. (ROA pg. 603, see also trial transcripts pgs. 639-657) It should also be noted that the vehicle of the victim was a Chevrolet Blazer with window tinting on the side windows. The defense used a Land rover of similar dimensions with similar window tinting in the recreation. One notable difference is that the attempt at identification in the recreation experiment was made by placing the observer (i.e. from the perspective of Juan Brown) in a stationary position, not in a vehicle traveling at 40 mph towards another vehicle traveling 45 mph, resulting in a closing vector of over 85 miles per hour, as Juan Brown attested to at trial.

Dr. Boehme testified that even though the closing vector during the recreation was less than half of what was present under the circumstances that Brown testified to at trial (i.e. from a stationary position observing an approaching vehicle traveling at 45 mph), identification was impossible given the conditions (such as time of night, visibility, lunar phase, etc.) (EH

Transcripts pg 445-448) In short, the doctor testified that an accurate identification of this type would have been impossible at the speeds involved, environmental conditions, and visibility that Juan Brown testified to.

Interestingly enough, and as an aside, Juan Brown's ability to identify the occupants actually *improved* over time to include characteristics of the previously unidentifiable occupant of the backseat. In his statement given 6/10/91 Brown stated that he saw a "silhouette" of a person in the backseat. In defendant's trial (3/10-12/92) the "silhouette" became a "light-skinned black male". In Co-Defendant Johnson's trial (5/19-27/92) this "silhouette" was again improved to a "light skinned black male with short hair". Finally in Co-defendant Hartley's trial (8/26/93) the "silhouette" had evolved into a "light skinned black male with short hair and a smaller build." (See ROA 594-609 for further clarification, trial testimony citations, and further inconsistencies) Clearly this evolution of testimony could only be the result of outright embellishment or coaching by the prosecution, unless Mr. Brown somehow defies human physiology and his memory improves with time.

Dr. Boehme, an expert in the field of identification and optics, testified that he was unable to identify the two passengers occupying the driver's and front passenger's seats of a vehicle traveling at 45 mph past him

from a *stationary position* in the exact same location, and under the same conditions present April 22, 1991. Juan Brown stated that he could not only clearly identify the occupants of the front seats that night, but also clearly identify characteristics of the individual occupying the back seat of the vehicle while the two vehicles *closed at a rate of 85-90 miles per hour.*

Juan Brown claimed to know both Gino Mayhew and Ronnie Ferrell at defendant's trial, however Doctor Boehme knew the identity of the occupants of the vehicle in the recreation, and testified that he could not identify them regardless of this previous knowledge. (EH transcript pg. 467) While it is admitted that the re-creation of the identification could not possibly mirror in perfection every minute detail of the original identification, the greater conditions were planned and accounted for in order to match as close as possible.

All of this information would have been available and usable by trial counsel, however as stated by Appellant in the reply to state's closing argument:

> "The state asserts that counsel 'vigorously attacked Juan Brown's credibility'. Shockingly, defense counsel's cross examination of Mr. Brown accounts for 3 ½ pages in the ROA (trial transcripts), taking roughly 3 minutes of the total time at trial at most. No questions pertaining to the identity of the vehicles occupants, visibility at the time, conditions on that particular night, or the window tinting of Mayhew's vehicle were asked. Counsel however did find it necessary to ask Mr.

> Brown if he had played basketball lately, had anything to eat, and if he had a coke that night. (See TT pgs. 654-657)" (ROA pg. 633)

Clearly this cannot constitute a "vigorous attack" or effective impeachment of a Category A eyewitness. The previous sections are, as mentioned previously, only one example of the impeachment material pertaining to this specific witness available to trial counsel. Counsel for defendant at trial instead however chose to address none of the important characteristics of Brown's testimony in his cross examination.

In this deposition for the co-defendant (as shown in the power point presentation ROA pg. 604) the defendant's story changed from what was presented at trial. Instead of passing the vehicle at a closing vector of roughly 85-90 mph, giving him a second or two at best in which to view the occupants of the vehicle, in the deposition for the Hartley case he claims to have seen the vehicle *turning onto* Moncrief from the Washington heights apartment complex. This is significant as it would have given Brown a much longer opportunity in which to view, recognize, and identify the occupants, including the "silhouette" in the back seat (alleged to be Hartley).

This evolution of testimony, as demonstrated herein previously, is reflective of what occurred for nearly every one of the state's main witnesses over the course of their testimony, as demonstrated in each power point

presented at the evidentiary hearing. Testimony became more distinctive, more detailed, and recollection miraculously improved over time.

As clearly demonstrated by the defendant in the 3.850 (ROA pgs. 73-77), at the evidentiary hearing in the power point presentations (ROA pgs. 580-625), in the written closing arguments (ROA pgs. 365-371), and finally in the reply to state's written closing argument (ROA pgs. 632-634), analysis and examples of what could have been presented by effective trial counsel as impeachment material against the three main state witnesses has been a part of the record from the outset and has been explored in depth with minute detail.

The court's conclusion that Appellant did not present any specific instances of Ineffective Assistance of Counsel during the Guilt phase is contrary to the record in this case, and is clearly based on an erroneous factual analysis, requiring reversal of Appellant's convictions and sentences, and a new trial granted. Said conduct by Mr. Nichols violated both prongs in *Strickland*, and it cannot be stated that after such a demonstration by Appellant as to the lack of veracity of the state's witnesses that it's confidence of the outcome would not be undermined had Mr. Nichols simply done his job.

E. THE TRIAL COURT ERRED IN FINDING THAT BOTH PRONGS IN STRICKLAND WERE NOT VIOLATED, AS

DEFENSE COUNSEL WAS INEFFECTIVE AND DEFICIENT IN HIS REPRESENTATION OF APPELLANT BECAUSE HE FAILED TO OBJECT TO THE PROSECUTION'S CONTINOUS MISCONDUCT, WHICH CONSTITUTED FUNDAMENTAL ERROR, AND PREJUDICED APPELLANT

In the instant case, Mr. Nichols ineffective assistance in failing to object to the prosecutor's gross misconduct throughout Defendant's trial made the proceedings presumptively unreliable and unfair, thereby prejudicing Appellant. This gross misconduct was so egregious that it cannot be said that fundamental error did not occur. Therefore, a new trial should be granted because a verdict of guilty would not have been obtained without the assistance of the alleged error. *See* *Bonifay v.* State, 680 So. 2d 413 (Fla. 1996)

Because the said arguments made by the prosecution in the instant case virtually mirror the arguments made in Florida Supreme Court's rulings in *Urbin v. State*, 714 So.2d 1178 (Fla. 1998), and *Brooks v. State*, 762 So. 2d 879 (Fla. 2000) that were condemned as "overzealous advocacy, egregious, impermissible, and improper" (to list a few), said arguments and comments were fundamental error, and Mr. Nichols failure to object to same was a gross misrepresentation of his client, as the jury was allowed to hear arguments containing Golden Rule violations, witness bolstering, and a host of improper comments on the evidence.

In an effort to shorten the instant brief, the arguments for the forthcoming sections of this sub-claim have been raised in the accompanying Petition for Writ of Habeas Corpus. As such, Appellant will only give citations to the record as to where Mr. Nichols failed to object to prosecutorial misconduct by the State Attorney. Appellant would ask the court to refer to Claim One of the Habeas petition (pg. 7-9 and footnotes) for the legal analysis and argument accompanying the forthcoming issues raised in this sub-claim (E).

