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

RONNIE FERRELL

Appellant,

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

STATE OF FLORIDA,

Appellee.
_____/

APPELLANT'S REPLY TO STATE'S RESPONSE BRIEF/ANSWER BRIEF TO CROSS-APPEAL

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

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

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PRELIMINARY STATEMENT

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

References to the Trial Transcripts will be designated "TT followed by a page citation. Transcripts to the Evidentiary Hearing held by the trial court in this case will be designated "EH" The Record on Appeal will be designated "ROA." References to the Supplemental ROA in this case will be designated "Supp Vol" followed by a volume number and a page citation. The initial brief to this court will be designated "IB", and finally the state's answer brief/Cross brief of Appelle will be designated "AB".

SUMMARY OF THE ARGUMENTS

1. Despite the state's contention that appellant has not preserved or presented claims for review, the appellant's numerous citations to the various documents and transcripts presented in the Record on Appeal have served to adequately present appellant's argument that the overall affect of the multiple and compound failures of trial counsel evidences the fact that trial counsel was not functioning as counsel as provided for by the 6th Amendment of the United States Constitution. Counsel's complete failure to participate in appellant's defense at all stages of trial constituted a deficient performance. The resulting prejudice caused by trial counsel's deficient performance served to render an outcome at trial that is not reliable per the holding of *Strickland v. Washington*, 466 U.S. 668 (1984). Additionally, Counsel's numerous absences at critical phases of appellant's trial and his complete failure to subject the state's case to meaningful adversarial testing are in violation of the holding as found in *US v. Cronic*, 466 US 648 (1984). Of the three potential ways to violate *Cronic*, counsel's inept performance and critical absences meet two of the standards to find a violation of *Cronic*.

2. The prosecution intentionally presented false testimony at trial by stating that the testimony of Robert Williams at trial could only have been learned through a "jailhouse confession" and that the information was not released to the press. The state presented further false testimony implicating appellant in the robbery of the victim preceding the murder, despite having attended depositions and possessing sworn statements from a persons admitting to being the second robber, and a person that verified that the identity of the second robber. These actions are in clear violation of the holding in *Giglio v. United States*, 92 S. Ct. 763 (1972).

3. The prosecution's failure to disclose to the defense evidence that Sidney Jones was a paid confidential informant at the time of appellant's trial is a clear violation of the holding in *Brady v. Maryland*, 373 U.S. 83 (1963). The state's duty to disclose this information was not met by simply stating that it was mentioned in a deposition when counsel for appellant failed to attend said deposition.

ISSUE ONE

TRIAL COUNSEL FOR APPELLANT FAILED AT EVERY LEVEL AND STAGE OF APPELLANT'S CASE TO ACT AS COUNSEL AS PROVIDED FOR IN THE 6TH AMENDMENT OF THE UNITED STATES CONSTITUTION. COUNSEL'S PERFORMANCE WAS DEFICIENT UNDER *STRICKLAND V. WASHINGTON*, 466 US 668 (1984); AND *UNITED STATES V. CRONIC*, 466 US 648 (1984)

The State throughout their response brief continually derides appellant for failure to present any argument in support of claims within the initial brief. Despite the State's contention, these issues were presented thorough arguments and analysis that were raised in the initial brief, citing to the evidentiary hearing transcripts, the 3.851 postconviction motion, the power point presentation introduced at the evidentiary hearing, and the written final closing arguments in support of a new trial after the lower court evidentiary hearing. It is clear Appellant has sufficiently argued and thus preserved all of his issues raised in his initial brief.

Further, as this court will find that upon review of the order of the trial court, indisputable facts supporting a number of claims and facts contained in the record that were raised by the appellant were either misconstrued or incorrectly interpreted by the trial court. As such, some of the trial court's rulings were based on erroneous findings of fact without actually addressing the argument of each claim, thereby allowing this court not to take deference to the facts used to support the trial court's position. *Sochor v. State*, 883 So.

2d 766 (2004 Fla. LEXIS 985); *Oceanic International Corp v. Lantana Boatyard*, 402 So. 2d 507 (Fla. 4th DCA 1981).

There are a number of indisputable facts present in this case that the State, regardless of their attempt to do so, cannot rebut. The first being that trial counsel failed to preserve any claim to prosecutorial misconduct on direct appeal through timely objections to improper comments by the State. It is also undeniable that prosecutor's closing arguments in this case both the Guilt and Penalty phases of Appellant's trial has been condemned in over 60 years of prior Florida Case law, including *State v. Urbin* and *State v. Brooks*, thus making it three times this same prosecutor has been in front of this court for his grossly improper closing arguments. The condemned language from the litany of prior Florida Supreme Court rulings is bright as day in the record for this case, clearly printed in the transcripts, and it is impossible to ignore or overlook it despite the state's attempt to cloud the issue.

The second indisputable fact is that regardless of the state's various attempts to spin the facts of the procedural history, to attack appellant's method of presenting claims and arguments in the initial brief, and to defend the error filled order of the trial court[1], it is indisputable that trial counsel

1 *See Dillbeck v. State*, 882 So. 2d 969 (Fla. 2004). In *Dillbeck* this court addressed the issue of inadequate trial court orders and remanded appellant's case back to the trial court for failure to make adequate rulings on

Richard Nichols was deficient in the instant case in many regards. Again, like the Florida Supreme Court's familiarity with the conduct of the prosecution in the instant case, this Court is also familiar with the conduct of the trial counsel, and publicly reprimanded him for same. See The Florida Bar v. Richard D. Nichols, case no.: 93, 177. [*Ordering a public reprimand on Mr. Richard D. Nichols in reference to his failure to act in three separate cases in which he was counsel. The court noted that counsel filed no responses to the complaints despite being served requests to respond, failed to act on behalf of his client, failed to return telephone calls to the client, and failed to provide his client with requested information. The court also noted that Mr. Nichols was given a private reprimand by the Bar in 1991.].*

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appellant's 3.850 motion. Florida Rule of Criminal Procedure 3.850(d) states that if an evidentiary hearing is required, the court shall grant a prompt hearing thereon and shall cause notice thereof to be served on the state attorney, determine the issues, and *make findings of fact and conclusions of law* with respect thereto. The court held that: *The trial court's failure…to make findings of fact and conclusions of law violated Florida Rule of Criminal Procedure 3.850(d).* [*citing Jones v. State*, 740 So. 2d 520, 524 (Fla. 1999) *"We have repeatedly stressed the need for trial judges to enter detailed orders in postconviction capital cases. The present order is completely inadequate and does not assist us in our review."]*

The *Dillbeck* opinion also cites Florida Rule of Criminal Procedure 3.851(f)(5)(D) which states: "…the trial court shall render its order, ruling on each claim considered at the evidentiary hearing and all other claims raised in the motion, making detailed findings of fact and conclusions of law with respect to each claim, and attaching or referencing such portions of the record as are necessary to allow for meaningful appellate review."

The state cannot legitimately or rationally justify Mr. Nichols' lack of effort in this case, and his failure to zealously defend his client. The following list denotes the many examples of textbook ineffective assistance of counsel that was rendered upon appellant Ronnie Ferrell at his trial.

Failure to Preserve Appellant's Case for Appellate Review

Counsel made no effort to preserve appellant's case for Appellate review. He did not preserve a trial file per testimony of the direct appeal attorney for defendant. (EH 17-21); *See* *The Florida Bar v. Brakefield*, 679 So. 2d 766 (Fla. 1996); *See also* Florida Bar Regulation 4-1.16(d) *(Protection of Client interests).* In fact, it appears nothing from trial counsel representation in this case remains in existence.

Failure to Set, Take, or Attend Depositions

Counsel failed to set, take, or attend depositions of state witnesses in and for this case. Topping the list of witnesses counsel neglected to depose were the only Jailhouse snitch that testified that Appellant "confessed" the murder to him while incarcerated, the only two eyewitnesses, an eyewitness to allow the state to introduce prejudicial Williams Rule (and motive theory) evidence, and two defense witnesses that would have disallowed the state from introducing said Williams rule testimony.

This list includes: Robert Williams (Category A Jailhouse Snitch), Juan Brown (Category A eyewitness), Sydney Jones (State Category A eyewitness), Gene Felton (Category A Williams Rule witness), Jarrod Mills (witness to Williams Rule evidence for defense that supported Deatry Sharp's testimony that he was the third individual in the robbery of the victim prior the murder), Deatry Sharp (eyewitness to Williams Rule evidence for defense) Ronald Carn, Ronald Bronner, Eric Brooks, Gregory Stiger, Sylvester Johnson, Annie Oglesby, Steve Mitchell, and Leon Danzler.

Even discounting the fact that counsel failed to set and take his own depositions, appellant's co-defendants were fortunate enough to have able counsel that did set depositions, investigate the case, and acquaint themselves with the facts of the incident. However, of the twenty-seven depositions scheduled and taken by counsel for appellant's codefendants, appellant's counsel attended only three.

Counsel for co-defendants took the following depositions in and for the Hartley and Johnson cases, all prior to appellant's trial date: Leon Danzler (May 21, 1991) (Supp Vol III 293-295); Sydney Jones (State Category A eyewitness, January 7, 1992) (Supp Vol IV 540); Ronald Carn, Ronald Bronner, Eric Brooks (January 8, 1992) (Supp Vol III 296-310);

Gregory Stiger (January 22, 1992) (Supp Vol III 287-292); Gene Felton (Cat A), Jarrad Mills (witness to Williams Rule evidence for defense), Deatry Sharp (eyewitness to Williams Rule evidence for defense) (February 13, 1992) (ROA 553); Sylvester Johnson (February 21, 1992) (Supp Vol III 282-285); Annie Oglesby, Steve Mitchell (February 21, 1992) (Supp Vol III 302-305).

Of these three depositions that counsel did attend, counsel's lack of effort or concern is readily apparent. In the February 13, 1992 deposition of appellant's mother, he asked no questions of her during this deposition. (Supp Vol VIII 1436-1467; EH 658-59) At the February 14, 1992 deposition of Rene Jones (a prospective alibi witness for appellant) counsel limited the deposition to ½ hour so that he could leave due to other engagements. (ROA 56-60; EH 656-659) Counsel left the deposition of the state's lead detective William Bolena half way through, missing vital information from the detective regarding William rule evidence Deatry Sharp and alibi witness Bobby Brown. (Supp Vol IX 1563)

After the completion of Appellant's trial in March of 1992, counsel for the co-defendants scheduled and deposed the following individuals prior to the trials of the co-defendants, all of which were available during the pendency of appellant's trial (as well as being provided in the state's

discovery exhibit) gave pertinent information regarding appellant's case: Ronald Wright (July 2, 1992); Deatry Sharp (October 6, 1992); Steve Mitchell (November 19, 1992); James Brown (December 8, 1992 and May 5, 1993); Elijah Blackshear (December 11, 1992); Wayne Townsend, Linwood Smith (January 8, 1993); Juan Brown (January 20, 1993). (See ROA 56-60, 363, 551-554; EH 654-659).

Failure to Investigate Appellant's Case

Beyond the failure to take depositions, trial counsel failed to investigate the state's witnesses and the content of their testimony. These failures have repeatedly discussed and analyzed in the many briefs, hearings, exhibits, and arguments raised.

(1) Counsel failed to investigate the newspaper and media articles that were the likely source of Robert Williams's testimony regarding the incident. (ROA 74-75, 112-115, 367, 369 footnote 17, 611-625; EH 217-223; IB 20, 42-44).

(2) Counsel failed to investigate the legitimacy of the "identification" of appellant in the victim's vehicle (in which appellant was allegedly a passenger) made by Juan Brown. (ROA 76-77, 594-609, 633-34, IB 46-51).

(3) Counsel failed to investigate both the legitimacy of Sidney Jones testimony, and the fact that he was a paid confidential informant by the

Jacksonville Sheriff's Office throughout his life. (ROA 580-592, 647 footnote 12; Supp Vol I 20-55; IB 45-46) If counsel had attended the deposition of Sidney Jones, scheduled by counsel for co-defendants, he would have learned that Mr. Jones stated that there were a number of other people present at Washington Heights that witnessed the event. None of these persons were contacted in an attempt to verify or impeach Mr. Jones, presumably due to counsel's failure to attend the deposition or schedule his own.

(4) Counsel failed to learn from the State's Lead Detective William Bolena that he believed that Deatry Sharp, and not Ronnie Ferrell, robbed Mayhew on the Saturday prior to the murder (contrary to the prosecutor's theory that Ferrell was involved in said prior robbery), and that Bobby Brown saw Ferrell give Clyde Porter a ride at the same time the abduction of Mayhew occurred. (Supp Vol IX 1483-84; ROA 121-22)

This list is by no means exhaustive, however this material has been covered repeatedly by appellant in the numerous briefs and arguments preceding this reply brief.

Failure to Investigate Testimony and Media Sources

As briefly mentioned previously herein, counsel failed to investigate or even be aware of the media coverage of this case and the fact that it was

being used as a source of testimony. The articles from the Florida Times Union published prior to defendant's exhibits were entered as exhibits in the evidentiary hearing. (Supp Vol IV 623-49) This argument was covered in nearly every preceding brief in this case and was argued extensively at the evidentiary hearings. (ROA 112-115, 177-197, 367, 369 footnote 17, 611-625, 632-633)

This analysis was supplemented at the Evidentiary hearing in this case through testimony of then Duval County Correctional Officer Tara Wildes who verified that inmates had complete access to newspapers and television at the time of William's incarceration. (EH 217-223) Ronald Carn's January 8, 1992 deposition further evidences that it is likely that Robert Williams formulated his testimony based on what he saw and read. (IB 42-45) A cursory review of Williams' testimony and the facts contained in the newspaper show the attested facts by Williams' are almost identical to those facts contained in the newspaper.

Failure to Present an Alibi Defense when stating in Opening Statement to the Jury an Alibi Defense would be provided

Counsel failed to file a notice of alibi prior to trial in this case, yet in opening statements informed the jury that they would hear alibi testimony, but then failed to produce any defense in the guilt phase. The clerk's file evidences the fact that no notice of alibi was filed. The trial transcripts

evidence the fact that he promised an alibi defense, but didn't deliver one to the jury. (TT 471) This fact was pounced upon and utilized to the advantage of the state in closing arguments (TT 872), however now the state denies that this was an example ineffective assistance of counsel, despite taking advantage of counsel's inept defense at trial.

Failure to Attend Pretrials, Jury Selection, and the serving of the Habitual Offender Notice on Appellant

Counsel first, and apparently without consulting his client (i.e. appellant) (as there is no formal written waiver contained in the trial file), waived his presence as all pre-trial hearings. (TT 17-18) Counsel then failed to attend approximately twenty-eight of forty pre-trial hearings held in this case. When counsel was present for hearings, it was without his client, thus passing up numerous opportunities to consult with this client and to keep him abreast as to the progress of the case, or lack thereof.

