IN THE SUPREME COURT OF FLORIDA

MICHAEL GORDON REYNOLDS,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	**CASE NO. SC10-1602**
STATE OF FLORIDA,	)	**L.T. NO. 98-3341-CFA**
	)	
Appellee.	)	
________________________________	)	

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the
Eighteenth Judicial Circuit in and
for Seminole County, Florida

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PRELIMINARY STATEMENT

Appellant, Michael Gordon Reynolds (Reynolds), was the defendant and postconviction movant in the Circuit Court of the Eighteenth Judicial Circuit, in and for Seminole County, Florida. Appellee, State of Florida ("State"), was the plaintiff.

References to the Postconviction Record on appeal will be designated by the symbol "PCR" followed the appropriate page number(s) and encased in parentheses.

References to the Trial Record will be designated by the symbol "V" (Volume), followed pertinent volume and page number(s), encased in parentheses.

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction to review a Circuit Court's ruling upon a motion for post-conviction relief, pursuant to Fla. R. Crim. P. 3.851, in a death penalty case. Art. V, § 3(b)(1), Fla. Const.; Fla.R.App.P. 9.030(a)(1)(A)(1).

STANDARDS OF REVIEW

I. A ruling whether to grant an evidentiary hearing on a Rule 3.851 motion is subject to *de novo* review, *Seibert v. State*, Nos. SC08-708, 08-1615, -- So.3d --, 2010 WL 2680239 (Fla. 2010), accepting the motion's factual allegations as true, and affirming only if filings show it has failed to state a facially sufficient claim or that there is no issue of material fact to be determined. *Id.* If "there is any question as to whether a rule 3.851 movant has made a facially sufficient claim requiring a factual determination, the Court will presume that an evidentiary hearing is required." *Id.*; *Amendments to Fla. Rules of Crim. Pro. 3. 851, 3.852, & 3.993,* 772 So.2d 488, 491 n. 2 (Fla.2000). A postconviction claim may be summarily denied only if it is "legally insufficient, should have been brought on direct appeal, or [is] positively refuted by the record." *Connor v. State,* 979 So.2d 852, 868 (Fla. 2007).

II. On review of a trial court's ruling after an evidentiary hearing on an ineffective assistance claim, this Court gives deference to the trial court's factual findings to the extent they are supported by competent, substantial evidence, but reviews *de novo* the court's determinations of deficiency and prejudice, which are mixed questions of fact and law. *Arbelaez v. State*, 898 So.2d 25, 32 (Fla. 2005).

STATEMENT OF THE CASE AND FACTS

On August 25, 1998, Michael Gordon Reynolds, was indicted on three counts of first-degree premeditated murder for the murders of Danny Ray Privett, Robin Razor, and Christina Razor, and burglary of a dwelling in which a battery upon Robin or Christina or both was committed while being armed with a weapon. (V1 31-33). Reynolds entered pleas of not guilty, and the case came to jury trial.

Facts Adduced at Trial

The relevant circumstances of the crime and jury trial are set forth in this Court's opinion on direct appeal, *Reynolds v. State*, 934 So.2d 1128 (Fla. 2006):

> On July 22, 1998, the bodies of the victims were found on the property located at 1628 Clekk Circle in Geneva, Florida. Danny's body was found outside near a large pine tree, and the bodies of Robin and Christina were found inside a trailer in which the victims were living. The trial in this case began on April 21, 2003, and on May 7, 2003, Reynolds was found guilty of the lesser-included offense of second-degree murder as to the murder of Danny, and guilty as charged as to the remaining three counts of the four-count indictment. The evidence established that on July 22, 1998, Shirley Razor, the mother of victim Robin Razor, traveled to the crime scene to deliver items Danny used in the work he was doing on trailers at that location. Upon arriving at the property, Shirley noticed Danny lying on the ground outside. Shirley, being accustomed to seeing Danny drunk and passed out, proceeded to her separate trailer on the property and ate her lunch. After finishing her lunch, Shirley walked over to the trailer in which Danny and Robin were living when she noticed that Danny had a "hole in his head." After discovering that Danny was dead, Shirley ran to a neighbor's residence and called the authorities. Subsequent to the arrival of the fire department