Appellant requests his Court reverse and remand Appellant's case for a new guilt phase trial, as the trial court erred in denying Appellant's forthcoming claims that both prongs in *Strickland* were violated by Mr. Nichols not objecting to the numerous instances of prosecutor misconduct, and said conduct by the prosecution was fundamental error.

(1) Mr. Nichols was ineffective in failing to object to the State's Committed 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.

The trial court erred in denying this claim based on the courts opinion that these statements do not rise to the level that the FSC found objectionable in *Urbin* and *Brooks*. This ruling is in clear contrast to both the record for this case and Florida Case law. Mr. Nichols was ineffective

and deficient in his representation of appellant at trial for failing to object to said comments by the prosecution. This deficiency served to undermine confidence in the outcome of the trial.

The prosecution used the word execute or a variation of it 11 times during the guilt phase and 13 times in the penalty phase closing arguments of appellants trial while describing the murder. (TT 842-872) (TT 985-1002). These comments mirror the comments made in *Urbin* and *Brooks.*

(2) Mr. Nichols was deficient in failing to object to the State's Committed 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.

The trial court erred in denying this claim based on the courts opinion that the prosecutions comments were fair and did not exhort the jury to convict for other reasons that overall guilt. This ruling is contrary to both the facts and case law as it is clear from the record that Mr. Nichols was both ineffective and deficient in his representation of appellant at trial for failing to object to said comments by the prosecution, and that said deficiency undermined confidence in the outcome of trial.

The prosecution accused the Defendant of being a liar and made character attacks against the defendant on five different occasions during the Guilt Phase closing arguments. (TT 870-71, 877)

These statements are nearly identical to the same statements made by this prosecutor in both *Urbin* and *Brooks* which were condemned by the FSC. See also 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.)*

(3) Mr. Nichols was deficient in failing to object to the State's Prosecutorial Misconduct when it violated the "Golden Rule" by creating an imaginary script to explain the events of Gino's murder.

The trial court erred in denying this claim based on the courts opinion that the prosecutions comments did not rise to the level of a Golden Rule violation. This ruling is contrary to both the facts and case law as it is clear from the record that Mr. Nichols was both ineffective and deficient in his representation of appellant at trial for failing to object to these comments by the prosecution, and that said deficiency undermined confidence in the outcome of trial.

In *Urbin v. State* the Florida Supreme Court condemned Mr. Bateh'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).

The prosecution repeatedly committed this error in the instant case during both phases of appellant's trial, almost mirroring *Urbin* and *Brooks* arguments, and would ask this court to either remand this claim to the trial court with an order granting appellant a new trial. (See TT pgs. 842, 854, 997-1,000).

(4) Mr. Nichols was deficient in failing to object to the State's committed 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.

The trial court chose not to reach the merits of this claim as it granted a new penalty phase, However, Appellant re-alleges and re-incorporates his previous argument for the purpose of preserving this claim.

(5) Mr. Nichols was deficient in failing to object to the State's committed Prosecutorial Conduct my misstating the law and mitigation.

The trial court chose not to reach the merits of this claim as it granted a new penalty phase, However, Appellant re-alleges and reincorporates his previous argument for the purpose of preserving this claim.

(6) Mr. Nichols was deficient in failing to object to the State's committed Prosecutorial Misconduct by arguing the Death Penalty was not sought in all cases, but Defendant's case "Cried out Loud for it."

The trial court chose not to reach the merits of this claim as it granted a new penalty phase, However, Appellant re-alleges and reincorporates his previous argument for the purpose of preserving this claim.

(7) Mr. Nichols was deficient in failing to object to the State's committed Prosecutorial Misconduct by repeatedly trying to vouch for witness credibility.

The trial court erred in denying this claim based on the courts opinion that the prosecutions comments were fair and did not exhort the jury to convict for other reasons that overall guilt. This ruling is contrary to both the facts and case law as it is clear from the record that Mr. Nichols was both ineffective and deficient in his representation of appellant at trial for failing to object to these comments by the prosecution, and that said deficiency undermined confidence in the outcome of trial.

The prosecution attempted to bolster the credibility of nearly every state witness in guilt stage of appellant's trial. In the guilt phase this included: Gene Felton (TT pg. 851), Sidney Jones (TT pgs. 852-853, 856-859) Juan Brown (TT pgs. 859, 861-62), Robert Williams (TT 862, 865-66, 873, 876), and a blanket statement involving all witnesses (TT 877-878).

The trial court avers that Appellant did not provide specific citations to the record to support his argument that the State bolstered witness credibility in this case. (ROA pg 677) While noting that Appellant did cite to a large section of trial transcripts in the guilt phase, the court found this to be insufficiently pled. Appellant would note that in addition to the pages cited by the court on ROA pg 29, this argument appears in greater detail in the ROA at pages 82, and 447 footnote 17.

The aforementioned facts demonstrated that the trial court erred in denying the instant claim that both prongs of *Strickland* were not violated as a result of Mr. Nichols failure to object to said state improper closing argument. Wherefore, Appellant requests this court reverse and remand Appellant's case for a new trial.

(8) Mr. Nichols was deficient in failing to object to the State's committed Prosecutorial Misconduct by Arguing for the "Same Mercy."

The trial court chose not to reach the merits of this claim as it granted a new penalty phase, However, Appellant re-alleges and reincorporates his previous argument for the purpose of preserving this claim.

(9) Mr. Nichols was deficient in his performance by failing to object The State committed Prosecutorial Misconduct by arguing personal beliefs about evidence, even arguing for evidence that did not exist to gain a conviction.

The trial court erred in denying this claim based on the courts opinion that the prosecutions comments were fair and did not exhort the jury to convict for other reasons that overall guilt. This ruling is contrary to both the facts and case law as it is clear from the record that Mr. Nichols was both ineffective and deficient in his representation of appellant at trial for failing to object to these comments by the prosecution, and that said deficiency undermined confidence in the outcome of trial.

The prosecution made several comments on evidence not introduced at trial, including: 1) The "gold chain" that Robert Williams stated appellant told him that he took from Mayhew, but was never introduced at trial. (TT pg. 840) 2) Sydney Jones' statement that he saw that the gun used by Hartley didn't have a "cylinder" (attempting to corroborate William's statement that the gun had a clip, however no gun was introduced at trial) (TT pg. 854), and 3) The argument to the jury as to why drugs were supposedly let at the scene. (TT pg. 865)

In conclusion, the preceding instances of Mr. Nichols' failure to object to the plethora of the prosecutor's improper closing arguments (in the guilt phase and the penalty phase), viewed separately or together, are clear instances of ineffectiveness of Mr. Nichols representation of Mr. Ferrell. Furthermore, the holdings of *Urbin* and *Brooks*, together with the preceding

60 years of case law regarding prosecutorial misconduct, show that Mr. Ferrell was severely prejudiced by Mr. Nichols failure to object to ongoing and grossly improper arguments made by the prosecution.