Then counsel decided not to show up for jury selection, and despite the prosecution's, the trial court's, and even Mr. Nichols' secretary's efforts, could not be located. This propounded the trial court to state on the record,

> "None of the attorneys, Mr. Bateh and Mr. Berry have not (sic) heard from him, they've stated on the record that they have 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 here to represent the defendant*."

(TT 128-29)

This issue was raised and discussed extensively in the initial brief to this court (IB 27-33); the initial brief to the trial court (ROA 66-67, 70-72); at the evidentiary hearing (EH 649-650); and in written final closing arguments to the trial court (ROA 363-64).[2]

Counsel also was absent with no justification or warning during the serving of Habitual Offender status on his client (Supp Vol III, 469-470).

Also, included within the dates of counsel's absence from the pretrials was the court's testimony stating that pretrials were being held to give counsel numerous opportunities to present pre-trial motions and argument. (TT 21, 28, 128-129, 132) Counsel simply did not bother to attend these scheduled court dates.

The case law in this matter is succinct and goes back decades. It addresses a fundamental and bedrock legal principle in that the purpose of

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2 See *James v. Harrison*, 389 F.3d 450 (US App, 2004) [*Holding that*: *"The state concedes, as it must, that voir dire and jury selection proceedings constitute a critical stage of the trial. See e.g. Gomez v. United States, 490 US 858, 873 104 L. Ed 2d 923, 109 S Ct. 2237 (1989). Thus if James' Lawyers, Pride and Ness, had abandoned him – if they had absented themselves from these proceedings and no other counsel had represented James – a reviewing court would have to presume prejudice because the abandonment would have constituted a 'breakdown' in the adversarial process." Cronic, 466 US at 657-59, 662."*

counsel is to provide assistance to defendants throughout legal proceedings. *Powell v. Alabama*, 287 US 45, 69 (1932); *US v. Chronic*, 466 US 648 (1984); *Fennie v. State*, 855 So. 2d 597 (Fla. 2003); *Bell v. Cone*, 535 US 685 (2002); *Thomas v. Kemp*, 796 F. 2d 1322 (11th Cir. 1986). Frankly, it is difficult to even comprehend that the state can attempt to excuse counsel's actions and legitimately contest that missing over ½ of the pre-trial hearings, including jury selection, and the declaration of Habitual offender, would not constitute prejudice and deficient performance, given the myriad case law in support of this contention.

Failure to Challenge the State's Williams Rule Evidence of a prior robbery of the Victim

Counsel failed to investigate and refute the introduction of Williams Rule evidence. Counsel acknowledges on the record that the state had filed a previous notice of intent to introduce Williams rule evidence, however he failed to file anything in opposition. (TT 426-428) Counsel then, after hearing the state's position, *stipulated to the factual representation of the state* without attempting to combat the state's position. The court inquired to defense counsel:

> **The Court:** "All right. Let me ask you this, you stipulate that the facts – you agree that the facts that Mr. Bateh has just outlined are sufficient for the court to make a decision on?"
> **Mr. Nichols:** "Yes".

(TT 429)

This stipulation is irrefutable evidence that counsel conducted no research or investigation into the matter whatsoever. Had he conducted any kind of legitimate investigation, including the taking of depositions (or even participating in the depositions of co-counsel) in the case he would have been aware of the sworn statement of Deatry Sharp who confessed that he was one of the participants in the Saturday robbery, and not appellant. (Supp Vol IV 548-573) He would have been aware of the fact that the state's lead detective William Bolena believed that Deatry Sharp participated in the earlier robbery, and not appellant. (Supp Vol IX 1483-84; ROA 121-22) Finally he would have been aware that Jerrod Mills, a person that was a witness to the robbery, named Deatry Sharp as a participant, and not appellant. (IB 103) Given the fact that counsel had literally months to investigate and refute the argument by the state as the notice of intent was filed long before the issue was heard by the court, counsel's stipulation and obvious lack of effort is inexcusable.

There existed extensive proof that appellant did not participate in the prior robbery of the victim, and had counsel exhibited even a modicum of effort, the state would not have been allowed to bring in the prior robbery of the victim as Williams rule evidence. The alleged retaliation for the robbery

by the victim could never have been used by the state as the motive as to why appellant would kill his friend. This is an absolute textbook definition of deficient conduct on the part of defense counsel and prejudice to his client, and no excuse for this lack of advocacy or diligence can be raised under the guise of "strategy".

Failure to Impeach State Witnesses using Depositions, sworn statements and/or conflicts with each witness's testimony and version of the facts

Counsel failed to subject the state's witnesses' testimony to any credible form of impeachment. This subject has been covered in detail in the initial brief to this court and the numerous briefs, argument, and documents presented to the trial court. Specifically the undersigned has shown that *extensive* impeachment material was available to trial counsel pertaining to the state's main witnesses Robert Williams, Sidney Jones, Gene Felton, and Juan Brown.

Robert Williams, a jailhouse snitch during an era now known to be notorious for this kind of false testimony, could have learned every individual aspect of his trial testimony through newspaper and media articles, prior to giving any sworn statement to the state. (ROA 74-75, 442-447, 611-625; IB 41-44) This was verified in a deposition by another inmate at the time Ronald Carn. Former JSO correctional officer Tara Wilde testified at the evidentiary hearing that inmates had access to media sources

at the time of Williams' incarceration where he allegedly spoke with appellant. This fact was never brought up in cross examination by counsel, which incidentally accounted for five pages total in the trial transcripts. (TT 682-86, 688)

Counsel failed to effectively cross examine Sidney Jones. Appellant addressed this failure of counsel extensively in prior documents. (ROA, 580-592; IB 45-46) In the April 17, 2006 continuation of the evidentiary hearing, counsel raised the fact that Mr. Jones was employed by the JSO as a confidential informant at the time of the murder for which appellant was convicted, and entered pay stubs evidencing this fact. (Supp Vol I 1-37) It was also brought to light that Mr. Jones was charged with Perjury for lying under oath, but that the conviction was overturned for reasons unrelated to the perjured testimony. (ROA 647 footnote 12; IB 46) Jones actually stated that he was a witness to a murder, but it was later shown that he was *incarcerated during the time of the murder*. The undersigned also evidenced the fact that Mr. Jones was blackballed by the JSO and that there was no evidence that Sidney worked as an informant for the JSO after April 18, 1991. (Supp Vol I 1-37) Additionally, counsel at trial was unaware of the accurate number of felony convictions of Mr. Jones, and could have impeached his testimony at trial when Jones stated that he had 5 felony

convictions, instead of the 7-9 that he had at the time. All of this evidence, along with the fact that Mr. Jones version of the events differed significantly from Juan Brown's version of the facts (IB 44-46), was never discussed at trial.

Gene Felton was presented by the state at trial to testify that he knew that appellant participated in the Saturday robbery of the victim, and to bolster the testimony of Lynwood Smith. (TT 531-561) Lynwood Smith claimed that Mayhew came in his room and identified Kip as one of the robbers; however he couldn't identify the second robber. Again, *at no point* in Smith's hearsay testimony did he say that Mayhew identified Appellant. Felton testified that he overheard appellant and co-defendant Johnson discussing the robbery in a pool hall. Felton admitted that he had been drinking, that he was outside of the pool hall when he allegedly heard this, and that there were a number of other people inside the pool hall when this happened. (TT 562-571)

As discussed previously, counsel did not attempt to counter this through the testimony of Deatry Sharp, the admitted 2nd robber; the testimony of the state's lead detective William Bolena, who indicated that he believed that Sharp was the second robber; or the testimony of Jerrod Mills, who stated in deposition (that counsel didn't attend) that Deatry Sharp was

the third robber. The state's Williams rule testimony and motive for the murder was weak at best, the testimony was questionably allowable in the first place, and the testimony could have been countered by an informed trial counsel that was familiar with his client's case.

Counsel failed to impeach eyewitness Juan Brown. The state labeled counsel's cross examination of this witness at trial as "vigorous", despite the fact that it accounted for 3 ½ pages of the transcripts (roughly three minutes of questioning) and that he asked no questions regarding the supposed identification. Counsel however did find it necessary to ask Mr. Brown if he had played basketball lately, had anything to eat, or if he had a coke. (TT 654-657) Mr. Brown's "evolving testimony" and his impossible identification of appellant were analyzed extensively in the initial brief to this court. (IB 45-51) Trial counsel did not investigate the improbability of this identification, nor did he impeach this witness about the identification at trial. That the state holds this 3 ½ page cross examination to be a "vigorous" one is frankly astounding given the plethora of impeachment material that was discovered and presented to the trial court some 15 years later by the undersigned. (ROA 595-609)

In summary, counsel's ambivalence towards his client's case is most readily observable through his complete failure to first learn the stories of

the witnesses through deposition, investigate their eventual testimony that would be presented against his client, and finally to impeach these clients at trial using any of the multiple sources available.

Failure to Object to Prosecutorial Misconduct in both Guilt and Penalty phases of Appellants trial whereby said misconduct mirrored conduct chastised by the Florida Supreme Court in *State v. Urbin, State v. Brooks*, and a litany of previous cases spanning six decades.

Throughout the guilt and penalty phases of defendant's trial, the prosecution committed prosecutorial misconduct that was left un-objected to by trial counsel. The egregious behavior of the prosecution has been evidenced, cited to, analyzed, and addressed in detail throughout the prior proceedings, in both this court and the trial court. This issue was first addressed in the Initial Brief to the trial court (ROA 78-86); At the evidentiary hearing of the trial court (EH 615-39); In the power point presentation given at the evidentiary hearing (ROA 499-526); In written closing arguments to the evidentiary hearing (ROA 375-377 footnote 34); In the reply to state's written closing arguments (ROA 634-635); and finally in the initial brief to this court (IB 52-77).

Appellant took pains to point out that the prosecution in this case was previously condemned by this court in two cases for using inappropriate argument and egregious conduct in closing arguments that was similar, and sometimes verbatim, to the language used by the prosecution in the instant

case. In both *Urbin v. State*, 714 So. 2d 411 (Fla. 1998), and *Brooks v. State*, 762 So. 2d 879 (Fla. 2000), this court opined at great length the misconduct by the same prosecutor and how the misconduct was deemed to be erroneous for the past fifty years. The following language and descriptors were used by this court in *Brooks* when describing the performance of this prosecutor:

> "similar to comments condemned in *Urbin*", "repetitive, overzealous advocacy", "improper comments", "inflamed the passions and prejudices of the jury", "impermissible", "dehumanizing comments", "not isolated comments of the type we have deemed harmless in other cases", "blatantly impermissible", "this precise line of argument was specifically denounced by this Court", "irrelevant", "tends to cloak the State's case with legitimacy", "improper statements", "misstated the law", "clearly over-stepped the bounds of proper argument", "egregiously improper", "personal attack against defense counsel", "transcended the bounds of legitimate comment on the evidence", "egregious", "misleading".

The instant case differs from the preceding cases only in that the prosecutor's egregious conduct was not limited to the penalty phase, but was prevalent in the guilt phase closing arguments in the instant case. (IB 52-77)

The state has attempted to claim that as the instant case preceded both *Urbin* and *Brooks* by a number of years, that appellant is unable to raise these cases in support of its claim. However, as noted by this court in *Brooks* in reference to the conduct of the prosecution:

> "For that reason, the state's argument that 'to the extent that *Urbin* arguably sets forth a new rule of law, unless this court explicitly states otherwise, a rule of law which is to be given prospective application does not apply to those cases which have been tried before the rule is announced' *is meritless on its face*. *Urbin* simply reiterated what this court's decisions have declared time and time again. Clearly, the state ignores the extensive case law citations throughout the *Urbin* opinion, as well as the penultimate paragraph which begins, 'The fact that so many of these instances of misconduct are literally verbatim examples of the conduct that we have unambiguously prohibited in *Bertolotti*, *Garron*, and their progeny…' The state also overlooks the statement, 'This court has so many times condemned pronouncements of this character in the prosecution of criminal cases that the law against it would seem to be so commonplace that any layman would be familiar with and observe it' commentary found in a 1951 opinion *Stewart v. State*, 51 So. 2d 494 (Fla. 1951)"

Id at 29

Appellant is aware of this court's recent ruling in *Merck v. State*, 975 So. 2d 1054 (Fla. 2007) in which the court found that the prosecution's "golden rule" and "same mercy" arguments were deemed harmless as they were presented in conjunction with argument for an HAC aggravator, were argued in the context of a response to mitigation evidence presented by the defense, and were examined not as isolated comments, but in the context of the entire closing argument. *Id* at 1062

The instant case is distinguishable from *Merck* in that: 1) the prosecution's comments were overzealous, aggressive, unprovoked, and raised not as a rebuttal to any form of mitigating evidence or argument. Nor

were they fair comments on the evidence presented. As noted, in the penalty phase no evidence or argument of mitigation was presented by the defense with the exception being that the appellant was not the trigger man in this murder.

2) The golden rule arguments raised by the prosecution were raised not only in support of a finding of the HAC aggravator, but were additionally raised in support of a finding of guilt during guilt phase closing arguments. (TT 842, 845, 854, 996-1001, 1007) As noted previously, this court overturned the finding of the HAC aggravator on direct appeal as the facts of this case did not support a finding of HAC. *Ferrell v. State*, 686 So. 2d 1324 (Fla. 1996)

3) The guilt and penalty phase closing arguments of the prosecution were riddled with examples of impermissible argument, conduct, and language by the prosecution throughout the guilt and penalty phases of appellant's trial. The "same mercy" and "golden rule" violations made in the instant case were joined by numerous other examples of prosecutorial misconduct, including: a) "inflaming the minds and passions of the jury" through the repeated referral of the murder as an 'execution' 13 times in the guilt phase closing argument (TT 842-872), and an additional 11 times in the penalty phase; b) repeated dehumanization of the defendant by referring to

him as a liar in the guilt phase (TT 871, 877), and impermissible comments in the penalty phase (TT 996-1007); c) inviting the jury to disregard the law by inferring to the jury that they would be breaking the law if death was not given (TT 985-1011); d) Misstating the law pertaining to mitigation (TT 1007); e) Improper Death Penalty Arguments (TT 986-87); f) vouching for credibility of witnesses in the guilt phase (TT 846-79); f) denigration of counsel and defense's case (TT 872); g) arguing personal beliefs and non-existent evidence (TT 864-65, 994-10004) h) arguing that mitigating factors do not apply (TT 1005-008). Clearly these are not instances of an "isolated" comment that can be viewed independently of the overall guilt and penalty phase closing arguments. Indeed, the prosecution's entire guilt and penalty phase arguments are based on these impermissible arguments, and are not simply harmless by-products in the context of a permissible overall argument.