personnel, Shirley went to her daughter's trailer and upon looking inside found that her daughter, Robin, and her granddaughter, Christina, were inside and apparently dead. At trial, a medical examiner, Dr. Sara Hyatt Irrgang, testified that the deaths had occurred at least eight hours, but probably more than twelve hours prior to her arrival at the crime scene, placing the time of death between nine p.m. on July 21 and seven a.m. on the morning of July 22. The evidence demonstrated that Danny Ray Privett was found lying outside beneath a large pine tree on his side with his face down, surrounded by bloody pieces of concrete block and broken pieces of glass. Danny's jeans were partially unzipped suggesting that he had been in the process of urinating when the attack occurred. The autopsy of Danny Ray Privett revealed that he suffered a large depressed skull fracture with additional injuries to the head area. The wounds appeared to have been caused by three or more separate blows, with the injuries indicating that the assailant had been behind the victim. There was no indication of any defensive wounds on Danny, and examination of his major skull injury revealed that the injury was likely caused by a partially broken cinder block, based on fragments found within the wound. The medical examiner was unable to determine the order in which the injuries had been inflicted upon him. The cause of death for Danny was determined to be primarily due to blunt force trauma to the head with the large depressed skull fracture probably being the fatal blow. If this blow had been inflicted first, the medical examiner opined that the victim would have lost consciousness within a second to a minute or two. Robin and Christina Razor were found dead inside the living room portion of the camper trailer being used as living quarters. Robin was found lying on the floor, face up. Christina was found nearby sitting on the couch and leaning to her left. The living room area was in disarray and a large amount of blood was scattered throughout this area of the trailer. Robin Razor's autopsy revealed that she suffered multiple stab wounds along with multiple blows to the side of her face and a broken neck resulting in injuries to her spinal cord. Closer examination revealed that Robin suffered ten stab wounds to the head and neck area and one to the torso area. The wounds appeared to have been inflicted with a sharp object such as a knife or scissors. Based on examination of the Robin's body and the defensive wounds present, the medical examiner opined that she had been involved in a violent struggle. In addition to the above wounds, Robin suffered multiple superficial wounds to her torso area which the medical examiner stated to be consistent with torment wounds--

wounds produced not to cause serious injury but to cause aggravation and produce fear in the victim. The medical examiner was of the opinion that because blows to the victim's head were inflicted at different angles and the presence of significant defensive wounds, it was likely that she was conscious and struggling when these wounds were inflicted. The primary cause of death for Robin was determined to be the broken neck and spinal cord injury, although bleeding from the stab wounds would have also resulted in death. The autopsy of Christina Razor revealed that she suffered blunt force trauma to her head, a stab wound to the base of her neck that pierced her heart, and another stab wound to her right shoulder that pierced her lung and lacerated her pulmonary artery. These latter two wounds would have resulted in significant internal and external hemorrhaging and would have been fatal. The medical examiner indicated that the only sign of defense wounds to Christina was the presence of a small contusion to her left hand, which could have occurred as she attempted to block a blow from her assailant. The medical examiner opined that Christina would have lost consciousness within a minute or two of receiving the stab wounds. The primary cause of death for Christina was determined to be internal and external hemorrhaging. During his investigation of the crimes, Investigator John Parker of the Seminole County Sheriff's Department made contact with Reynolds and requested that he submit to an interview, to which Reynolds voluntarily agreed. During this interview, Investigator Parker also inquired about injuries that he observed on Reynolds' hand and ankle. In response to inquiries made about these injuries, Reynolds advised the investigator that at approximately five a.m. on the morning that the victims' bodies were discovered, he was taking his dog outside and slipped on the exterior step of his camper, twisting his ankle. Reynolds stated that the cut on his hand occurred when he caught his hand on a burr on the aluminum door frame of his trailer as he attempted to break his fall by grabbing the door frame. Reynolds advised the investigator that approximately thirty or forty minutes after sustaining the injuries he cleaned the cut to his hand and proceeded to an emergency room for treatment. Reynolds stated that while on his way to the emergency room he suffered a flat tire and borrowed a jack from a convenience store to change his tire and after doing so he proceeded to the emergency room. After receiving treatment for his injuries, Reynolds informed the investigator that he returned to his residence and removed the burr from the trailer door frame with a pair of channel-lock pliers. In addition to the discussion concerning the injury,