F. DEFENSE COUNSEL WAS INEFFECTIVE AND DEFICIENT IN HIS REPRESENTATION BECAUSE COUNSEL CONDUCTED AN INADEQUATE VOIR DIRE. APPELLANT WAS PREJUDICED AS THE RESULT OF JURORS BEING ALLOWED TO BE STRUCK FROM THE JURY POOL WHEN THEY COULD HAVE BEEN REHABILITATED

The trial court erred in denying this claim based on the courts opinion that Mr. Nichols voir dire was thorough and sufficient, that the striking of 12 jurors by the state for their opposition to the death penalty had no bearing on appellant's trial, and that voir dire was not rushed by Mr. Nichols. This ruling is contrary to both the facts and case law as it is clear from the record that Mr. Nichols was both ineffective and deficient in his representation of appellant at trial for failing to object to these comments by the prosecution, and that said deficiency undermined confidence in the outcome of trial.

Trial counsel may be held to be ineffective under a 3.850 motion by failing to object to, or properly question veniremen during voir dire. *Monson v. State*, 750 So. 2d 2000 (Fla. 1st DCA 2000). Counsel can be ineffective in failing to object to a court appointed time limit of voir dire. *Black v. State*, 771 So. 2d 583 (Fla. 4th DCA 2000). Also, failure to provide

the Defendant "a panel of impartial, indifferent jurors…violates even the minimal standards of due process. *Morgan v. Illinois*," 504 U.S. 719 (1992).

In the instant case, Defendant's counsel was deficient in his performance during the jury voir dire. Counsel's entire questioning of prospective jurors is contained in only eighteen pages of the transcripts. (TT pgs. 377-94). The questioning was miniscule and wholly inadequate when compared to the State, which was contained in one-hundred forty-one pages of the transcripts (TT pgs. 235-276), lasting for approximately six hours. (TT pgs. 415). Moreover, during questioning of prospective jurors, counsel asked a total of five questions.

Counsel continued his deficiency by allowing the State to remove twelve venire persons for cause without ever individually questioning them. (R. p. 394-395) Counsel did not try to rehabilitate any venire person who expressed hesitation or opposition to the death penalty.

It also should be noted that defense counsel failed to strike any prospective jurors for cause, despite a prospective juror stating that he believed that a sentence of life imprisonment should be replaced with a death sentence and that life imprisonment should never be an option. (TT pg. 307)

Continuing, defense counsel was ineffective by not objecting to the Courts instruction to prospective jurors about the position Hebrew and Christian scholars have taken on capital punishment. This instruction regarding religious aspects and the law was raised on Defendant's direct appeal, but the Appeals court held that there was no remedy because defense counsel did not object to the instruction at trial and said instruction was not fundamental error. *See* *Ferrell v. State*, 686 So. 2d 1328. However, the Court did state that "without question, trial judges and attorneys should refrain from discussing religious philosophy in court proceedings." *Id.*

Lastly, counsel was ineffective in not objecting to the court's insistence of hurrying and rushing the time needed to conduct jury voir dire. (CITE) Defense counsel's actions show that he was more concerned about being late than picking an impartial jury for the Defendant, who was facing the death penalty. Compared with the other deficiencies in counsel's conduct, it can be said that Defendant was prejudiced by his counsel's ineffectiveness during voir dire within the meaning of *Strickland.*

G. DEFENSE COUNSEL WAS INEFFECTIVE AND DEFICIENT IN HIS REPRESENTATION BY ALLOWING AND/OR RECOMMENDING TO APPELLANT NOT TO PRESENT ANY EVIDENCE OR WITNESSES IN EITHER THE GUILT OR PENALTY PHASE(S) OF THE TRIAL IN ORDER FOR COUNSEL TO HAVE TWO CLOSING ARGUMENTS. COUNSEL DID NOT CONDUCT ANY INVESTIGATION OR RESEARCH POSSIBLE DEFENSES, WITNESSES,

MITIGATION EVIDENCE OR EXCULPATORY EVIDENCE. COUNSEL'S ACTIONS CANNOT CONSTITUTE TRIAL STRATEGY NOR CAN DEFENDANT'S ALLEGED WAIVER OF PRESENTATION OF EVIDENCE IN THE GUILT AND PENALTY PHASE BE CONSIDERED VOLUNTARY. AS A RESULT OF COUNSEL'S INEFFECTIVENESS, APPELLANT WAS PREJUDICED.

a. Trial counsel's actions in waiving the presentation of witness and/or testimony in the guilt phase of Defendant's trial cannot be considered trial strategy.

The trial court erred in denying this claim based on the courts opinion that appellant's decision to waive witness testimony in the guilt phase was both a knowing and voluntary waiver. This ruling is contrary to both the facts and case law as it is clear from the record that Mr. Nichols was both ineffective and deficient in his representation of appellant at trial, and that said deficiency undermined confidence in the outcome of trial.

As previously mentioned, at the close of the State's case in chief Defendant's counsel rested without putting on any evidence or testimony in support of Defendant's innocence. In support of counsel's actions, the following conversation took place in front of the judge.

> The Court: Do you have any announcement so far as his [Defendant] testifying?
>
> Mr. Nichols: Your Honor, and Mr. Ferrell, listen to this, I have spoken with Mr. Ferrell about his right to call witnesses that we've previously named, and I've explained to him the effect of those witnesses, my opinion as to their effect on the outcome of this trial and also their effect procedural as to whether or not we get opening and closing

argument, I've explained to him that should we call any witness other than himself than the State in closing would go first and last and we would be in the middle, I have explained to him that he has the right to take the stand himself and should he do that without calling any other witness we would still have opening and closing argument, that would not lose the right to closing merely of his taking the stand, I have also explained to him what I would expect by way of cross examination, the effect on the jury should he take the stand and it's my understanding at the present time that it's the decision the Defendant to authorize me to rest without calling any witnesses and without calling him as a witness in his own behalf, is that right , Mr. Ferrell?

The Defendant: Yeah.

The Court: Well, you know, Mr. Ferrell, you have heard those things that Mr. Nichols has just stated, is that your decision?

The Defendant: Yes.

The Court: The decision to rest your case?

The Defendant: Yes.

The Court: After having conferred with your attorney, Mr. Nichols, he's given you the benefit of his opinion, he's told you what questions will be asked if you were to take the witness stand or testify, and that's your decision, close your case without testifying or without putting any witnesses, is that correct?

The Defendant: Yes, sir.

It is clear by the language in the trial transcripts that it was Mr. Nichols strategy to convince the Defendant not to present any evidence or testimony in favor of allowing his counsel to preserve two closing arguments. However, this "tactic" by defense counsel cannot be considered

strategy, and nor can Defendant so-called waiver of evidence be considered knowingly and voluntarily.

As previously mentioned, before making the decision to forego any evidence in the guilt phase to strengthen the Defendant's innocence to the charges, counsel did no investigation or preparation for trial whatsoever. He had not deposed the State's main witnesses, he had not shown up for the vast majority of the depositions that were taken, he failed to read the newspapers or television broadcasts which completely negated the State's contention that its main witnesses were credible, he failed to read the provided discovery found in sworn statements and depositions that proved another person confessed to the robbery the State was claiming Defendant committed to prove motive, he missed numerous pre-trials, filed only bare-bones motions, did not interview witnesses that Defendant himself provided which proved Defendant had an alibi, he ignored Defendant's requests to come see him in jail, he ignored family and friends who called and stated they had valuable exculpatory evidence to offer, failed to properly impeach state witnesses, failed to look at the State witnesses' arrest and booking reports which contained evidence that State witnesses were previously convicted of perjury and/or admitted being police informants, he failed to read the State witnesses' statements contained in either affidavits, sworn statements, or

depositions, all of which were riddled with contradictory statements. Unfortunately, the list of counsel's inactions is not exhaustive.