For these reasons, the instant case is distinguishable from *Merck*. Given that the same prosecutor in *Urbin* and *Brooks* prosecuted this case, and that the language used is verbatim to that used in those cases, *Urbin*, *Brooks*, and the decades of previous case law governing those decisions are clearly controlling in this case. Counsel's failure to object to the comments and conduct defined by this court as "egregious" and fundamentally unsound

is a clear example of ineffective assistance of counsel. As evidenced, the state's claim is without merit. Trial counsel's failure to object to the blatant misconduct of the prosecution is only another example of Ineffective Assistance of Counsel in a long list of many.

As this conduct occurred not only in the penalty phase, but was prevalent in the guilt phase as well, appellant should be granted a new trial, as the misconduct by the prosecution was fundamental error, and inflamed the passions and minds of the jury by injecting facts geared to obtain a guilty verdict based on emotion, rather than the facts and the law.

Failure to Provide Alibi Testimony

Counsel's opening statement, with its promise to the jury that he would present alibi evidence (TT 471) that was never honored and explained. To compound matters, the prosecutor took advantage of trial counsel's said failure and stressed to the jury that counsel had promised an alibi but did not deliver. (TT 879-81) *See* *Avery v. State*, 737 So 2d 1166 (2nd DCA 1999); *Honors v. State*, 752 So 2d 1234 (2nd DCA 2000)

Failure of adequately present a Motion for Judgment of Acquittal (JOA)

Counsel's boilerplate request for Judgment of Acquittal (TT 807) without listing reasons or facts evidence his complete lack of knowledge about the facts of the case. Counsel for appellant was admonished by this

court previously for moving for a Judgment of Acquittal without providing sufficient support. *See* Brooks v State, 762 So 2d at 895 *["Under these factual circumstances, we conclude that the limited, boilerplate motions for judgment of acquittal which were of a technical and pro-forma nature as voiced by counsel for Brooks were totally inadequate to preserve a sufficiency of the evidence claim for appellate review."]* Counsel's lack of familiarity with the facts of the case hampered him from including any details or information in the request for JOA for the instant case as well.

Failure to Appoint Co-Counsel

Trial counsel failed to secure the services of a co-counsel, against the recommendations of the 1989 American Bar Association's Guidelines for Capital Cases, number 2.1.

Failure to Appoint Investigator

Counsel failed to utilize the services of an investigator in and for this case. The clerk's docket evidences no proof in the form of a motion for appointment of investigator, a motion to pay investigator for services rendered, or any other form of evidence showing that an investigator was used on this case.

Failure to Present Witnesses/Defense in an effort to "sandwich" the prosecution by retaining first and last closing arguments

The courts file contains no trial subpoenas or evidence that counsel ever intended to call anyone in appellant's defense. If counsel would have actually investigated or participated in discovery he would have known about potential witnesses such as Rene Jones, Deatry Sharp, William Bolena, Jerrod Mills, etc. The American Bar Association's guidelines definitively state that it is the duty of capital counsel to investigate a case *even if a defendant indicates he has no witnesses to call.* (1989 ABA Guideline 11.4.1) Defendant's waiver was not an informed waiver and was made at the behest of his counsel, whose Modus Operandi in all of his capital cases was to present no case or defense in order to preserve closing argument. The complete failure to challenge the state's Williams Rule evidence, the misguided opening statement, the lack of knowledge during cross-examination as to the witnesses testimony, the failure to depose said witnesses, the failure to object to the egregious state closing arguments, and more, corroborate Appellant's contention that counsel had a very limited understanding of his client's case, as well as the State's case in chief.

Failure to File Pre-Trial Motions

Trial counsel failed to file any pre-trial motions, aside from the standard boiler plate death penalty motions presented in all capital cases. The trial court clerk's docket for this case evidences this fact. There are no

motions in limine, no motions challenging testimony, no motions challenging the admission of William's Rule testimony, etc. Counsel was given multiple attempts from the trial court to file any substantive motions, and not only did he not file any substantive motions, he failed to show up for court to tell same.

Failure to Conduct adequate Voir Dire

Counsel's questioning of potential jurors accounts for eighteen pages of the transcript (TT 377-94) in a six hour voir dire. In contrast, the state's questioning accounted for 141 pages of the transcript. (TT 235-376) Counsel allowed the state to remove twelve venire persons for cause without individually questioning them. (TT 394-395) Counsel failed to strike a juror for cause despite the juror stating that a sentence of life should be replaced by a death sentence and that life should never be an option. (TT 307) Counsel failed to object to the courts biblical references and argument. (TT 374) Finally, counsel again seems to have had other pressing engagements to attend to on the day of jury selection as he indicated that he needed to be elsewhere. (TT 397)

Failure to Present Mitigation in Penalty Phase and failed to proffer mitigation at Spencer hearing

Counsel failed to prepare for sentencing/Spencer hearing in this case, despite having nearly two years to do so. Appellant's trial concluded March

12, 1992. Appellant was sentenced December 13, 1993. Counsel also presented no mitigation in the penalty phase of appellant's trial, at sentencing, or at the Spencer hearing instead stating that it was the wishes of the defendant not to present testimony, and that, "*…there is nothing to offer in the way of mitigation, and consequently there are no other witnesses to call.*" (TT 984) This then fails to preserve any mitigation claim that appellant could argue upon Federal Review. *See* *Grim v. State*, 2007 WL 2873367. The clerk's file does not contain any subpoenas to any agencies such as schools, hospitals, or friends and family for the purposes of gathering mitigation information.

Note that at the evidentiary hearing held on this case, appellant presented testimony from his mother, sister, and other friends and family members (including a former JSO corrections officer) that refuted counsels assertion that there was nothing to present. Each family member discussed at length the history and past of appellant, his home life, his difficult childhood, his relation to his father, his substance abuse, etc. (EH 39-54, 81-90, 101-115, 151-161, 166-175, 189-207) Additionally, psychiatrist Dr. Earnest Miller testified at the evidentiary hearing that he conducted no form of a mitigation survey or evaluation for the purpose of gathering mitigation to present in the penalty phase. (EH 126-146)

More importantly, these family members and friends attested that they were never contacted by counsel despite numerous attempts to contact him on their own. (EH 48-50, 88-89, 124-26, 186-86, 199-200) Counsel has a duty to perform a mitigation investigation and present relevant and pertinent information, despite any declarations from the client. The ABA guidelines in place at this time clearly support this claim (Supp Vol XI 1887), and the case law pertaining to this matter is in agreement with appellant. *See* Ragsdale v. State, 798 So 2d 713 (Fla. 2001); *Phillips v. State*, 608 So. 2d 778 (Fla. 1992)

As presented to the trial court, the undersigned discovered a number of mitigators that should have been raised in the penalty phase (or at least in the Spencer hearing) that were enumerated and discussed at length in the initial brief and the evidentiary hearing. (ROA 93-96, 527-546; EH 585-609) Given that the vote was 7-5 in favor of death, the presentation of any mitigation evidence could have been the deciding factor in granting life instead of giving death.

Failure to Rebut the HAC Aggravating Factor

It should be noted that although the Florida Supreme Court found the HAC aggravating factor not applicable on direct appeal, at trial, defense counsel failed to present any argument against the introduction of the HAC

aggravator during sentencing. In closing arguments during the penalty phase, the state argued for the finding of the HAC aggravator. (TT 996-1001)

At no point in counsel's penalty phase closing argument (accounting for 14 pages of the transcript) does he address the prosecution's attempt to persuade the jury to find this statutory aggravator. (TT 1012-1026) The trial court would endorse the finding of this aggravator in its sentencing order, assigning it "great weight". The FSC, in the direct appeal opinion, overturned the finding of this aggravator, stating: "*Speculation that the victim may have realized that the defendants intended more than a robbery when forcing the victim to drive to the field is insufficient to support this aggravating factor.*" *Ferrell v. State*, 686 So. 2d 1324 (Fla. 1996)

Analysis of trial counsel's performance per *Strickland v. Washington*, 466 U.S. 668 (1984)

A claim of ineffective assistance of counsel must meet two components as analyzed under *Strickland*. The first is that a defendant must show counsel's performance was deficient and made errors so serious that counsel was not functioning as counsel as guaranteed by the sixth amendment. The second is that a defendant must show that counsel's performance prejudiced the defense. This second requirement requires a showing that the errors deprived the defendant of a fair and reliable trial.

The errors of trial counsel addressing the first prong of *Strickland* will be addressed first.

Failure to Follow ABA Guidelines

As noted, the 1989 ABA guidelines for Capital case representation were in place at the time of Appellant's trial. The 1989 ABA guidelines set forth parameters to follow in capital cases beginning from the pre-trial to post-conviction proceedings. Counsel for appellant failed to follow nearly all of the guidelines in place, including:

Guideline 2.1 Number of Attorney's Per Case. The ABA recommends that two attorneys be appointed to any capital case (Supp Vol XI 1877); counsel did not seek the services of another counsel.

Guideline 11.2 (B) Minimum Standards not Sufficient. This guideline states that counsel should be required to perform at the level of an attorney "reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has had adequate time and resources for preparation." (Supp Vol XI 1886) Counsel for appellant was anything but zealously committed to the case, as evidenced by the numerous examples cited herein and in the Initial Brief to this court.

Guideline 11.4.1 Investigation. "Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase

of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously." (Supp Vol XI 1887) Counsel did not utilize an investigator, did not set or attend depositions, did not attempt to investigate the testimony of the states witnesses, did not contact the family for mitigation purposes, did not seek an expert's assistance in conducting a mitigation investigation, and presented no evidence or testimony in either the guilt or penalty phase of appellant's trial.

Guideline 11.4.2 Client Contact. "Trial counsel should maintain close contact with the client throughout preparation of the case." Counsel did not speak with appellant, maintained no form of communication (counsel did not keep a file for this case containing letters), and failed to attend over ½ the pretrial hearings set for this case.

Guideline 11.5.1 Pre-Trial Motions. "Counsel should consider filing a pretrial motion "whenever there exists reason to believe that applicable law may entitle the client to relief…" (Supp Vol XI 1190-92) Counsel failed to attend over ½ the pre-trials, filed no motions other than nine boilerplate death penalty motions, did not attempt to combat the introduction of William's rule evidence (counsel stipulated to the facts as given by the state without conducting any independent investigation prior despite having

months in which to do so, as evidenced herein), failed to file motions to suppress the state's testimony about physical evidence that was never introduced (i.e. the gold chain Robert Williams claimed was taken from Mayhew, but was never found or introduced by the state), failed to combat unreliable identification testimony as enumerated in 11.5.1 (B)(7)(c) (Sidney Jones, Juan Brown), and failed to file a Notice of Alibi prior to trial, telling the jury there was an alibi, and then presenting no testimony or evidence of an alibi.

Guideline 11.7.1 General Trial Preparation. "Counsel should formulate a defense theory…consider both the guilt/innocence phase and penalty phase, and seek a theory that will be effective through both phases" (Supp Vol XI 1895) Counsel presented no defense at trial, in either stage of the proceedings, in an effort to "sandwich" the prosecution's closing arguments.

Guideline 11.7.2 Voir Dire and Jury Selection. "Counsel should be familiar with techniques for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable." (Supp Vol XI 1896) As discussed herein, counsel allowed the state to remove twelve venire persons for cause without individually questioning them. (TT 394-395) Counsel failed to strike a juror for cause

despite the juror stating that a sentence of life should be replaced by a death sentence and that life should never be an option. (TT 307) Counsel failed to object to the courts biblical references and argument. (TT 374) Finally, counsel again seems to have had other pressing engagements to attend to on the day of jury selection as he indicated that he needed to be elsewhere. (TT 397)

Guideline 11.7.3 Objection to Error and Preservation of Issues for Post Judgment Review. Counsel failed to object to blatant and clearly established reversible error made by the prosecution during the closing arguments of both the guilt and penalty phases of appellant's trial, thus making it ineligible for presentation on direct appeal, or in any future federal review.

Guideline 11.8.3 Preparation for the Sentencing Phase. Counsel conducted no investigation into mitigation for sentencing, as evidenced herein above.

Guideline 11.8.5 The Prosecutor's Case at the Sentencing Phase. "If counsel determines that the prosecutor plans to rely on or offer arguably improper, inaccurate, or misleading evidence in support of the request for the death penalty, counsel should consider appropriate pretrial or trial strategies in response." (Supp Vol XI 1899) Counsel failed to object to clear

prosecutorial misconduct in closing argument, and failed to address the argument for the introduction of the HAC aggravator found impermissible by this court.

Guideline 11.8.6 The Defense Case at the Sentencing Phase. "Counsel should present to the sentencing entity all reasonable available evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence." (Supp Vol XI 1899) Counsel failed to introduce all of the sub categories suggested by the ABA guidelines including: Medical history, Educational history, Employment/training history, Family and Social history, Rehabilitative potential, Expert testimony, and witnesses and affidavits. (Supp Vol XI 1899). Again, no evidence was presented by counsel at either the sentencing phase or at the *Spencer* hearing.

All of the listed examples evidence the failure of trial counsel to act as Sixth Amendment Counsel, pertaining to guidelines as established by the American Bar Association. When combined with the established examples of counsel's lazy conduct and lack of effort for this case, the first prong of Strickland is easily established.

Trial Counsel's "strategy" and FSC history

A defendant must overcome the presumption that under the circumstances the challenged action might be considered sound trial

strategy. A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of IAC musty identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. *See* Williamson v. Dugger, 651 So. 2d 84 (Fla. 1985); *see also* Johnson v. State, 903 So. 2d 888 (Fla. 2005) However, a strategy to do nothing is not an acceptable strategy. *See* Williams v. State, 507 So. 2d 1122, 1124 (Fla. 5th DCA); *Cole v. State*, 700 So. 2d 33 (Fla. 5th DCA)

The state has made reference to the transcript of the 3.850 hearing for *Bell v. State*, 965 So 2d 48 (Lower tribunal number Case Number 16-1994-CF-9776-AXXMA, Fourth Judicial Circuit, Duval County Florida) in an attempt to legitimize Mr. Nichols' conduct under the broad umbrella of strategy. At this hearing Mr. Nichols defended his "strategy" of doing nothing (AB 26-27).

The state fails to mention however that this transcript was ruled inadmissible in this case by the trial court (preceding the evidentiary hearing in response to a Motion in Limine filed by appellant) as the finding of Ineffective Assistance of Counsel and strategy is conducted on a case by case analysis and therefore not relevant to the instant proceedings. *See*

Johnson v. State, 903 So. 2d 888 (Fla. 2005)[*Holding that, "a court deciding a claim for ineffective assistance of counsel must judge the reasonableness of counsel's challenged conduct* on the facts of the particular case, *viewed as of the time of counsel's conduct."]*

The state, in attempting to "have its cake and eat it too" by avoiding clear precedent in this matter by bringing in testimony in a previous case. However the state fails to come clean regarding the big picture of Mr. Nichol's history with this court where in a host of other cases his "strategy" has been admonished. It should have also pointed out to this court Nichols' previous Florida Supreme Court admonishments, including but not limited to:

(1) Mr. Nichols' host of bar complaints over the course of his tenure, 2) his public reprimand by this court previously, and 3) that he received a private reprimand prior to the public reprimand. (4) In *State v. Brooks* the Florida Supreme Court commented on Nichols' insufficiency to preserve appellate claims, finding that,

> "the limited, boilerplate motions for judgment of acquittal which were of a technical and pro-forma nature as voiced by counsel for Brooks were totally inadequate to preserve a sufficiency of the evidence claim for appellate review. In so concluding, we are mindful that the trial court had previously permitted counsel for Brooks and Brown to adopt each others objections during trial, but such permission did not address or extend to substantive motions. Additionally, at the close of the

> State's case, counsel for Brooks merely adopted his earlier boilerplate motion. Accordingly, we find that the purely technical and pro-forma boilerplate motions for judgment of acquittal offered by Brooks were inadequate to preserve a sufficiency of the evidence claim for appellate review."

Brooks at 895.

(5) In *Stephens v. State*, 787 So. 2d 747 (Fla. 2001) the Florida Supreme Court notes that Stephens attempted to raise a claim that counsel failed to meet with him and failed to provide him with documentation. The trial court was forced to order Mr. Nichols to see his client and provide him with documentation in order to avoid hearing the inquiry. *Id* at 758. That the trial court was forced to step in and intervene in this matter evidences that the claim contained merit.

In the subsequent appellate history of this case, *Stephens v. State*, 975 So. 2d 405 (Fla. 2007) this court noted that counsel for Stephens failed to attend depositions, holding that, "*Stephens asserts that his lead counsel failed to attend several depositions. The trial court found that such absence is presumptively deficient, and we agree. The absence of counsel at discovery depositions in a criminal case where the State is seeking the death penalty is very disturbing.*" *Id* at 418.[3]

3 In Stephens this court denied appellant Stephens claim as he didn't demonstrate prejudice. Appellant holds that the same is not true in the instant case however, as the failure to attend depositions led to counsel's

(6) In *State v. Reed*, 560 So. 2d 203 (Fla. 1990) the court notes throughout that nearly all of appellant's claims are inadmissible for review as Nichols failed to preserve them through objection at trial. In the subsequent appellate history for Mr. Reed, *Reed v. State*, 875 So. 2d 415, the court noted that Mr. Nichols presented no witnesses or mitigation in the guilt and penalty phase. Also, it should be noted that the prosecution was the same in Reed as in the instant case.

(7) In *Thomas v. State*, 838 So. 2d 535 (Fla. 2003), a case in which the state utilized the testimony of jailhouse snitches against the defendant, Mr. Nichols failed to impeach and investigate the witnesses and again presented no testimony, evidence, or mitigation in defense. Instead Mr. Nichols asserted that it was the client's decision not to present witnesses or mitigation, and that the client did not participate by giving him names of witnesses. *Id* at 540. However, as noted herein, counsel has a duty to investigate a case and a defense for a client despite any postulation of a defendant.

In nearly every case in which Mr. Nichols was counsel, his supposed "strategy" and lack of effort was relatively the same. No investigation

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complete unfamiliarity with the case, lack of impeachment, failure to combat the prosecutions Williams Rule evidence, facts, players involved, and sequence of events.

conducted, no inquires made, no substantive motions filed, no participation in depositions, no defense presented, no witnesses presented, no mitigation evidence presented, etc.

A strategy to do nothing is not an acceptable one. *See* *Cole v. State*, 700 So. 2d 33 (Fla. 5th DCA 1997). In the instant case, it is readily apparent that Mr. Nichol's performance at trial was deficient based on all the cited examples of his numerous failures.

Strickland's Second Prong, i.e. Prejudice

In addressing the second prong of *Strickland*, the defense must make a showing as to what the result of appellant's trial would have been had counsel's performance been acceptable. Once this prejudice is found, a new trial should be granted. *Lee v. State*, 324 So. 2d 694 (1st DCA 1976) holds that, "*Where there is a considerable question of substantial prejudice to a defendant, the ends of justice are best served by a new trial.*"

Had counsel conducted any kind of investigation through even the bare bones minimum of setting and/or attending depositions in this matter, it would have substantially altered the course of appellant's case.

The State's theory of the murder at trial was that Gino Mayhew was robbed by appellant, Sylvester Johnson, and Kenneth Hartley on the Saturday prior to the murder. Gino Mayhew then "put out a hit" on these

three co-defendants in retaliation for the robbery. In order to avoid the supposed contract "hit" put out by a 17 year old high school student who attended a prestigious school in Jacksonville, the three co-defendants preemptively murdered Mayhew before he could retaliate.

In support of this theory, the prosecution presented hand picked witness testimony from Gene Felton and Linwood Smith, neither of which identified the appellant as the masked robber as discussed previously herein. The state fails to mention that it took the deposition of Gene Felton, Jerrod Mills, and Deatry Sharp together on the same day and therefore was acutely aware of the fact that Mills and Sharp's testimony contradicted his case, his motive theory, and his introduction of Williams Rule evidence.

As discussed, Deatry Sharp admitted to being the second robber, in both sworn statements and in deposition; and Jerrod Mills confirmed that Deatry Sharp was the second robber, thereby excluding Ferrell from being involved in same. Additionally, the state's own lead detective confirmed in deposition that Deatry Sharp was the masked robber on that Saturday preceding the murder, not Ferrell. Had counsel for appellant attended, read, or bothered to investigate these facts, the state's *entire motive* for the murder would have been rendered null and void. Indeed, the prosecution was keenly aware of the effect that Deatry Sharp could have on his case, as his

hand written notes (Supp Vol XII 2171) plainly state, “Flip Diego” in them. Diego was the street name that Sharp was known by.

Had counsel presented Deatry Sharp and Jerrod Mills at trial, and questioned the lead detective under cross examination in this regard, the state’s entire case and motive for the murder is dealt a near fatal blow. This is a clear showing of prejudice to appellant. Without the Williams’ Rule testimony, and if a clear rebuttal to the hand picked witnesses by the state was shown, the state could not have established a credible reason as to why appellant would have murdered his friend.

Continuing, had counsel investigated the testimony of Robert Williams he would have been able to show that the entirety of his testimony could have been learned through media articles. The state admitted that it offered Mr. Williams a deal in exchange for his testimony, and Ms. Tara Wilde verified that he had access to media in jail. The undersigned counsel simply evidenced that each individual aspect or “point of truth” as the state referred to them, of Williams’ testimony was printed in a media article prior to Williams giving his sworn statement. Had this been presented to the jury, it would have at least served as a possible counter to the uncontested testimony that appellant allegedly confessed to a known jailhouse snitch and informant seeking to procure a deal in his approaching sentencing on a

maximum penalty of fifteen years. This failure to conduct any investigation clearly prejudiced the appellant, and allowed the only testimony of a Category A snitch-confession witness to go unchallenged to the jury.

Had counsel conducted any form of the investigation into the testimony of Juan Brown as conducted by the undersigned, the credibility of his alleged identification could have been challenged, and the differences with the testimony of Sidney Jones would have been demonstrated. As noted, defense counsel didn't set or attend a deposition of this witness and his cross examination at trial evidenced his complete lack of familiarity with the case and the facts. The undersigned conclusively demonstrated, in a power point analysis, through the presentation of a video of the recreation test conducted, and expert testimony in support, that Juan Brown's identification was suspect at best and likely impossible. When looking at how his testimony "evolved" as the trials for these three co-defendants progressed, it is plainly obvious that this failure to impeach and investigate the witness prejudiced the appellant at trial.

Without any rebuttal, impeachment, or educated cross examination to the state witness testimony, the jury was left without any plausible explanation of innocence. This was highly prejudicial to appellant.

Counsel's failure to object to the inflammatory and blatant prosecutorial misconduct in both the guilt and the penalty phase clearly prejudiced the defendant. The absolute effect of this on the jury can admittedly never be known, but neither can it be stated that this had absolutely no effect on either the finding of guilt or the recommendation of the death penalty. As stated in the *Urbin* opinion,

> "Urbin's appellate counsel suggested at oral argument that the lack of objection to the numerous instances of clear misconduct revealed the quality of defense representation at trial. We tend to agree on this record, especially as to defense counsel's extremely brief and unfocused penalty-phase closing argument. Indeed, defense counsel opened his argument by assuring the jury that, 'I'll try and keep what [the prosecutor] may not have covered in my argument within ten minutes.' In that goal, defense counsel succeeded, proudly closing his abbreviated remarks by stating, 'I did it in ten minutes'."

Id at 418. *See also Ryan v. State*, 457 So 2d 1084 *[Holding that: "in a close case, the state cannot be allowed to push the jury to guilt with improper comments."]; Zakrezweksi v. State*; 866 So 2d 688 at 692 (Fla. 2003) *["A decision by counsel not to object to a prosecutor's improper comments during closing argument is fraught with danger because it might case an otherwise appealable issue to be considered procedurally barred.]*

Indeed, as did counsel for *Urbin*, trial counsel for appellant engaged in brief closing argument (TT 885-914) (after the state's closing took over an hour and fifteen minutes) during which counsel presented no valid

explanation or evidence combating the facts, instead informing the jury that "common sense" would lead them to find reasonable doubt. In support of his quest for common sense, counsel utilized boat construction analogies, discussed congressional expenditures of time, and ensured the prosecution that he wouldn't violate the golden rule (despite standing idle as the prosecution violated it repeatedly).

One would reasonably expect that when a decision is made to consciously forgo the presentation of evidence in defense in order to preserve first and last arguments that the closing argument presented would constitute a near perfect recitation and attack on the facts of the state's case. This however was clearly not the case in appellant's trial.

Counsel prejudiced appellant in that he waived appellant's appearance at pre-trial conferences. Counsel made this oral waiver on June 26, 1991, a mere 19 days after his appointment to the case. (TT 18) Counsel did not discuss this waiver with appellant, this waiver was not informed, and nor was it made in writing. *MacPhee v. State*, 471 So. 2d 670 (2nd DCA 1985) citing: Florida Rule of Criminal Procedure 3.180(a)(3) *providing that a defendant shall be present at any pretrial conference unless waived in writing.* Prejudice is evidenced in that counsel waived appellant's appearance, then failed to attend over ½ the pre-trial conferences, leaving

literally no one there to manage appellant's case. Had defendant been present at these conferences, he would have had an opportunity to confer with his counsel as to what was actually being done, voice his concern over the lack of effort being put into his case by his appointed counsel, and actively participate in his own defense. As it was, defendant was shuffled out of the game by an illegal waiver of his presence by his attorney who then remained absent from proceedings while failing to investigate the case.

In addressing the failings of counsel to actively test the state's case, it must be noted that the state's case against appellant was weak at best. There existed no physical evidence linking appellant to the murder, no DNA or serological evidence, appellant was not suspected to be the trigger man by police, no gun was ever linked to appellant, no confession was given to police, and no prints of appellant were found at the scene. Intimate details of the murder were leaked to the press giving any enterprising criminal an opportunity to present an alleged "jailhouse confession" to the state. Finally, appellant has maintained an unwavering declaration of innocence since his arrest.

The states entire case involved the testimony of professional criminals, convicted felons, known snitches, and confidential informants. In trying to establish some kind of motive, the state introduced suspect

William's rule evidence utilizing two "witnesses" that never identify appellant as participating in the robbery, but yet buried the testimony of the person that admitted to being the second robber, along with the testimony of a person corroborating it. Deatry Sharp's testimony conflicts with the testimony of Williams, Felton, and Smith. All trial counsel had to do was call him to the stand and bring it out. This would have eliminated the state's motive in one fell swoop. Calling Bobby Brown and/or Clyde Porter would have put Appellant in some other location at the time of the crime as well.

The state attorney's hand written notes were introduced as evidence at the evidentiary hearing in this case and further demonstrates prejudice. In the second page of his notes, the prosecution admits to the weakness of his case by writing, "See V's (victim's) family re: weak case". (Supp Vol XII 2171).

In order to compensate for his weak case against appellant, the prosecution engaged in egregious prosecutorial misconduct in the closing arguments of the guilt and penalty phases (which have already been the topic of condemnation in two Florida Supreme Court cases, *State v. Brooks* and *State v. Urbin)* in what can only be viewed as an attempt to inflame the jury to the point where the strength of the case was overlooked. Coupled with an inept defense, the results speak for themselves. An objection voiced by trial

counsel would have eliminated this misconduct, which acted as an outside influence independent of the facts of the case on the jury's decision.

No mitigation was presented on behalf of the client. Given that the vote for death was 7-5 and the presentation of mitigation evidence by Appellant at the evidentiary hearing, the trial court admitted that this conduct was deficient in granting a new penalty phase at the trial level.

The undersigned went to great lengths to show what should have been presented on behalf appellant, and has demonstrated the prejudice rendered to appellant due to counsel's deficient performance and failure to subject the state's case to adversarial testing. In order to affirm the decision of the trial court regarding the guilt portion of appellant's trial, this court will essentially have to support the error laden decision and conclusion of the trial court, who found that all of the failures of trial counsel, as detailed herein and in previous sources, had no bearing or relevancy whatsoever in determining the outcome of appellant's trial.[4]

Analysis of trial counsel's performance per *US v. Cronic*, 466 U.S. 648 (1984)

4 As previously stated in Appellant's Initial Brief to this Court, the trial court, in making its ruling regarding the 3.851, arrived at many conclusions using inaccurate facts contained in the record, and in some instances, did not arrive at a conclusion and/or opinion on some of Appellant's claims.

Appellant contends that the numerous absences at various proceedings and/or counsel's lack of ability to reasonably represent appellant at any stage in the instant case was a clear violation of the holding of Cronic v. U.S., 466 U.S. 648 (1984).

In Cronic violations, prejudice does not need to be shown, for it is presumed. *See* Reyes Vasquez v. U.S., 1994 U.S. District LEXIS 17517 (11th Cir.)[*Holding that, "the Eleventh Circuit has interpreted the case law to permit a presumption of prejudice in circumstances which offend basic concepts of due process. When such circumstances exist, the concern is with procedural fair trial requirements, and not with whether the defendant would have been found guilty."]*[5]*;* There are three ways counsel can commit a Cronic violation[6]. In the instant case, a Cronic violation occurred two out of the three possible ways a violation can occur.