Doing nothing is not an acceptable trial strategy. *Cole v. State*, 700 So. 2d 33 (Fla. 5th DCA 1997) Furthermore, when there is little or no investigation, the court may conclude that the omission was a substantial oversight, rather than a legitimate trial strategy. *Rose v. State*, 675 So. 2d 572 (Fla. 1996)

Based on the aforementioned facts and case law, the court's ruling that Appellant knowingly and voluntarily waived his right to present evidence was in error and contrary to precedent.

b. Defense counsel was ineffective in not investigating or preparing for the penalty phase of Defendant's trial.

The trial court granted this argument within the claim.

c. Any waiver of presentation of evidence that Defendant may have made in either the guilt or penalty phases of the trial was not made knowingly, intelligently, and voluntarily.

The trial court granted this argument within the claim.

H. DEFENSE COUNSEL WAS INEFFECTIVE AND DEFICIENT IN HIS REPRESENTATION BY ARGUING A DEFENSE BASED ON PROPOSED WITNESS TESTIMONY IN OPENING STATEMENTS, THEN PRESENTING NO SUCH WITNESS TESTIMONY OR EVIDENCE OF THE DEFENSE THROUGHOUT THE TRIAL. AS A RESULT OF SAID INEFFECTIVENESS, THE JURY NEVER HEARD SAID DEFENSE, ALLOWING THE PROSECUTION TO COMMENT ON THE FACT THAT MR. NICHOLS SAID HE WOULD

PRESENT A DEFENSE AND DID NOT, THEREBY PREJUDCING APPELLANT

The trial court erred in denying this claim based on the courts opinion that trial counsel could not present an alibi defense where none existed. This ruling is contrary to both the facts and case law as it is clear from the record that Mr. Nichols was both ineffective and deficient in his representation of appellant at trial, and that said deficiency undermined confidence in the outcome of trial.

Appellant re-alleges and reincorporates the argument as presented in the amended 3.851 motion.

I. DEFENSE COUNSEL WAS INEFFECTIVE AND DEFIECIENT IN HIS REPRESENTATION OF DEFENDANT BY FAILING TO OBJECT TO JURY INSTRUCTIONS REGARDING (1) IMPROPER AGGRAVATORS (2) BURDEN SHIFTING TO DEFENDANT TO PROVE DEATH IS NOT APPROPRIATE

Appellant re-alleges and reincorporates the argument contained in his 3.851 Motion (ROA pgs. 99-103)

J. DEFENSE COUNSEL WAS INEFFECTIVE AND DEFICIENT IN HIS REPRESENTATION OF DEFENDANT BY FAILING TO ARGUE INSUFFICIENCY OF THE EVIDENCE IN EITHER A JUDGMENT OF AQUITTAL OR A MOTION FOR NEW TRIAL

The trial court erred in denying this claim based on the courts statement that because the FSC found that there was sufficient evidence to convict appellant at trial that the motion would have been denied. This ruling

is contrary to both the facts and case law as it is clear from the record that Mr. Nichols was both ineffective and deficient in his representation of appellant at trial, and that said deficiency undermined confidence in the outcome of trial.

K. APPELLANT'S WAIVER OF ALL PRETRIAL HEARINGS WAS NOT KNOWINGLY, INTELLEGENTLY, AND VOLUNTARILY WAIVED. DEFENSE COUNSEL WAS INEFFECTIVE IN NOT INFORMING OR ASKING DEFENDANT FOR HIS APPROVAL BEFORE WAIVING HIS PRESENCE, AND AS A RESULT APPELLANT WAS PREJUDICED BY NOT BEING ALLOWING TO ATTEND PRETRIAL PROCEEDINGS

The trial court erred in denying this claim based on the courts opinion that this claim is not supported by the record and that appellant has failed to identify any "critical pre-trial" stage at which he was involuntarily absent. (ROA pg 689) This ruling is contrary to both the facts and case law as it is clear from the record that Mr. Nichols was both ineffective and deficient in his representation of appellant at trial, and that said deficiency undermined confidence in the outcome of trial.

It should be noted that trial counsel waived Defendant's appearance on June 26, 1991 (TT pg. 18) for "all dates where evidence wasn't presented". The court's order however failed to cite further on TT pg. 18 where counsel states, *"I don't see that there will be any occasion for the*

defendant to be present except trial. I don't think there are going to be any motions to suppress or anything else…I don't think he needs to be here."

This statement evidences a number of "points of truth". Trial counsel 1) waived defendant's appearance at pre-trial hearings 19 days after being appointed without consulting defendant; 2) stated on the record that he didn't see any occasion to file any motions to suppress in a first degree murder case 19 days after having been appointed; and 3) Trial counsel felt confident enough in his initial review of a capital murder case to waive the defendant's presence at pre-trial 19 days after having been appointed.

Following the record from June 26, 1991, defendant (or counsel, or both) would have missed the following pre-trial hearings/events:

1) July 18, 1991 (TT pgs. 21-27). Neither defendant nor his trial counsel were present on this date. At this hearing counsel for Co-Defendant Hartley informs the court that the State has not provided anything other than names for witnesses he intends to use, no police supplement reports, no sworn statements, etc. in the way of discovery. This then means that counsel for defendant both a) waived the right of defendant to attend pre-trial hearings twenty two days prior without having state's discovery; and b) stated on the record twenty two days prior that he didn't see any reason that

he would file motions to suppress without having been provided as much as a police report, sworn statement, or anything of an evidentiary nature.

2) October 11, 1991, William's Rule Hearing. Neither defendant, *nor trial counsel* attended the hearing in which motions of Limine pertaining to Williams Rule were heard. Trial counsel for Codefendant Hartley argued at length to keep out testimony pertaining to alleged previous robberies committed by Hartley. In defendant's case, Counsel did not only not file his own motions of Limine on behalf of the defendant pertaining to the alleged "Saturday Robbing" of the victim, he failed to even attend a hearing where motions on the William's rule were heard and argued at length after waiving defendant's presence. (TT pgs. 69-110). This was blatantly ineffective representation and prejudicial to Mr. Ferrell.

3) November 12, 1991, Original Trial Date. (TT pgs. 128-131) Defendant was brought from Jail, counsel for defendant did not attend. Defendant was in courtroom on the date set for trial without counsel. Counsel did not file a motion to continue previously, the right to speedy trial had not been waived, and the court stated:

> "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 to select a jury on the Ronnie Ferrell case. None of the attorneys, Mr. Bateh and Mr. Berry have not heard from him, they've stated on the record that they've not heard from him today. My secretary has called

> his office and all she got was the answering machine. So I have no recourse on the case because the defendant is charged with murder in the first degree but to continue the case, toll the running of speedy trial for the reasons just stated, there is no one her to represent the defendant."

While Appellant was brought to this hearing, counsel failed to attend Voir Dire after waiving defendant's right to attend pre-trial hearings.