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5 Prejudice can also be presumed if there is a fundamental breakdown in the adversarial process. *See* Aldrich v. Wainwright, 777 F. 2d 630 (11th Cir. 1985).

6 The three ways a defense counsel can violate Cronic are the following: (1) a defendant is actually or constructively denied counsel at a critical stage of the proceeding ("it is well settled that constructive denial can occur when there is an egregiously deficient performance by defendant's trial counsel.) Fennie v. State, 855 So. 2d 597 (Fla. 2003);("critical stages" of the proceeding have been found in the following circumstances: (1) At sentencing, Tucker, 969 F. 2d 155 (5th Cir. 1992); (2) Pre-trial period, Mitchell v. Mason, 325 F. 3d 732 (6th Cir. 2003); (3) Pre-trial preparation, Id.; (4) Failure to investigate defendant's background, Appel v. Horn, 250 F. 3d 203 (3rd Cir. 2000); (5) Offering no assistance at plea proceedings,

Defense counsel violated the first situation in *Cronic* where prejudice can be presumed by constructively denying appellant counsel at a critical stage at a proceeding. In fact, as stated above, counsel missed numerous "critical stages" of his case, starting from the onset of counsel's appointment. A brief synopsis of this first *Cronic* violation is as follows:

Childress v. Johnson, 103 F. 3d 1221 (5th Cir. 1997); (6) Jury voir dire, *Gobert v. State*, 717 S.W. 2d 21 (Tex. Crim. App. 1986); (7) Failing to file an interlocutory appeal, *Thomas v. O'Leary*, 856 F. 2d 1011 (7th Cir. 1988); (8) Closing arguments, *Hunter v. Moore*, 304 F. 3d 1066 (11th Cir. 2002); (9) Filing a motion for new trial, *King v. State*, 613 So. 2d 888 (1993 Ala. Crim. App.); (10) Preliminary hearings, *Thomas v. Kemp*, 796 F. 2d 1322 (11th Cir. 1986); (11) Absence of defense counsel at the return of the jury verdict, *Wilson v. State*, 764 So. 2d 813 (Fla. 4th DCA 2000); (12) Failing to call witnesses that are beneficial to defendant's case, *States v. Swanson*, 943 F. 2d 1070 (9th Cir. 1991); (13) Penalty phase, *Blake v. Kemp*, 758 F. 2d 523 (11th Cir. 1985). (14) Voir Dire, *James v. Harrison*, 389 F.3d 450 (US App, 2004)

(2) Defense counsel fails to subject the State's case to meaningful adversarial testing. *Fennie v. State*, 855 So. 2d 597 (Fla. 2003)(An example when counsel fails to subject the prosecution's case to meaningful adversarial testing is when counsel remains silent and refuses to participate in trial**.** *See Reyes-Vasquez v. U.S.*, 865 F. Supp. 1539 (U.S. Dist. Ct. S. Dist. Fla. 1994). Another example of this type of *Cronic* error is when the defense counsel refuses to participate in any aspect of the trial, including the attorney's lack of participation at trial. *Bell v. Cone*, 535 U.S. 685 (2002));

(3) Circumstances are such that even competent counsel could not render assistance. For instance, said circumstances have been found when the Defendant has been "denied the right to effective cross-examination," which "would constitute error of the first magnitude and no amount of showing of want of prejudice would cure it." *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.]*

On June 26, 1991, counsel waived appellant's presence at all pretrial proceedings. (TT 17-18) This occurred 19 days after counsel was appointed to represent appellant. It appears from the record that appellant was unaware of this waiver, did not consent to it, and was not present when said waiver occurred. (TT 18-19)

Counsel repeatedly failed to attend scheduled court dates, with no rhyme or reason explaining his absence, as demonstrated as follows: 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 128-9)[7]

Counsel missed numerous other pre-trial dates as evidenced by the following: Counsel missed the pretrial date of November 21, 1991, *stating to the trial judge's secretary that he was out of town and would be back on November 25*. (TT 132) Counsel missed pretrial on December 5, 1991.

7 The trial court had no choice but to continue Defendant's trial, though Defendant had not waived his speedy trial rights.

"*And it should have been on today's calendar. I assume that Mr. -- I assume that Mr. Nichols does not know about it today*." (TT 140). Counsel missed pretrial on December 17, 1991. "*The case is already set for trial. Mr. Nichols was not in chambers this morning and he's not here at this time. So I'll just pass that to the next scheduled date which is 1-7*." (TT 143). Counsel missed pretrial on January 7, 1992. "*Mr. Nichols was not in chambers this morning but he called my secretary and told my secretary he had a sick child and he had to stay at home. Pass to the next scheduled date*." (TT 144).

Counsel missed pretrial on January 24, 1992, less than two months before the trial was scheduled to begin. "*It was set this afternoon for 3 o'clock to hear motions, there are no motions, the attorney was not in chambers this morning, we have received no motions*." (TT 151). Counsel missed pretrial on February 2, 1992. "*Mr. Nichols was not in chambers this morning. It's already set for trial… We will pass till that day*." (TT 155)

Counsel missed pretrial on February 13, 1992, and on this date the State was able to serve a Habitual Offender Notice on appellant with no objections. "*At this time, Mr. Ferrell, your attorney, I don't know, he wasn't in chambers this morning and I don't know if you've heard from him or not, but at this time the State is serving upon you … notice of intent to have you*

classified as an habitual felony offender under Florida Statute 775.084. " (TT 164) Counsel missed pretrial on February 20, 1992, with no apparent excuse. (TT 166) Appellant notes that this list is not exhaustive, and it appears from the record that appellant's counsel failed to attend approximately twenty-seven (27) pretrials in all.

After appellant was convicted of First-Degree Murder, the often unexplained failure to attend court hearings continued: On April 22, 1992, counsel failed to attend a hearing to discuss the pending sentencing hearing, "*On the Ferrell case – according to my notes on my green page here we are going to discuss the sentence hearing date today and he is represented by Mr. Nichols. Has anyone seen Mr. Nichols? … I am going to pass the case on the defendant Ferrell to 4/7 and I will have – advise Mr. Nichols to be here on that date*." (TT 1044-45) On September 25, 1992, counsel missed another hearing, "*On the Defendant, Ronnie Ferrell, has been convicted of murder in the first degree… We have discussed this in chambers – we have with Mr. Bateh. His attorney Mr. Nichols was not present at that time. "* (TT 1059)

On November 5, 1993, defense counsel stated he was still not ready for sentencing hearing because "*At that time Mr. Nichols advised me he was – because he was in trial all this week in that case, he was unprepared to*

proceed to with this sentencing hearing." (TT 1077) The following three weeks were provided for defense counsel to prepare for appellant's sentencing hearing.

Counsel's deficient conduct was again displayed during the November 29, 1993 proceedings, "*In the case on the defendant Ronnie Ferrell, George* (the State), *Mr. Nichols represents this defendant and he was in chambers this morning. He advised, and he said I could state this on the record, that he had on, the sentence hearing which is scheduled for today, that he had nothing additional to say other than that – those matters he brought out when we had the advisory sentence before the jury and he said he had nothing else to say. I assumed he was going to come back and put that on the record*." The preceding was followed by comments from the prosecutor, and sentencing was passed to December 17, 1993. (TT 1083) Defense counsel had nearly two years since the end of trial to establish some form of mitigation for the court's consideration.

If the aforementioned failures and absences were not enough to establish a constructive absence at a critical stage(s) of appellant's trial, appellant's counsel failed to attend approximately 27 depositions taken in and for this case by counsel for the co-defendants, Hartley and Johnson. Counsel did not attend the depositions of all four of the state's main State

witnesses: Robert Williams, Gene Felton, Sidney Jones, and Juan Brown. Finally, counsel failed to file a motion for new trial.

These absences at said critical stages[8] cannot be considered harmless. *See* Burdine v. Johnson, 231 F. 3d 950 (5th Cir. 2000) [*Holding that, "once it is determined a constructive denial of counsel has occurred, and prejudice is presumed, it is inappropriate to apply harmless error analysis."]. See* Burdine v. Johnson, 231 F. 3d 950 (5th Cir. 2000) [*Holding that "once it is determined a constructive denial of counsel has occurred, and prejudice is presumed, it is inappropriate to apply the harmless error analysis.*"]. *Cronic* error of this magnitude is per se constitutional error and requires automatic reversal of a defendant's conviction.

8"Critical stages" of the proceeding have been found in the following circumstances: (1) At sentencing, *Tucker*, 969 F. 2d 155 (5th Cir. 1992); (2) Pre-trial period, *Mitchell v. Mason*, 325 F. 3d 732 (6th Cir. 2003); (3) Pre-trial preparation, *Id.*; (4) Failure to investigate defendant's background, *Appel v. Horn*, 250 F. 3d 203 (3rd Cir. 2000); (5) Offering no assistance at plea proceedings, *Childress v. Johnson*, 103 F. 3d 1221 (5th Cir. 1997); (6) Jury voir dire, *Gobert v. State*, 717 S.W. 2d 21 (Tex. Crim. App. 1986); (7) Failing to file an interlocutory appeal, *Thomas v. O'Leary*, 856 F. 2d 1011 (7th Cir. 1988); (8) Closing arguments, *Hunter v. Moore*, 304 F. 3d 1066 (11th Cir. 2002); (9) Filing a motion for new trial, *King v. State*, 613 So. 2d 888 (1993 Ala. Crim. App.); (10) Preliminary hearings, *Thomas v. Kemp*, 796 F. 2d 1322 (11th Cir. 1986); (11) Absence of defense counsel at the return of the jury verdict, *Wilson v. State*, 764 So. 2d 813 (Fla. 4th DCA 2000); (12) Failing to call witnesses that are beneficial to defendant's case, *States v. Swanson*, 943 F. 2d 1070 (9th Cir. 1991); (13) Penalty phase, *Blake v. Kemp*, 758 F. 2d 523 (11th Cir. 1985); (14) Closing argument, *Hunter v. Moore*, 304 F. 3d 1066 (11th Cir. 2002).

Per se constitutional error such as the aforementioned does not require the Defendant to preserve the error on direct appeal. *See also* Fennie v. State, 855 So. 2d 597 (Fla. 2003); *Hunt v. Mitchell*, 261 F. 3d 575 (6th Cir. 2001). *See* Powell v. Alabama, 287 U.S. 45, 69 (1932) [*a person accused of a crime "requires the guiding hand of counsel at every step in the proceedings against him," and that the constitutional principle is not limited to the presence of counsel at trial... "It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial*."]

This was not a case of merely missing one or two court dates with a valid explanation. Counsel's actions showed a complete disregard for a reasonable representation of appellant. Counsel missed approximately 27 pre and post-trial dates[9] *See* Mitchell v. Mason 352 F. 3d 732 (6th Cir. 2003)

9 The pre-trial period has been declared to be vitally important to a defendant's constitutional guarantees under the 6th Amendment. *See* Id. [*Holding that "the pre-trial period is perhaps the most critical period of the proceedings… that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important.*"]; Thomas v. Kemp, 796 F. 2d 1322 (11th Cir. 1986) [*Holding that "the functions served by an attorney at a preliminary hearing are first, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the state's case*

[*Holding that, "the pretrial period is indeed a critical stage, the denial of counsel during which support a Cronic analysis."];* Counsel failed to attend jury selection/jury voir dire. *See* Shaw v. State, 422 So. 2d 20 (Fla. 2nd DCA 1982) [*Holding that jury selection is a "critical stage" of the proceeding."]; See* U.S v. Thomas, 856 F. 2d 1011 (7th Cir. 1988) [*Holding that, "when an attorney voluntarily leaves the courtroom during a critical stage of the trial, the defendant need not affirmatively prove prejudice under Strickland, rather, the court holds that the burden shifts to the government to prove that the error was harmless beyond a reasonable doubt."]*.

Counsel failed to offer any mitigation at the sentencing hearing. *See* Tucker v. Day, 969 F. 2d 155 (5th Cir. 1992)[*Holding that the sentencing proceeding is a critical stage under* Cronic, *and because of defense counsel's actions of remaining silent and offering nothing by way of*

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that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the state's witnesses at trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the state has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matter as the necessity for an early psychiatric examination or bail."]

mitigation at the sentencing hearing and thereby not representing client's interests, defendant was constructively denied the right of counsel.].

In conclusion, appellant did not even have the benefit of a warm body to stand next to him in a majority of his criminal proceedings in the instant case, and said instant facts showing counsel's unexplained absences at numerous proceedings were in violation of the holding(s) in Cronic, and cannot be considered harmless. *See* Rushen v. Spain, 464 U.S. 114 (1983) (per curiam) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963) [*Stating that, some stages of the criminal trial where, "the deprivation, by its very nature, cannot be harmless."]. See* U.S v. Thomas, 856 F. 2d 1011 (7th Cir. 1988) [*Holding that, "the right to counsel under the U.S. Constitution amend. VI guarantees more than just a warm body to stand next to the accused during critical stages of the proceedings; an accused is entitled to an attorney who plays a role necessary to ensure that the proceedings are fair. The right to counsel is thus the right to effective assistance of counsel."].*

Appellant's counsel violated the second violation of Cronic, to-wit: by failing to subject the State's case to meaningful adversarial testing. Fennie v. State, 855 So. 2d 597 (Fla. 2003); Bell v. Cone, 535 U.S. 685 (2002) [*Stating*

that to fail to subject the prosecution's case to meaningful adversarial testing, the attorney's failure must be complete."].

Although the second way to violate *Cronic* is an extremely high standard to meet, counsel's egregious conduct in this case has met said standard. Appellant's counsel's actions conclusively proved that he did not subject the prosecution's case to meaningful adversarial testing. Without regurgitating the previously listed instances of ineffectiveness and failures mentioned prior in this brief, appellant refers this Court to the previously listed arguments that detailed counsel's failure and absence to attend pre-trials, jury selection, post trial conferences, attend or take depositions, subpoena witnesses, conduct investigation in preparation for the guilt or the penalty phase of appellant's trial, failure to talk to witnesses in both said trial phases, etc.

During Voir Dire, counsel failed to rehabilitate jurors whom expressed objection to the death penalty, failed to object to the state striking twelve jurors for cause, based on the "views" of the death penalty, when he could have attempted to rehabilitate said jurors, failed to object when the trial court presented to the jury an argument regarding "god," tried to leave early from said proceedings, etc. This failure to adequately conduct Voir

Dire left appellant with a pro-death jury, prejudicing him from the onset of his First-Degree Murder trial.