In conjunction with this argument it must be noted that since trial counsel failed to file any motions (with the exception of 9 motions pertaining to the unconstitutionality of the death penalty 4 days before defendant's trial), that there were very few "critical" pre-trial hearings (with the exception of the previous listed hearings) which defendant could have attended as counsel himself did not attend over half of the pre-trial hearings, presented no argument to limit or challenge any of the state's testimonial evidence at any time prior to trial, and made critical decisions on the record about Appellant's defense prior to even reviewing the majority of the evidence.

Given that counsel made a uniformed waiver of Appellant's right to attend pre-trial hearings, as clearly evidenced by the record, the trial courts ruling on this claim is based on erroneous factual findings. Appellant, in addition to his appointed trial counsel, was not in attendance at a number of critical pre-trial hearings. Wherefore, the trial court erred in denying this

claim, and Appellant's convictions and sentences should be reversed, and a new trial granted.

L. DEFENDANT'S COUNSEL WAS DEFICIENT IN HIS REPRESENTATION OF APPELLANT BECAUSE HE FAILED TO FILE MOTION FOR A CHANGE OF VENUE, AS THE DEFENDANT'S CASE WAS WIDLEY PUBLICIZED

Appellant re-alleges and reincorporates the argument as presented in the initial 3.851 motion and asks this court for a thorough review and analysis of the case law and argument presented. (ROA pg. 104-110)

M. THE CULMATIVE EFFECT OF COUNSEL'S NUMEROUS ERRORS AND DEFICIENCIES PREJUDICED DEFENDANT

Appellant re-alleges and reincorporates the argument as presented in the initial 3.851 motion and asks this court for a thorough review and analysis of the case law and argument presented. (ROA pg. 110)

CLAIM TWO:

THE STATE PRESENTED KNOWINGLY FALSE MATERIAL INFORMATION, WHICH PREJUDICED THE DEFEDANT AND THEREBY WAS A VIOLATION OF GIGILIO V. UNITED STATES.

The trial court erred in denying this claim based on the courts opinion that appellant has failed to prove any of the three *Giglio* prongs pertaining to all three subsections of this claim (ROA pg 692-698) This ruling is contrary to both the facts and case law.

The State knowingly presented false testimony in violation of *Giglio v. United States* by continually misrepresenting to the jury knowingly false information to support the credibility of the State's main witness and strengthen his theory of Defendant's guilt. This false representation was material, for the jury was led to believe information about numerous issues regarding Defendant's case that simply were not true.

To establish a claim under *Giglio v. United States*, it must be shown that; (1) the testimony given at trial was false, (2) the prosecutor knew the testimony was false, and (3) the statement was material. 92 S. Ct. 763 (1972). Under *Giglio*, a statement is material if "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 96 S. Ct. 2392 (1976). The thrust of *Giglio* and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, and that the prosecutor not fraudulently conceal such facts from the jury." *Id*. (quoting *Smith v. Kemp*, 715 F. 2d 1459, 1467 (11th Cir.), 464 U.S. 1003, 104 S. Ct. 510, 78 L. Ed. 2d 2d 699 (1983). Applying these elements**,** the evidence must be considered in the context of the entire record. *See State v. Riechmann*, 777 So. 2d 342 (Fla. 2000). Lastly, as the beneficiary of the *Giglio* violation, the State bears the burden to prove that the presentation of false testimony at trial was

harmless beyond a reasonable doubt. *Guzman v. State*, 2003 Fla. LEXIS 1993 (Fla. 2003).

The trial court ruled that the Appellant failed to meet the criteria necessary to establish a *Giglio* violation as defendant 1) failed to meet the first and second prongs of *Giglio*, by showing that Robert Williams testimony was both false and that the prosecutor had knowledge that it was false; 2) failed to establish that the prosecutor knowingly presented false argument regarding the amount of time Robert Williams would receive upon sentencing in exchange for testimony against defendant; and 3) failed to establish that the prosecution elicited false testimony from Robert Williams and Gene Felton regarding the April 20, 1991 robbery of Gino Mayhew.

It is Appellant's contention however that the State committed prosecutorial misconduct by knowingly presenting false information to the jury. Aware of defense counsel's lack of investigation and preparation, it is Appellant's position that the State simply assumed defense counsel was unaware of the extent of media coverage Gino's death received. The State was thereby able to improperly and incorrectly convince the jury there were no news reports or articles published from which Robert Williams could have received his knowledge of Gino's death.

The following facts demonstrate the State's level of awareness that knowledge Robert Williams possessed came almost entirely from media coverage of the murder, not through a "jailhouse confession" from Defendant:

(1) The undersigned counsel is in receipt of the State Attorney's Files for this motion. Said files contained all of the Florida Times Union articles regarding the death of Gino Mayhew, with the last article containing Mr. Bateh's name. These articles initially appeared to the public on April 24th, 1991. Robert Williams did not proclaim his knowledge of the case until May 28th, over a month after public release of this information.

(2) Lead homicide detective William Bolena stated in deposition (which Mr. Bateh attended) that he had in his possession all of the media articles, and conducted a review of the material to establish what could be known had someone read these. (See Bolena Deposition at pg. 111) For the Lead Detective to state that he was aware of the content of the articles and had reviewed them for the purpose of catching snitches, yet somehow overlooking the entirety of Robert William's *verbatim* testimony does not add up. It would be even more inconceivable that the prosecution somehow missed these headlines as well. It must be noted as well that throughout the investigation of this case that Detective Bolena and State Attorney George

Bateh were in very close contact, and both attended the many sworn statements taken in and for the cases connected to this incident. There is literally no possible way that one, let alone both, of these men would have mysteriously "forgot" that many witnesses discussed the coverage of this case in media. Nor is it possible that both of them simply overlooked the fact that everything that Williams said he heard from the defendant could have came from the media sources. It just is not conceivable given the depth of this investigation by the state.

(3) At the evidentiary hearing in and for Appellant's case, the testimony of officer Tara Wilds was presented. Ms. Wilds (See EH transcript pgs. 217-222) testified to the fact that during the time of Robert William's incarceration prior to testifying against defendant inmates had complete access to newspapers and television.

(3) The State conducted numerous depositions in this case that demonstrate awareness of the extent of media coverage which Robert Williams could have based the foundation of his testimony upon. [See deposition of Ronald Carn, 1/8/92, in which Ronald Carn states, ["*I had seen it on the news and heard it, yes… I seen Gino Mayhew, the little… Blazer he was driving.* To which Mr. Bateh asks, "*Do you get to see the TV every day they're in the jail*?" Ronald Carn's response, "*Yes, sir, everyone do, if they*

want to look at it." Further questioning by Mr. Bateh involves "*When did you first learn that Duck or any of those people were involved with the shooting of Gino Mayhew*?" Ronald Carn replies, "*I first learned of that when I seen his name in the paper and things.*" Mr. Bateh, "*So you also had the newspaper that you could look at while you were in the jail*?" Ronald Carn's response, "*Yes, sir. Everybody get the paper every day in the cells*."] Ronald Carn was an inmate in the Duval County Jail, the same facility as Robert Williams.

See also Deposition of Deatry Sharp, 2/13/92, in which Deatry Sharp made the following statements about Gino's death, immediately following his admittance of partaking in the 4/20/91 robbery to Mr. Bateh: "*Everybody – when Gino got killed, everybody knew… everybody knew…Everybody knew about that. It wasn't no secret or nothing. It was on the news, too.*"

See Deposition of Rene Jones, 2/14/92, in which Mr. Bateh asks the following: "*Now, do you know where Ferrell was on the night of – do you know when Gino Mayhew was killed*?" Rene Jones responds, "*From what I heard on the news… That a young black male was shot in the back of the head and was found in his vehicle*." Mr. Bateh further asks, "*The story of the Gino Mayhew murder was on the news for a couple of weeks, wasn't it, that was a big news story, wasn't it*?"

See Deposition of Towanna Ferrell, 2/14/92, when Towanna states, "*from seeing it – from seeing the – seeing the – Mayhew was on – seeing it on TV all the time, that's why.*" Mr. Bateh then asks her, "*The news broadcasts about the Mayhew murder were on for several nights weren't they…. That was a big news story, is that right*?"

In sum, a total of fifteen depositions were conducted by the State which mention media coverage of Gino Mayhew's death. Of those cited above, three occurred only a month before Defendant's trial, the exception being Ronald Carn's deposition occurring two months before trial. The questions posed by Mr. Bateh to these witnesses clearly demonstrate his knowledge of the widespread media coverage, and it is impossible to believe that he somehow forgot all of this in the span of a month before trial (it is important to note that the State vehemently, consistently, and repeatedly argued to the jury in the closing argument of the guilt phase that Robert Williams's testimony could not have come from the news media).

In conjunction with the many depositions and sworn statements mentioning the media, his comments on television news coverage prove that Mr. Bateh knew Robert Williams had access to all of this information. Robert Williams was not in jail when the first media reports were issued of Gino's death, so he certainly had access to it then. Even if Robert Williams

was in jail, the deposition given by Ronald Carn and the testimony of Officer Wilds demonstrates that Robert Williams and every other inmate in the Duval County Jail could have received this information with little difficulty.

It must be mentioned that the State also bolstered its main witnesses' credibility by telling the jury that Robert Williams will be in prison for approximately ten years (TT pg. 862) The State told that jury that, "I would submit to you that he has every incentive in the world, he has ten years worth of incentives, of reasons to tell the truth." (TT pg. 862) Additionally, the State argued:

> "I would submit to you that Robert Williams has been very candid and has been very truthful. You saw him testify from that stand, you watched the way he testified and I would submit to you that he was very straight forward, that he was very candid, that he was very truthful….I submit to you that he has every reason to come into this courtroom and tell the truth. He has ten years worth of reasons to be truthful to you." (TT pgs. 866-873).

These continuous statements regarding Robert Williams impending sentence was misleading. Robert Williams faced a *possibility* of *up* to ten years in prison in return for his testimony, not "ten years...to be truthful," as the State led the jury to believe. It must also be pointed out that Robert Williams received only 1 year and 6 months for his testimony, a sentence

not even close that which the State led the jury to believe Robert Williams was going to get.

The egregious conduct by the State during closing arguments cannot be considered harmless error. The jury was deceived into believing that Robert Williams was a credible witness because there was no possibility of his knowledge of the so-called "Points of Truth" being based on anything other than conversation with Defendant. The previously listed facts and arguments presented herein demonstrate this is simply not true. Due to defense counsel's deficient conduct and complete lack of investigation, the State was able to convince the jury that Robert Williams, a man convicted of numerous felonies and a man seeking a deal with the State for a reduced prison sentence, was a credible witness. The jury, due to the State's egregious conduct and Mr. Nichols deficiency as counsel, was left with no alternative but to believe the knowledge Robert Williams possessed could only have come from one source, Defendant's own mouth.

In conclusion, the State went to great lengths to convince the jury that Robert Williams was a credible witness. In doing so, the State knowingly presented false information regarding the media coverage of Gino Mayhew's death to obtain a conviction against Defendant. Besides being a violation of *Giglio v. United States*, this conduct is a direct violation of Fla. Rules of

Professional Conduct Rule 4.3.3 (a)(1) and Rule 4-8.4(c). *See also* The Florida Bar v. Schaub, 618 So.2d 202 (Fla.1993). [*Holding that the prosecutor's duty to search for the truth is completely abandoned when he or she engages in conduct designed to delude the fact-finder. The prosecutor's primary responsibility is to see that justice is done, not to win at all costs. Therefore, the prosecution's misconduct of deliberately presented misleading evidence denied Defendant a fair trial.*]

The State's misconduct did not end with the misrepresentation of evidence used to bolster the credibility of its main witness. Shortly before Defendant's trial, the prosecution attended a deposition of a person who willingly admitted being involved in the 4/20/91 robbery, and possessed a sworn statement from that person (Deatry Sharp) professing the same. The prosecution also attended the deposition of lead homicide detective William Bolena when he admitted Deatry Sharp's involvement. This issue has been previously discussed herein. In order to bolster his case and to obtain a conviction the prosecution knowingly elicited false testimony from Robert Williams and Gene Felton in violation of *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173 (1959); *See also* Ho Yin Wong, 359 So.2d 460 (3rd DCA 1978). In *Napue*, the U.S. Supreme Court held [*that if the record supported the allegation that the state refused to correct false testimony which bore upon*

the witness's credibility, this would constitute reversible error.] *Id*. In the instant case, the prosecution both knew Deatry Sharp confessed to partaking in the robbery, and knew that Jerrod Mills (who witnessed the robbery) named Deatry Sharp as one of the men who participated. However the prosecution buried these facts and argued Defendant's guilt based on the testimony of Gene Felton and Robert Williams, neither of who were *actually there*. Despite Deatry Sharp's confession and Jerrod Mills testimony, the prosecution allowed Robert Williams and Gene Felton to testify that Defendant was involved in the 4/20/91 robbery of Gino, without presenting both options.

The prosecution's purpose for eliciting this testimony was to establish a motive for Defendant's involvement in the subsequent kidnapping and murder of Gino. If the State did not have the testimony of Robert Williams and Gene Felton placing Defendant at the robbery, Defendant would have no reason to be a part of the kidnapping and murder of Gino. Refusing to correct this false testimony constitutes reversible error. *Id*. Finally, the only remaining witness the prosecution argued had knowledge of the 4/20/91 robbery was Lynwood Smith.

Lynwood Smith confessed that Gino told him he knew Duck and Kip were involved, but could not determine the third person. The prosecution

knew that the unknown person was Deatry Sharp, but argued before the jury that it was Defendant instead. Had the knowledge of Deatry Sharp's admittance to committing the robbery Defendant was accused of and extent of media coverage been known to the jury, there is a reasonable probability the outcome of trial would have been different. *See* Porterfield v. State, 472 So.2d 882 (1st DCA 1985) [*The principle that a state may knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon Defendant's life or liberty may depend*.]

The State's actions are precisely what the U.S. Supreme Court tried to prohibit when it decided *Giglio v. United States*. The State, and its lead investigator, had unfettered access to all of the media listing pertaining to Defendant's case, media information that included the same details of the murder that Robert Williams stated he received solely from the Defendant. The State, and its lead investigator, also had knowledge that someone other than Defendant committed the important previous robbery of the victim, the

same robbery that the State argued Defendant committed, thereby establishing a motive for Defendant to kill the victim.