During his opening statement, counsel made uninformed and unguided statements to the jury, thereby showing his lack of knowledge of the case, and even told the jury they would hear an alibi when counsel filed no notice of alibi and did not present an alibi during trial.

Counsel failed to properly impeach the state's witnesses because of his lack of knowledge of the case. This fact is proven simply by looking at the record and noting the concrete impeachment evidence counsel had at his disposal but failed to use same.[10]

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10 Documents at counsel's disposal including: (1) a sworn statement and deposition of Deatry Sharp, who admitted to the earlier Saturday robbery that the state alleged Defendant committed, giving the state a motive for Defendant to kill the victim. Not only could have counsel used this at trial to impeach two of the state's main witnesses' testimony (that of Robert Williams and Gene Felton), but counsel could have prevented the state from entirely bringing the previous Saturday robbery of the victim up at trial, by arguing this Sharp statement at the previous hearing on the state's introduction of Williams rule evidence; (2) newspaper articles, whereby if counsel would have simply perused and correlated them with Robert Williams testimony (and the time the newspaper articles were printed and when Mr. Williams statements were made), he could have simply shown the jury that the majority of Mr. Williams testimony could have easily been conducted by just reading the newspaper; (3) prior convictions, which (if used) would have shown the jury that another State witness, Sidney Jones, was lying about his number of felony convictions; (4) documents showing State witness Sidney Jones was a previous C.I. for the JSO, which would have shown the jury that Mr. Jones could have been biased in his testimony, because his sole source of income came from being a snitch and selling

Counsel convinced appellant not to present a defense at trial, thereby forgoing him from presenting any evidence and/or witnesses on his behalf (excluding testifying on his own behalf). In particular, counsel told the court that after conversing with Defendant and explaining the evidence to him, they agreed it was best not to present evidence in favor of having two closing arguments. (TT 808-809).

This waiver by appellant was not knowingly, voluntarily, and/or intelligently made, for counsel's decision to present two closing arguments was not an informed or reasonable decision, because of counsel's failure to investigate (amongst other things discussed herein) appellant's case. *See* *State v. Lewis*, 838 So. 2d 1102 (Fla. 2003). Essentially, appellant's counsel was attempting to divert his ineffective representation by getting his client to waive his case, thereby allowing counsel's failure to investigate the case to go unnoticed. This tactic is not only unreasonable, but unethical.

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drugs; and (5) any of the discovery documents (witness depositions and sworn statements), which (if counsel had read them) could have helped counsel show the jury (and combated the state's repeated misleading arguments in closing regarding the witnesses veracity) that the statements of each State witness is inconsistent with one other and, therefore, if you believe one State witness, you cannot believe the other. Coupled with the newspaper articles and the Deatry Sharp information, counsel could have systematically eliminated the credibility of all the state's witnesses, putting a severe damper on all State witnesses. This includes counsel's reading of the statements made by the lead detective Bill Bolena, whom also admitted it was not appellant who committed said earlier robbery of victim, but was Deatry Sharp.

Counsel failed to object to improper closing arguments from the state attorney, made to inflame the passions and minds of the jury, this essentially eviscerated Defendant's opportunity for a fair trial.[11] The arguments made by the state have been condemned by the U.S. Supreme Court and the Florida Supreme court for the last 50 years. Moreover, the Florida Supreme Court, in *Urbin v. State* and *Brooks v. State*, specifically condemned the identical closing arguments made by the state in the instant case. Defendant notes that the state attorney in the instant case was the same attorney in the *Urbin* and *Brooks* cases. Allowing said arguments to be consistently given by the state to the jury, without objecting to same was egregiously improper.

Counsel for Defendant also failed to file a motion for new trial in the instant case.[12]

Counsel allowed Defendant to waive any evidence and/or testimony in appellant's penalty phase, and did not conduct any mitigation or know of any investigation before waiver was made.[13] This is shown from the record,

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11 It is interesting to note that the prosecution objected to defense counsel's closing argument, calling it a "golden rule" violation, yet counsel makes an actual golden rule argument (as defined by Florida Supreme Court law) in the very same proceedings.

12 It appears that counsel voiced an oral motion for a new trial.

13 As demonstrated in the evidentiary hearing that counsel did not: interview defendant's family; subpoena records such as mental health, school, DOC records, etc.; subpoena witnesses for said hearing; retain

as counsel stated in said hearing that, "there is nothing to offer by way of mitigation, and consequently there are no other witnesses to call." (TT 984) Again, in light of the aforementioned facts, this again was not a voluntary waiver, according to the clear case law given above. (See also, ABA guidelines and *Rompilla.*)

Again in the penalty phase of appellant's trial, the state gave improper closing arguments, and counsel again failed to object to same. (See *Brooks*, *Urbin*, above given argument) Defendant notes that the jury recommendation of death was 7 to 5, thereby one vote for life would have given Defendant a life sentence. *See Phillips v. State*, 608 So. 2d 778 (Fla. 1992) [*Stating that "the jury vote in this case was seven to five in favor of a death recommendation. The swaying of the vote of only one would have made a critical difference here. Accordingly, we find that there is a reasonable probability that but for counsel's deficient performance in failing to present mitigating evidence the vote of one juror might have been different, thereby changing the jury's vote to six to six and resulting in a recommendation of life reasonably supported by mitigation evidence*."].

After the jury recommended death and prior to appellant's sentencing, counsel again repeatedly missed scheduled court dates with no excuse, and

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mental health experts, etc.; and from the record, do any investigation into Defendant's mitigation and/or penalty phase of his trial.

subsequently presented no mitigation and/or evidence at the sentencing hearing/Spencer hearing (See testimony of Larry Turner and Tom Fallis in Evidentiary hearing, pgs. 469 and 237 respectively, see also ABA 1989 guidelines). As stated previously, the deficiencies did not cease subsequent to Appellant being found guilty. (TT 1044-45); (TT 1059); (TT 1077); (TT 1083). *See* *Tucker v. Day*, 969 F. 2d 155 (5th Cir. 1992) [*Holding that, the Supreme Court has recognized that there are some circumstances in which although counsel is present, "the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided," and because defendant's counsel made no attempt to represent his client's interests in his sentencing hearing, this failure amounted to a constructive denial of defendant's right to counsel.]. See also Fennie v. State*, 855 So. 2d 597 (Fla. 2003)

The aforementioned lack of diligence and ineffective representation throughout appellant's criminal proceedings conclusively demonstrates that counsel failed to subject the State's case to meaningful adversarial testing. *Fennie v. State*, 855 So. 2d 597 (Fla. 2003)[14] Said ineffective conduct

14 Further, lack of pretrial preparation, lack of preparation at a sentencing hearing, the pretrial period, the failure to investigate appellant's background, failing to call witnesses, jury voir dire, and the penalty phase have all been considered. "Critical stages" of the proceeding. Therefore, much of the instant claim that counsel failed to subject the state's case to meaningful

transpired throughout appellant's criminal proceedings, including pretrial, depositions, jury selection, trial, penalty phase and sentencing, thereby allowing the state to present un-contradicted (yet unreliable and misleading) evidence, thereby contaminating the entire proceeding. *See* Sullivan v. Louisiana, 508 U.S. 275 (1993) (Rehnquist, C.J., concurring)). Courts have found said violations in numerous cases. *See* Tucker v. Day, 969 F. 2d 155 (5th Cir. 1992) [*Finding said violation when attorney did not represent client's interests in sentencing hearing.]; Quintero v. Bell*, 368 F. 3d 892 (6th Cir. 2004) [*Holding that, "counsel's acquiescence in allowing seven jurors who had convicted petitioner's co-conspirators to sit in judgment of his case surely amounted to an abandonment of "meaningful adversarial testing"*

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adversarial testing would also fall under the first Cronic violation under constructive absence of a critical stage. *See* (1) At sentencing, *Tucker*, 969 F. 2d 155 (5th Cir. 1992); (2) Pre-trial period, *Mitchell v. Mason*, 325 F. 3d 732 (6th Cir. 2003); (3) Pre-trial preparation, *Id.*; (4) Failure to investigate defendant's background, *Appel v. Horn*, 250 F. 3d 203 (3rd Cir. 2000); (5) Jury voir dire, *Gobert v. State*, 717 S.W. 2d 21 (Tex. Crim. App. 1986); (8) Closing arguments, *Hunter v. Moore*, 304 F. 3d 1066 (11th Cir. 2002); (9) Filing a motion for new trial, *King v. State*, 613 So. 2d 888 (1993 Ala. Crim. App.); (10) Preliminary hearings, *Thomas v. Kemp*, 796 F. 2d 1322 (11th Cir. 1986); (11) Absence of defense counsel at the return of the jury verdict, *Wilson v. State*, 764 So. 2d 813 (Fla. 4th DCA 2000); (12) Failing to call witnesses that are beneficial to defendant's case, *States v. Swanson*, 943 F. 2d 1070 (9th Cir. 1991); (13) Penalty phase, *Blake v. Kemp*, 758 F. 2d 523 (11th Cir. 1985); (14) Closing argument, *Hunter v. Moore*, 304 F. 3d 1066 (11th Cir. 2002).

throughout the proceeding, making "the adversary process itself presumptively unreliable."](Writ of Cert. denied, 534 U.S. 936 (2005);

Based on the aforementioned facts and case law, counsel violated two out of the three situations in *Cronic* were prejudice can be presumed. Not only did counsel fail to attend numerous "critical stages" of appellant's proceedings (such as investigation, pre-trials, depositions, jury selection, etc.), but counsel also woefully failed to subject the state case to meaningfully adversarial testing, resulting in a trial that was fundamentally unfair.

ISSUE TWO

THE PROSECUTION ELICITED AND GAVE FALSE TESTIMONY TO THE JURY IN APPELLANT'S TRIAL IN AN ATTEMPT TO BOLSTER STATE WITNESS TESTIMONY IN VIOLATION OF Giglio v. United States, 92 S. Ct. 763 (1972)

As shown at the evidentiary hearing held by the trial court, it is clear that the state elicited and gave testimony and/or information to the jury which the state knew was false.[15] Further, said false, or at the very least

[15] 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). This "material" standard is more of a "defense friendly" standard than *Brady's* "reasonable probability" standard. This is so because the *Giglio* standard reflects "a

misleading, testimony allowed by the state was material to appellant's case because the testimony was used to bolster the credibility of his witnesses and to convince the jury in closing arguments that no newspaper articles could have supplied the necessary information to the witnesses.

Appellant has proven through testimony that newspapers were available and accessible within the Duval County Jail during and prior to appellant's incarceration (EH 217-222, 39-79)

It is clear that one of the state's main witnesses, Robert Williams, has severe credibility issues when his statements are compared to the information contained in the newspapers.[16] Even a cursory review of the

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heightened judicial concern, and correspondingly heightened judicial scrutiny, where perjured testimony is used to convict a Defendant." *Bagley*, 473 U.S. 682 (1985). 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 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).

[16] When viewing Mr. Williams' statement in conjunction with other state witnesses' testimony, the newspaper articles in existence at the time Williams gave his testimony, the testimony of Detective Bill Bolena (in regards to the Mr. Sharp earlier robbery issue), the testimony of Deatry Sharp, and the fact that Mr. Williams was facing up to 15 years in prison at the time of his trial testimony, Mr. Williams' lack of credibility is clear.

statements and articles will show how easily his story could have been concocted.

Moreover, the state was obviously aware of the striking similarities between Williams' "knowledge" of appellant's case and the facts contained in the newspaper. A major part of the state's closing argument was dedicated to bolstering Williams' credibility, by stating that the facts Williams testified about "were not contained in the newspaper." (TT 838-879). Consciously aware of the information in the newspapers, the State repeatedly and improperly argued the knowledge Robert Williams possessed of the crime were so called "Points of Truth," available only because of his first-hand knowledge. (TT 849) According to the State, there was absolutely no possibility of Robert Williams learning anything about this case unless Defendant told him in person.

The following questions posed by the State to witnesses Dr. Lipkovic and William Bolena: "*And I asked him did you release to the media the fact that **(1)** Gino was shot in the head? Did you release to the media the fact that **(2)** Gino was shot in the front seat? Did you release to the media that the shooter, **(3)** the person that did the shooting was in the back seat? Did you tell the media **(4)** how many times Gino was shot, whether it was more than once? Did you release to the public or media that **(5)** Gino was shot*

four or five times? Did you release to the media I asked him that drug paraphernalia, ***(6)*** *drug paraphernalia was found on the front seat? Did you release to the media that* ***(7)*** *an automatic pistol was used to shoot Gino? Those were all points of truth, points of truth that Robert Williams, Robert Williams got from that Defendant in the Duval County Jail that he could have only gotten from someone that was there actively involved in that armed robbery with a firearm, armed kidnapping with a firearm, first degree murder*." (TT 848-849)

Further, "*and then Robert Williams said and these are not matters that were released to the public or the media, the defendant admitted to Robert Williams that Kip, the shooter in the back seat, that Gino was shot in the head, Gino was shot four or five times, and it all was not released to the media, to the public, that Gino was shot with a gun that had a clip, and Mr. Williams told you he knows enough about firearms to know that was an automatic*." (TT 864)

Unsurprisingly, nearly every statement, or so called "Point of Truth", the State argued to the jury about Robert Williams' knowledge that was supposedly not released to the media was either a *Headline* article, or a conspicuously-placed article in the Florida Times-Union, beginning one day after the murder, and readily accessible to Mr. Williams (and any other state

witness) before he gave any statements in this case. The state's closing argument was factually wrong, inaccurate, and knowingly misleading.[17]

[17] The following information was contained in the Florida Times-Union beginning the day after the murder: (1) *Gino Mayhew was shot in the head*. (2) *Gino Mayhew was shot 4-5 times*. (3) *There was drug paraphernalia found in the front seat, and the police believe the killing was drug related*. (4) *The type of weapon used to commit the murder*. (5) *The names and photographs of Ronnie Ferrell, Sylvester Johnson, Kenneth Hartley and Gino Mayhew* (6*) Specific details of the kidnapping and murder known only to law enforcement.* (7) *The locations of where the kidnapping and murders occurred, as well as a detailed map highlighting the areas.* (8) *The type of vehicle Gino was driving.* (9) *Defendant's Mother stating he was a good friend and like a brother to Gino.* (10) *Criminal Histories of each Defendant and Co-Defendants, and a long list of family members of Gino.* (11) *Information about Gino being robbed on 04/20/91*. (12) *Comments from employees of the Jacksonville Sheriff's Office about the kidnapping and murder.*

Nearly every statement the State argued to the jury about Robert Williams's knowledge that was supposedly not released to the media or public was either a headline article, or an article in the Florida-Times Union newspaper, beginning one day after the murder. Television coverage was also very widespread and detailed, including such things as Defendant's Bond Hearing and explanations of what he was being charged with in Gino's death. The jury was forced to believe that all of the knowledge Robert Williams had was in fact from appellant's own mouth; that he "*didn't know this defendant from Adam's house cat. He didn't know Kenneth Hartley, he didn't know Gino Mayhew, he hadn't even heard of the murder*." (TT 863)

The following is an article taken from the Florida Times-Union ten (10) days before the first statement made by Robert Williams. "*Mayhew's body was found on April 23 slumped over the steering wheel of his family's Chevrolet Blazer near Sherwood Forest Sixth Grade Center. He'd been shot repeatedly. According to police, Mayhew was abducted by two men the night before his body was found. He had driven to Washington Heights Apartments, 4229 Moncrief Road, to visit acquaintances when the two men got into his vehicle, police said. A witness told police that Hartley, who sat behind Mayhew, pointed a small-caliber handgun at the back of his head while Ferrell sat beside the youth*." *Florida Times-Union*, May 18th, 1991.

This article alone refutes the so called “Points of Truth” #2 and #3, as well as explains many other details of the crime Robert Williams allegedly could never have known. “Points of Truth” #4 and #5 would not have been very difficult to figure out when a headline of an article published the day after Gino’s death states “*Paxon senior shot about 5 times*,” and "Point of Truth" #1 could easily be known when the same article states “*Mayhew’s grandfather said at least one of the shots was to the head*.” *Florida Times-Union*, April 24th, 1991. "Point of Truth" #6 could be viewed in an article two days later, with another headline reading “*Evidence of Drugs at Death Scene*,” and the very first sentence of that article explaining how “*Jacksonville police found drugs and drug paraphernalia with a slain Paxon High School senior Tuesday, and investigators think the killing may have been drug related*.”

The only “Point of Truth” (#7) that Robert Williams claimed to know that was not found directly in the newspaper was his alleged knowledge of a clip, meaning that an automatic weapon was used to commit the murder. The State repeatedly argued this knowledge of a clip proved Robert Williams’ knowledge of the crime and appellant’s guilt, but one thing must be noted. Throughout the entire police investigation a clip was <u>never found</u>. In effect, the State was arguing something that didn’t exist to build the credibility of Robert Williams. Additionally, the Florida Times Union stated a small caliber handgun was used in the murder. When asked in a deposition, lead homicide detective William Bolena claimed that a small caliber handgun is almost always an automatic weapon, so therefore Robert Williams’s testimony regarding the murder weapon does not prove anything.

The State based its case against Defendant on his alleged motive stemming from the 4/20/91 robbery of Gino. Robert Williams stated that Defendant took part in the crime but was wearing a ski mask, so Gino did not recognize him. He further explains that appellant was thus able to set up a drug purchase two days later because Gino trusted him. This fabricated story by Robert Williams would not have been difficult to conceive with the information from the very same 5/18/91 article stating “*Mayhew knew at least one of the men, police and relatives stated. Ferrell’s mother, Gladys, said her son was Mayhew’s good friend and treated him like a little brother*.” This article, coupled with a 4/25/91 article stating “*Mayhew’s girlfriend told the family that Gino was robbed last Saturday by two men who pulled guns on him*,” effectively show that a robbery occurred and Gino wouldn’t think of Defendant being involved because he trusted him. After adding the information about the various roles of the defendants in the

murder, as well as nearly every detail in Robert Williams's testimony being released to the public, his testimony and credibility becomes highly questionable.

Robert Williams also claimed knowledge of information that was not contained in the media coverage of Gino's death. However, for an unbeknownst reason the majority of this information was never confirmed by police or investigators. For example, he claimed to know where the murder weapons were discarded by giving the exact street address where they could be found. Despite the precise location where the weapons were located, police never found any weapons. The State also argued that Robert Williams claimed a rope gold chain was taken by appellant after Gino's murder, thus further establishing his guilt and the Aggravating Factor he was convicted of; committing a murder for pecuniary gain. (TT 676, 840) However, Robert Williams never mentioned a gold chain being taken until his trial testimony. Therefore, even if defense counsel had attended a sworn statement given by Robert Williams he would have had no way of knowing this information until his trial testimony.

Continuing, there is not a single deposition, sworn statement, or any other form of documentation which claims appellant had a rope gold chain, money, or drugs after Gino was murdered. Once again, the State was trying to establish guilt and involvement with Hartley and Johnson based on something that was either unproven or untrue. It must be stated that when all information released to the public and media is taken from the sworn statements and testimony of Robert Williams; there is nothing left but circumstantial evidence resulting from a story easily concocted by a man seeking to have his *15 year prison sentence reduced to 18 months*.

There was absolutely no physical evidence produced that could verify anything Robert Williams claimed he knew that was not found in the media. In fact, there has never been any physical evidence whatsoever to link appellant to this crime. In conjunction with this is the amount of things Robert Williams claimed he knew that was not released to the public which went either unverified or were found to be untrue; such as the location of the murder weapons, the amount Gino lost from the robbery, and accounts given of the 4/20/91 robbery and murder two days later.

The State was able to establish the credibility of Robert Williams due to the repeated emphasis there was no possibility of him knowing anything about the crimes unless appellant told him in jail. Had the jury known this was completely untrue and the media contained almost his entire testimony, the statements and credibility of a man seeking a bargain in sentencing

Because of counsel's complete lack of preparation in this case, and in violation of *Giglio*, the prosecution time and again argued to the jury the "Points of Truth," knowing them to be available to the general public including inmates in jail, and consciously aware that there where news articles in print that mirrored Williams' testimony.[18]

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would have surely damaged. The result of the trial would have been altered had this easily obtained information been produced by defense counsel and used for impeachment. Appellant was greatly prejudiced because it was not.

In conclusion, every detail of the robbery, kidnapping and murder that Robert Williams claimed he knew, and that was able to be confirmed, was in the media. Every detail he claimed he knew, but was not in the media, could not be confirmed.

[18] The prosecution's knowledge of the facts and extent of the Ferrell case contained the news media is easily apparent from the record. For instance, the following examples show how in the prosecution's own words knew that the Ferrell case was being covered by the newspapers: (1) the state attorney box given to defense counsel contains all the newspaper clippings elicited from the Ferrell case, before and after trial, and said articles regarding the case started to appear approximately one month prior to Mr. Williams giving his first statement. (2) The State's main investigator testified in deposition (that the prosecution attended) that he had all of the newspaper articles in his possession, and conducted a review of the material to establish what could have been known if somebody had read them. (See Bolena depo, pg. 111) (3) The State conducted numerous depositions in this case that demonstrate his 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 the prosecution 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 the prosecution 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*

The news coverage of this case was widespread. Why would the state spend so much time discussing these facts if there was not a great concern about Williams' credibility? The state's absolute duty is to search for and present the truth, but that did not happen in this case.

The State went to great lengths to convince the jury that Robert Williams was a credible witness.[19] In doing so, the State knowingly

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his name in the paper and things." The prosecution:, "*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 the prosecution*:* "*Everybody – when Gino got killed, everybody knew… everybody knew. It was sad. Once I heard about it, I even cried. I didn't like what happened. 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 the prosecution 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*." The prosecution 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*." The prosecution 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.

[19] For example, in guilt phase closing argument, the State made the following improper and misleading comments: "He [Robert Williams] told

presented false information regarding the media coverage of Gino Mayhew's death in order to obtain a conviction. 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,*

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you the maximum penalty was 15 years in prison and in return for his truthful testimony in this case he told you that it's agreed that he won't get more than ten years, ten years in Florida State Prison for trying to sell a stolen camera." (TT 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 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 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 to the one the State led the jury to believe Robert Williams was going to get. This argument only compounds the overreaching bounds the State was willing to go to get a conviction.

the prosecution's misconduct of deliberately presented misleading evidence denied Defendant a fair trial.]

Unfortunately, the State's misconduct did not end with the misrepresentation of evidence used to bolster the credibility of Mr. Williams. Shortly before appellant'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.[20] The prosecution also attended the deposition of lead homicide detective William Bolena when he admitted (and believed) Deatry Sharp's involvement in the robbery, thereby discounting appellant's involvement.

In order to obtain a conviction including the introduction of Williams Rule evidence, the state ignored a witness admission to committing the Saturday crime (underlying possibly the motive for the murder); ignored another witness's statement that exculpated Defendant from the robbery; ignored his lead detective's investigation and opinion that appellant didn't participate in the earlier Saturday crime. The state knowingly elicited false

[20] It is interesting to note that Mr. Sharp, Mr. Mills, and Mr. Felton's sworn statements were taken on the same day, (coupled with the fact that the State's lead detective agreed with Sharp's statements and belief Defendant was not involved in the Saturday robbery), yet the prosecution chose to use Felton's testimony, and not Sharp and Mills, whom stated Defendant was not involved in earlier robbery.

testimony from Robert Williams and Gene Felton in violation of *Giglio* and *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173 (1959); *See also* Ho Yin Wong, 359 So.2d 460 (3rd DCA 1978).

If the State did not have the testimony of Robert Williams and Gene Felton placing appellant at the robbery, appellant would have no reason to be a part of the kidnapping and murder of Gino, and the state's motive would have been non-existent. Therefore, in order to successfully utilize its motive, the state had to ignore the testimony of Mr. Sharp, Mr. Mills, and Detective Bolena. Refusing to correct this false testimony constitutes reversible error. *Id*. [21]

The State's actions are precisely what the U.S. Supreme Court tried to prohibit when it decided *Giglio v. United States*. Given the fact that the state

[21] 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 appellant instead. Had the knowledge of Deatry Sharp's admittance to committing the robbery appellant 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*.]

was aware of the news articles together with Mr. Williams' testimony, the state's "motive" for presenting false testimony becomes clearer.[22] 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 appellant was being accused of, it cannot be said that the jury's verdict would have remained the same. If the State's violations were not presented, the whole case would have been put in a different light, thereby the jury's verdict severely undermined. A look at the prosecution's own notes show the great lengths it took to secure a

[22] It is interesting to note that after appellant's trial, in the co-defendant's trials, the state did not use state witnesses Robert Williams and Gene Felton, and argued to the jury that the earlier robbery was committed by the co-defendant's and "this other person." (See Sylvester Johnson trial, opening statement by state). Furthermore, the prosecution drastically reduced his statements to the jury of what was contained in the newspaper, again demonstrating his overreaching in appellant's case. Additionally, two of the state's witnesses, Juan Brown and Sidney Jones, as shown by the prosecutors notes (Supp Vol XII 2171), were brought out to the scene of the crime presumably to get there story straight, because a reading of the statements given by the state's witnesses indicate that the stories are not consistent with one another. In fact, by reading said state witnesses testimony, if one believes one state witnesses testimony, the other witness's testimony cannot be true.

conviction, as the prosecution's intent was to bring the eyewitnesses to the scene together. (Supp Vol XII 2169, 2171)

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.*"].

ISSUE THREE

THE PROSECUTION FAILED TO DISCLOSE RELEVANT EVIDENCE TO THE DEFENSE IN VIOLATION OF Brady v. Maryland, 373 U.S. 83 (1963)

The prosecution in this case utilized the testimony of Sidney Jones, a known informant, but failed to disclose Mr. Jones status as a paid confidential informant to the defense. Counsel for appellant failed to attend the deposition of Sidney Jones taken by counsel for one of the co-defendants. The undersigned entered evidence at the evidentiary hearing showing that Jones was a paid informant employed by the Jacksonville Sheriff's Office at the time of appellant's case.

The prosecution has a duty to disclose to defense counsel any evidence that is favorable to the defense. *See* Brady v. Maryland, 373 U.S. 83 (1963) at 87. *See also* Gorman v. State, 597 So. 2d 782, (Fla. 1992) *[Holding that informant status in other cases can be deemed* Brady *material.]* At the continuation of the evidentiary hearing at the trial court level, appellant evidenced the fact that Jones was paid by the Jacksonville Sheriff's Office for performing as a confidential informant 10 times from December of 1990 to April of 1991. Including a payment on April 18, 1991 literally days after the murder in which appellant was accused. (Supp Vol II 23-24) Payment slips documenting these payments were entered as evidence by appellant at the continuation. (Supp Vol II 3-12).

These records indicate that at some point in time Jones was blackballed by the JSO and was no longer used as a confidential informant. The word "blackballed" appears on the Dec 19, 1990 and April 18, 1991 payment slips. (Supp Vol II 3, 5) Appellant called JSO Officer Randy Palmer, an officer of then 24 years experience who testified that an informant can be blackballed for a variety of reasons including: criminal activity, untrustworthiness, uncooperativeness, or a tendency towards violence. (Supp Vol II 26)

The state in turn attempted to discredit these reports saying that Jones could have been blackballed at any point from then until the present time; however it cannot refute the fact that JSO had no information or evidence that Jones was ever used as a Confidential Informant anytime after April 18, 1991. (Supp Vol II 37) The prosecuting attorney of appellant then took the stand at the evidentiary hearing and swore that in the deposition of Sidney Jones, taken on January 7, 1992, Jones admitted that he was a confidential informant. (Supp Vol II 42) However, as noted by appellant throughout this case, counsel did not attend this deposition, nor did he make reference to the fact that Jones was a confidential informant in cross examination of this witness. (TT 615-629)

The prosecution in this case admits on the stand that he was aware that Jones was a confidential informant prior to appellant's case. (Supp Vol II 44) This knowledge was never candidly disclosed to counsel at the time of the trial, nor did counsel for appellant ask for this information. (Supp Vol II 49) The prosecution did admit that he is aware of the case law requiring full disclosure of such information to the defense. (Sup Vol II 51) However the state indicated that because it was contained in a deposition which counsel for defendant did not attend, that he had met his requirement to disclose this information.

The bottom line here is that prosecution was aware of Jones status of a paid confidential informant, but sought to minimize this potential impact to his case by not candidly either stating such to counsel for co-defendants or by disclosing the various amounts of pay receipts proving this fact. The prosecution then, years later when it was evidenced by appellant, sought to claim ignorance of the existence of the pay receipts as to why this information wasn't provided to the defense. Not in 1991 nor before did the prosecution introduce to defense counsel (1) Jones was a Confidential Informant during the time Ferrell was arrested, and year prior to same, including the specific dates and times Jones worked as an informant, as it was readily available in 1991, as Appellant had discovered same in 2005. (2) Jones was paid anywhere from forty dollars to twenty five dollars for his information in cases. Like the Florida Supreme Court found in *Gorham v. State*, informant state in other cases can be deemed Brady material, as the information goes to witness bias, witness relationship to a party, personal obligations to a party, or employment by a party to show bias upon cross examination. 597 So. 2d 782 (Fla. 1992). *See also* Fla. Evid. Code 90.608(1)(b).