However, these facts were buried and set aside. The State instead presented testimony and evidence that was in complete contrast to factual information. The jury participated in and ruled on a case without having the real facts and evidence presented. The false misrepresentations and testimony had a reasonable likelihood of affecting the jury's guilty verdict. Had the jury been aware that there existed an alternative way for Robert Williams to learn of the information of Gino's murder, and had the jury been aware that someone actually confessed to the previous robbery the Defendant was being accused of, it cannot be said with any sense of reasoning that the jury's verdict would have remained the same.

If the State's violation would have presented to the jury, the entire case would have been cast in a different light, which undermines the jury's eventual verdict. At the very minimum, had the testimony of Deatry Sharp and Jerrod Mills been presented to the jury, the jury's eventual decision may have been different. Therefore, a new trial should be granted. *See* Craig v. State, 685 So. 2d 1224 (Fla. 1996) [*Holding that, "since the prosecution did everything possible to convey to the jury that appellant's codefendant would never be released from prison, when in fact he was granted work-release,*

the prosecution violated its duty of impartiality and established rules of conduct by misleading the jury as to the co-defendant's pending sentence. Therefore, a Giglio violation had occurred because of the prosecutions game of declaring, "It's for me to know and you to find out."]

Wherefore, based of the aforementioned violations, Appellant requests this Court reverse and remand Appellant's case for a new trial.

CLAIM THREE:

THE STATE IMPROPERLY WITHELD MATERIAL EVIDENCE IN VIOLATION OF BRADY V. MARYLAND AND THEREFORE DENIED DEFENDANT OF HIS CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The trial court erred in denying this claim based on the courts opinion that appellant has failed to demonstrate any violations of Brady in and for any of the witnesses discussed in the 3.850 (ROA pg 698-703) This ruling is contrary to both the facts and case law.

The State is obligated to disclose evidence favorable to the accused that, if suppressed, would deprive the Defendant of a fair trial. To establish such a violation, a Defendant must prove three elements: (1) that the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching, (2) that evidence must have been

suppressed by the State, either willfully or inadvertently, and (3) prejudice must have ensued. *State v. Lewis*, 838 So. 2d 1102 (Fla. 2002)

To review whether prejudice has ensued, the question is not whether the Defendant would more likely than not have received a different verdict with the evidence, but rather the question is whether in its absence *received a fair trial, understood as a trial resulting in a verdict worthy of confidence*. *Id.* Further, a Defendant's failure to request favorable evidence does not leave the Government free of obligation. *Young v. State*, 739 So. 2d 553 (Fla. 1999).

A *Brady* claim might arise when: (1) previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured, (2) the Government failed to accede to a defense request for disclosure of some specific kind or exculpatory evidence, and (3) the Government failed to *volunteer exculpatory evidence never requested*, or requested in a general way. *Id.* The Florida Supreme Court disavows any difference between exculpatory and impeachment evidence for *Brady* purposes and abandons the distinction between the "specific-request" and "general or no request" situations. *Id.* *See also* *Rogers v.* State, 782 So. 2d 373 (Fla. 2001).

This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the governments behalf in the case, including the police. *Id.* It also means that the rule encompasses evidence "known only to police investigators and not to the prosecutor." *Rogers v. State*, 782 So. 2d 373 (Fla. 2001). But whether the prosecutor succeeds or fails in meeting this obligation, whether that is a failure to disclose is in good faith or bad faith, the prosecution's responsibility for failing to disclose known and favorable evidence rising to a material level of importance is inescapable. *Id.* Merely writing the names of the witnesses interviewed by the State does not comply with *Brady Id.*.

Lastly, in determining whether Defendant was prejudiced, the question is not whether the Defendant can demonstrate by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the Defendant's acquittal. Rather, the Defendant must show that the "favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 115 S. Ct. 1555 (1995)

In Defendant's case, the prosecution violated Fla. R. Crim. Pro. Rule 3.220 and *Brady v. Maryland* by failing to turn over exculpatory and impeachment information with respect to: (1) Police interviews and notes (if

any) with Joyce Worth and Natasha Brown and, (2) Police interviews, statements, or depositions of Bobby Brown.

The trial court held that the defendant did not establish a Brady violation as the defendant failed to: 1) put on any admissible evidence that any law enforcement officer or agent of the state made or possessed any notes of an interview with either Joyce Worth of Natasha Brown; 2) the evidence shows that the state did not withhold evidence of Bobby Brown from defense counsel; and 3) that the evidence shows that counsel was aware of Sidney Jones history as a CI for the Jacksonville Sheriff's Office.

To begin, the prosecution committed a *Brady* violation and violated Fla. R. Crim. Pro. 3.220(a)(1) when he did not disclose to the defense or list in the State's discovery the State investigator's interview with Joyce Worth and her daughter Natasha Brown. *See* Fla. R. Crim. Pro. Rule 3.220(a)(1) [*Holding that the prosecution shall disclose to defense counsel….the names and addresses of all persons known to the prosecutor that have information which may be relevant to the offense charged, and to any defense with respect thereto (a statement can mean a verbatim recital of an oral statement made by said person to an officer or agent of the State and recorded contemporaneously with the making of such oral statement)*].

These two women had learned that a person other than Defendant committed the murder of Gino.

Defense counsel could have established a concrete alibi using this exculpatory evidence. Witnesses say that Defendant this said other person strongly resembled each other. This information would have corroborated Defendant's repeated and unwavering contention that he is wrongfully accused, as well as other witness testimony stating that this other person, not Defendant, was involved in Gino's murder.

In sum, if defense counsel knew about said other person that Defendant was mistaken for, he would have had both exculpatory and impeachment evidence at his disposal that would have changed the outcome of the trial. Because of the virtual inactivity of Defendant's counsel, the State was allowed to have their witness's testimony appear un-contradicted and believable in the eyes of the jury. If the jury knew that another person other than Defendant admitted participating in Gino's murder, it would have cast serious doubt on the credibility of the State's witnesses. Additionally, the jury would have heard a rendition of the events leading to Gino's death that did not come from felons seeking deals, police informants, and repeat convicted felons.

There is a very real possibility that the outcome of the trial would be different had this evidence been produced. The evidence is material. It exculpates Defendant of this crime and proves his innocence. *See* Rogers v. State, 782 So. 2d 373 (Fla. 2001) [*Holding that evidence of another person committed the murder other than the Defendant is a bedrock Brady material of the sort upon which many court have relied in ordering new trials*].

Additionally, the State withheld a police interview and/or sworn statement that was taken from Bobby Brown. In his September 18th, 1991 deposition, of William Bolena stated that he had interviewed an individual named Bobby Brown. *Bolena Depo*, p. 15, 1991.

Withholding valuable impeachment and exculpatory evidence in the form(s) of police interviews and media attention is not harmless error. Another person confessed to the crime Defendant was accused of. Two unbiased witnesses heard him admit it. Robert Williams had the probability of ruining the State's case if impeached. He was seen in the eyes of the jury as a credible witnesses, when it is very plausible that his testimony came straight from the media. Robert Williams was the most prominent piece of evidence linking Defendant to the crime. The jury should have been aware his knowledge of the crime could have came from somewhere other than Defendant's mouth. Testimony existed that proved that Defendant was not

at the scene of the kidnapping of Gino at 11:00 p.m., showing that Defendant could not have committed this crime.

It should be noted that Sydney Jones was the only witness to provide information about Gino's death in a period of time that did not occur well after the public received widespread and detailed information about Gino's murder. Therefore, it must be considered that witnesses with extensive criminal histories seeking prison breaks paid attention to this well-published story. None of the State's witnesses came forth with their "knowledge" of the crime immediately. In fact, the media released information about the murders before all testimony came forth.

The murder of Gino Mayhew occurred on April 23rd, 1991. The State's witnesses came forward with there information on the following dates: (1) Robert Williams gave statements on 5/28/91, 5/29/91, and 5/30/91. It is important to note that each statement given by Robert Williams became more specific and detailed than the next, due either to increased coverage in the media or by outright coaching by the State. It is also important to note that the media had released a myriad of details regarding the murder before Robert Williams gave his statements, details that were strikingly similar to what Robert Williams provided in his statements. The Florida Times-Union had details and a storyline of the Mayhew murder on 4/24/91, 4/25/91,

4/26/91, 4/27/91, 5/03/91, 5/18/91, and 5/23/91. (ROA pgs. 177-197) (2) Juan Brown gave his first statement on 6/5/91.

Counsel at evidentiary hearing entered pay stubs detailing the number of times Sidney Jones was paid by the Jacksonville Sheriff's office in exchange for acting as a confidential informant, many of these receipts pre-dated the trial of defendant. The state made no effort to inform trial counsel that Jones had an extensive history of acting as a confidential informant in exchange for cash and/or leniency.

As a result of the aforementioned *Brady* violations, Defendant was prejudiced. This information would cast serious doubt in the jury's mind as to the credibility of the State's witnesses. This, in turn, would have cast doubt on the viability of the entire case. Defendant requests an evidentiary hearing be held and a new trial be granted based on information wrongfully withheld by the State in violation of *Brady v. Maryland*.

CLAIM FOUR:

DEFENDANT HAS NEWLY DISCOVERED EVIDENCE OF SUCH NATURE TO PRODUCE AN ACQUITTAL OR RETRIAL. THEREFORE, DEFENDANT'S CONVICTIONS ARE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The trial court erred in denying this claim based on the courts opinion that appellant has failed to substantiate any of these claims through witness

testimony. (ROA pg 704-708). Appellant reincorporates and re-alleges the argument as presented in Amended 3.851 motion (ROA pgs.123-126)

CLAIM FIVE:

THE DEFENDANT'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE VIEWED AS HARMLESS WHEN VIEWED AS A WHOLE. THE COMBINATION OF ERRORS DEPRIVED DEFENDANT OF A FAIR TRIAL GUARANTEED BY THE 6TH, 8TH, AND 14TH AMENDMENTS.

Appellant reincorporates and re-alleges the argument as presented in Amended 3.851 motion (ROA pgs.126-127)

CLAIM SIX:

DEFENDANT IS INNOCENT OF FIRST-DEGREE MURDER. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT HIS CONVICTION AND SENTENCE.

Appellant reincorporates and re-alleges the argument as presented in Amended 3.851 motion (ROA pgs.127-129)

CLAIM SEVEN:

MR. FERRELL WAS DENIED A PROPER DIRECT APPEAL FROM HIS JUDGMENTS OF CONVICTION AND SENTENCES OF DEATH IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ART. 5, SEC. 3(b)(1) OF THE FLORIDA CONSTITUTION, AND SECTION 921.141(4) OF FLORIDA STATUTES, DUE TO OMISSIONS IN THE RECORD. MR. FERRELL IS BEING DENIED EFFECTIVE ASSISTANCE OF POSTCONVICTION COUNSEL BECAUSE THE RECORD IS INCOMPLETE

Appellant reincorporates and re-alleges the argument as presented in Amended 3.851 motion (ROA pgs.129-132)

CLAIM EIGHT:

THE FLORIDA SUPREME COURT ERRED DURING THE DIRECT APPEAL IN MR. FERRELL'S CASE WHEN THE COURT FAILED TO REMAND FOR RESENTENCING AFTER STRIKING AN AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF SOCHOR V. FLORIDA, PARKER V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS

Appellant reincorporates and re-alleges the argument as presented in Amended 3.851 motion (ROA pgs.132-133)

CLAIM NINE:

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED FOR FAILING TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY AND FOR VIOLATING THE GUARANTEE AGAINST CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant reincorporates and re-alleges the argument as presented in Amended 3.851 motion (ROA pgs.133-136)

CLAIM TEN:

MR. FERRELL MAY NOT BE EXECUTED BY LETHAL INJECTION WITHOUT VIOLATING THE CONSTITUTIONS OF THE UNITED STATES AND FLORIDA. THE LAW ENACTING LETHAL INJECTION IS UNCONSTITUTIONAL. THE WAIVER PROVISION IS UNCONSTITUTIONAL. IT IS AN

UNCONSTITUTIONAL SPECIAL CRIMINAL LAW. IT VIOLATES THE PROHIBITION AGAINST EX POST FACTO LAWS.

` Appellant reincorporates and re-alleges the argument as presented in Amended 3.851 motion (ROA pgs.136-150)

CLAIM ELEVEN:

IN LIGHT OF THE AFORMENTIONED EVIDENCE, THE PROSECUTION COMMITTED PROSECUTORIAL MISCONDUCT THROUGHOUT THE GUILT AND PENALTY PHASES OF DEFENDANT'S TRIAL, AND SUCH MISCONDUCT ROSE TO THE LEVEL OF FUNDAMENTAL ERROR, AND THEREFORE SUCH ERROR DENIED DEFENDANT'S DUE PROCESS RIGHTS AND RIGHT TO A FAIR TRIAL IN VIOLATION OF THE 6TH, 8TH, 14TH AMENDMENTS OF THE U.S. CONSTITUTION

Appellant reincorporates and re-alleges the argument as presented in Amended 3.851 motion (ROA pgs.150-151)

CONCLUSION:

One thing is clear from the record which cannot be rebutted by Appellee, and that is that Mr. Nichols was not acting as Appellant's counsel nor was he even doing the bare minimum asked for by an attorney. In particular, it is clear from the record that key witness depositions were not taken, pretrials were un-excusably missed, Appellant's trial was missed by Mr. Nichols with no excuse, and was not able to be contacted, no witnesses or evidence was presented by Mr. Nichols in either Appellant's guilt or penalty phase, with no reasonable excuse, and to top it off, no evidence or

witnesses were presented by trial counsel neither at Appellant's guilt nor his penalty phase of his trial. Additionally, the malfeasance by Mr. Nichols was aggravated by the overzealous prosecution in this case, and the prosecution taking full advantage of Mr. Nichols lack of ambition to employ tactics and arguments to the jury that have been condemned by this court for over 50 years.

The Florida Supreme Court and the Florida and U.S. Constitutions guarantee that the main goal of a Defendant's trial is to ensure that the Defendant receives a trial that is fundamentally fair. Unfortunately, this is a case were this main goal was not met. Allowing such conduct as stated above to be considered tolerable would set such a precedent that Defendant's would not be guaranteed the fundamental Sixth Amendment right to effective counsel and Due Process Rights. Appellant should be granted 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 _____, 2007.

RESPECTFULLY SUBMITTED,

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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.

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