This is a textbook example of what the Supreme Court sought to avoid in its ruling in *Brady.* Appellant should be given a new trial based on the

prosecutions failure to disclose and subversive attempt to legitimize his actions.

CONCLUSION:

Without a doubt, the instant case is legitimately one of the most appalling cases demonstrating deficient performance that has been before both the circuit court and appellate courts in the State of Florida. Appellant has not found one case in Florida whereby a trial counsel found it unnecessary to attend over ½ of his death-eligible-client's pretrials, to investigate his client's case, to depose any of the state's eyewitnesses and witnesses called at trial, to call a defense witness which would have completely contradicted the state's motive theory and Williams Rule evidence, to call no witnesses in defense, to present no alibi or evidence to speak of when such was available, and to fail to object to prosecutor closing arguments that have been condemned by the Florida Supreme Court for over a half a century.

Add to that a completely uninvestigated and outright lazy penalty phase performance where no mitigation was offered (in either the penalty or at the Spencer hearing) and where no family members were even spoken with prior, it behooves appellant to absolutely proclaim that this is a case which warrants a reversal and a new trial. Couple these facts with a

prosecutor with a "win-at-all-cost" mentality regardless of the truth, Mr. Ferrell was completely denied his constitutional right to a fair trial, and his right to competent counsel under the 6th Amendment of the Florida and U.S. Constitutions.

Appellant urges the court to look at the big picture in this case, to take into account the trial court's error filled order utilizing incorrect facts, to not entertain the state's attempts to legitimize the obvious failure of trial counsel to competently represent his client, and to see that the failures in this case reach down to an absolutely fundamental level.

CROSS APPEAL ISSUE ONE

WHETHER THE TRIAL COURT'S RULING IN GRANTING FERRELL A NEW PENALTY PHASE HEARING WAS SUPPORTED BY CASE PRECEDENT AND BY COMPETENT AND SUBSTANTIAL EVIDENCE (*RESTATED*)

A. Standard of Review

The Florida Supreme Court reviews a circuit court's resolution of a *Strickland* 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 as Appellate courts defer to the circuit court's factual findings. However appellate courts review de novo the circuit courts legal conclusions. *See Sochor v. State*, 833 So. 2d 766 (2004 Fla. LEXIS 985)

B. The trial court's finding and legal conclusion granting Ferrell a new penalty phase hearing was supported by competent, substantial evidence from the record and evidence introduced at the evidentiary hearing

The trial court's finding(s) that Ferrell is entitled to a new penalty phase hearing is a factual decision supported by competent, substantial evidence. Therefore, this Court must defer to the lower court's factual findings. *Id.* Moreover, the trial court was correct in its legal conclusion derived from its factual findings, and therefore the trial court's ruling granting Ferrell a new penalty phase should be affirmed.

(1) Ferrell's waiver of penalty phase evidence was not a voluntary and knowing waiver

The State alleges first that the trial court erred in concluding Ferrell's waiver was not knowing and intelligent. The state is mistaken in this matter.

Counsel has the duty to inform his client on what mitigating evidence had been found, in order for his client to have a knowingly and voluntary waiver of same. *See* *State v. Lewis*, 838 So. 2d 1102 (Fla. 2002) *[Holding that: The obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated--this is an integral part of a capital case. Although a defendant may waive mitigation, he cannot do so blindly; counsel must first investigate all avenues and advise the defendant so that*

the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision.].

Trial counsel also has an absolute duty to investigate for mitigating evidence in preparation for a penalty phase of a defendant's trial, despite a client's wishes to the contrary. *See* *Henry v. State*, 937 So. 2d 563 (Fla. 2006) *[Holding that: A defendant's waiver of his right to present mitigation in the penalty phase does not relieve trial counsel of the duty to investigate mitigation to ensure that the defendant's choice to waive his rights is a fully informed decision.]* *at 570*.

In Ferrell case, much like the case in *Lewis*, counsel for Ferrell had ample time in which to prepare his penalty phase case, (June 7, 1991 counsel appointed by court, trial held March 10-12, 1992) yet there exists no evidence in the record that he spent any time in preparing for the penalty phase. There exists no trial counsel file (EH 17-21); no testimony from trial counsel (he was deceased at time of evidentiary hearing); and no record subpoenas for schools, hospitals, medical records, DOC records, jails, etc. are contained in the clerk's file.

Dr. Miller (who was appointed by the court to assist trial counsel to determine competency) testified at the evidentiary hearing that he was not asked to, nor did he, conduct a mitigation investigation in the case. (EH 126-

146) Ferrell's family testified at the evidentiary hearing and stated they were not contacted by trial counsel for mitigation purposes, or for any reason for that matter (EH 39-54, 81-90, 101-115, 151-161, 166-175, 189-207).

It should be noted that this court reversed the trial court in *Lewis* for a new penalty phase noting that trial counsel in Lewis had 30 days to prepare for the case, yet "spent far less than 18 hours in preparing for the penalty phase." *Id* at 1114. In the instant case, there exists no testimonial or documentary evidence introduced by the state at the evidentiary hearing that trial counsel conducted *any* mitigation investigation whatsoever.

In the *Spencer* hearing, where mitigation can be presented free of a jury, and thus preserved for appellate review, none was presented by trial counsel yet again. Indeed, at the initial proposed date for the *Spencer* hearing, Counsel did not attend. The court stated on the record:

> "He (Trial counsel) advised, and he said I could state this on the record, that he had on, the sentence hearing which is scheduled for today, that he had nothing additional to say other than that – those matters he brought out when we had the advisory sentence before the jury and he said he had nothing else to say." (TT 1083)

At the rescheduled sentencing date, counsel again presented nothing in the way of mitigation, prompting Ferrell to say on the record after sentencing had been rendered, "Don't I get to say anything?" (TT 1093)

See *Tucker v. Day*, 969 F. 2d 155 (5th Cir. 1992)[*Holding that the sentencing proceeding is a critical stage under Cronic, and because of defense counsel's actions of remaining silent and offering nothing by way of mitigation at the sentencing hearing and thereby not representing client's interests, defendant was constructively denied the right of counsel*.].

Counsel offered nothing in the way of mitigation that could have been presented in either the penalty phase (after the alleged waiver by Ferrell) nor in the *Spencer* hearing. In fact, there exists *no evidence whatsoever* that any mitigation investigation was conducted in Ferrell's case. The State, try as they might, cannot rebut this fact. Ferrell met his burden of proof to show that his waiver of mitigation was not knowingly or voluntary. The lower court ruling was correct, and the court's ruling granting Ferrell a new penalty phase hearing was correct. *See* *State v. Lewis*, 838 So. 2d 1102 (Fla. 2002) *[Holding that: The obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated--this is an integral part of a capital case. Although a defendant may waive mitigation, he cannot do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision.]*.

(2) Ferrell was prejudiced as the result of said failure of his counsel to investigate available mitigation, as jury vote for death was 7 to 5, despite no mitigation being presented or even investigated.

The state in its cross-appeal argues Ferrell did not prove prejudice as to trial counsel's failure to put mitigation evidence to jury. Again, they are mistaken.

Numerous mitigating factors existed at the time of Ferrell trial, yet none were found nor investigated and presented by trial counsel at either the penalty phase or *Spencer* hearing. At Ferrell's evidentiary hearing, the undersigned showed without contradiction from the State, that approximately 31 non-statutory mitigating factors were available to trial counsel. They include: 1) Ferrell witnessed his older sister (who served as a maternal figure) shoot and kill her boyfriend when he was 16 years old (EH 113-14), 2) That Ferrell blamed himself for his sisters actions and incarceration because he showed her how to shoot a BB gun (EH 115), 3) Ferrell exhibits significant frontal lobe impairment (EH 326), 4) Alcohol and drug abuse beginning at age 14, 5) That Mr. Ferrell functions on the borderline area of Intelligence quotient testing, scoring a 78 when tested (EH 325), 6) Ferrell's father was physically abusive towards his mother when he was a child (EH 83, 85), 7) That Ronnie grew up impoverished and in a high crime neighborhood (EH 86), 8) That Ronnie witnessed the abuse of his

siblings by his father (EH 103), 9) That Ronnie suffered a beating at the hands of his father as a kid that was sustained and violent enough to draw blood (EH 103), 10) That Ferrell's father abused his children, including Ronnie (EH 85), 11) That Ferrell's mother left his father (taking he and his siblings) to escape the physical abuse resulting in a separation from his father at 11 years of age, (EH 107), 12) That the neighborhood in which he grew up was notorious for excessive drug activity (EH 110), 13) That his oldest sister was forced to act as a maternal figure as his real mother was forced to work long hours in order to support the family (EH 110), 14) That Ferrell was a respectful and attentive child despite his troubled youth (EH 112), 15) That Ferrell displayed an aptitude for mechanics and mathematics as a child (EH 112, 174, 196, 198), 16) Ferrell has two children that he remains actively involved with and in contact with despite his incarceration (EH 82), 17) That Ronnie was close with his father and was traumatized by his leaving the family (EH 86), 18) That Ferrell worked and provided for his wife and daughters prior to his arrest (EH 153), 19) That Ferrell took an active interest in his daughters upbringing and well being (EH 153), 20) That Ferrell and his siblings were forced to hide from their abusive father as children when their father would come to their house looking for them after their mother left him, (EH 193), 21) That Ferrell was scared and frightened

of his father (EH 193), 22) That Ferrell was raised with religion and attended church with his family (EH 194), 23) That Ferrell evidenced a learning disability as a child (EH 196), 24) Ferrell was sensitive to abuse when it came to his own children, never striking them or allowing others to (EH 195), 25) That Ferrell's father was an alcoholic during Ferrell's formative years (EH 104), 26) Ferrell witnessed his father threaten his mother and brandish a gun (EH 84), 27) As a youth Ferrell was struck in the head several times resulting in a loss of consciousness (EH 327), 28) That Ferrell witnessed his father pistol whip his mother (EH 84), 29) Ferrell was not the shooter in this incident, 30)Appropriate courtroom behavior at trial, and 31) potential for successful rehabilitation. (ROA Vol I 93-94, Vol III 527-547)

The above mitigation was available through a myriad of witnesses, including doctors (and/or mitigation experts) like Dr. Krop, Ferrell's mother Gladys, his sisters Towanna, Daphne, and Linda, his brother Luther, and his sisters then boyfriend Rene Jones. All of these witnesses were available at the time of Ferrell's trial and did in fact testify at Ferrell's evidentiary hearing. (EH 39-54, 81-90, 101-115, 151-161, 166-175, 189-207)

The trial court correctly found, based on said evidence presented at the evidentiary hearing, there was a reasonable probability, in light of the 7 to 5 vote for death, that one juror might have been swayed had mental health

mitigation been presented. (PCR Vol. IV 685) This was a correct legal conclusion under clearly established case law, and the trial court's finding was supported by competent substantial evidence, as Ferrell presented numerous witnesses and experts at the evidentiary hearing. On this reason alone, this Court should affirm. *See* *State v. Lewis*, 838 So. 2d 1102 (Fla. 2002)

Because Ferrell's jury vote was 7 to 5 for death is the closest vote possible for a death recommendation, Appellate courts have clearly noted that recommendations for death based on a close vote should be closely scrutinized by the trial judge. *See* *Morgan v. State*, 515 So. 2d 975 (Fla. 1987) *[Where the court stated the following in relation to a 7-5 jury recommendation: "This error may not be considered harmless in light of the close nature of the jury recommendation vote. It is significant that the difference of one vote rendered the jury recommendation one of death rather than mercy. Under such, and other circumstances, the failure to consider nonstatutory mitigating factors cannot be termed harmless error."]*

Finally, the state focuses its attention on the experts presented in the evidentiary hearing in an effort to claim that Ferrell was not prejudiced by his trial counsel's ineffectiveness in failing to conduct mitigation investigation. It fails to concede the fact that these experts were not the only

witnesses called at the evidentiary hearing in proving prejudice and showing mitigation. As discussed above, Ferrell's family members and friends testified as to the host of available mitigation that trial counsel neglected to find and subsequently failed to put forward to the judge or jury.

Lastly, in *arguendo,* if the trial court reached its conclusion to reverse the death sentence for a new penalty phase hearing based on improper reasoning, the tipsy coachmen appellate doctrine warrants this Court to affirm the trial court's granting of a new penalty phase. *See* Robertson v. State, 829 So. 2d 901 (Fla. 2002) *[Holding that: Generally, if a claim is not raised in a trial court, it will not be considered on appeal. However, notwithstanding this principle, in some circumstances, even though a trial court's ruling is based on improper reasoning, the ruling will be upheld if there is any theory or principle of law in the record which would support the ruling. This longstanding principle of appellate law, sometimes referred to as the "tipsy coachman" doctrine, allows an appellate court to affirm a trial court that reaches the right result, but for the wrong reasons so long as there is any basis which would support the judgment in the record. The key to the application of this doctrine of appellate efficiency is that there must have been support for the alternative theory or principle of law in the record before the trial court.]* Id at 906.

CONCLUSION:

The trial court's ruling that Ferrell be given a new penalty phase was a correct legal conclusion based on a thorough review of the facts contained in the record and presented at Ferrell's evidentiary hearing on his 3.851 motion. Therefore, this Court should affirm the trial court's ruling granting a new penalty phase. *See* *Sochor v. State*, 883 So. 2d 766 (2004 Fla. LEXIS 985)(*Holding that "so long as the trial court's decisions are supported by competent, substantial evidence, an appellate court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of witnesses and the weight to be given to the evidence by the trial court. Appellate courts recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact."). See* *Rose v. State*, 675 So. 2d 567 (Fla. 1996) *[Reversing the sentence of death and remanding for a new penalty phase due to counsel's failure to present mitigation when it was shown to exist]*; *See also*: *Blackwood v. State*, 946 So. 2d 960 (Fla. 2006) *[In granting a new penalty phase for failure to conduct any mitigation investigation the court held that: "In regard to ineffective assistance of counsel, to establish prejudice, there must be a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable*

probability is a probability sufficient to undermine confidence in the outcome.”].

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent via U.S. Mail to all counsel of record, on this 29th day of June, 2008.

RESPECTFULLY SUBMITTED,

TASSONE & SICHTA, LLC.

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

Copies furnished to:

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

Steve Siegel, Esq.
Assistant State Attorney
Office of the State Attorney
220 E Bay St
Jacksonville FL 32202

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.

RESPECTFULLY SUBMITTED,

TASSONE & SICHTA, LLC.

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