Reynolds also discussed an altercation in which he was involved with Danny Ray Privett regarding a trailer that was allegedly given to Reynolds by his landlord. According to Reynolds, the argument with Danny was centered upon Danny removing the trailer from Reynolds' property without permission. Upon discovering that Danny had removed the trailer, Reynolds indicated that he confronted Danny and a heated argument ensued. Reynolds stated that after exchanging words with Danny, he left Danny's property but returned a short while later to apologize and advise Danny that he could keep the trailer. Significantly, during this interview Reynolds advised the investigator that he had never been inside the trailer in which the victims were living. Subsequent to this interview, Reynolds gave permission for the search of both his trailer and his vehicle, and he also agreed to provide hair and blood samples for DNA analysis. Additionally, pursuant to a search warrant certain evidence was seized from Reynolds' vehicle and residence. At trial, a neighbor of the victims testified that on the night prior to the discovery of the bodies he observed a car similar to that of Reynolds parked at the victims' residence. Fingerprint and shoe pattern analysis of the crime scene and items collected from the scene revealed several prints of value, but none of them connected Reynolds to the scene. However, extensive evidence with regard to DNA analysis resulting from testing of items of evidence recovered from the crime scene was presented. Several of the items recovered from the crime scene inside the trailer and on the exterior of the trailer contained a DNA profile matching that of Reynolds. There was no eyewitness testimony offered by the State and, other than the concrete block allegedly used to strike the victims, no other weapon was recovered. The defense attempted to establish mishandling and contamination of the evidence, along with suggesting that other individuals had committed the crimes with which Reynolds had been charged. The defense elicited testimony from Danielle Privett, Danny and Robin's other daughter, indicating that her parents had been having an ongoing disagreement regarding rent payments with a man by the name of Justin Pratt, a friend of Pratt's, Alan Combs, and Pratt's girlfriend, Nicole Edwards. In addition to this testimony, Reynolds presented evidence consisting of portions of an interview conducted by the Sheriff's Department with Pratt wherein Pratt discussed the disagreement and admitted that he had left a note at the victims' residence indicating that “it was war, ... conventional weapons.” After hearing all the evidence, the jury rendered a verdict finding Reynolds guilty of second-degree murder as to the death of Danny Privett,

two counts of first-degree murder as to the deaths of Robin and Christina Razor, and burglary of a dwelling during which a battery was committed while Reynolds was armed with a weapon. During the penalty phase the State presented four witnesses. Danna Birks established multiple prior convictions of Reynolds. Tonya Chapple, the victim of Reynolds' prior conviction for aggravated battery, described the circumstances surrounding the prior crime. Christina Razor's grandmother testified as to Christina's age at the time of the crimes, and Robin Razor's brother read a prepared statement in the nature of victim impact evidence. Reynolds, after thorough consultation with his attorneys and the trial court, waived his right to present mitigating evidence. On May 9, 2003, the jury returned unanimous recommendations of death for both first-degree murder convictions. During the *Spencer* hearing, the sole testimony presented by the defense was the testimony of Reynolds himself. The State did not present any testimony, relying solely on the evidence and testimony admitted during the guilt and penalty phase trials as support for the aggravating factors. At sentencing, the State presented testimony of Teresa Barcia, the sister of Danny Ray Privett, who read a prepared statement expressing the pain caused by the victims' death and asking the court to impose the maximum sentence provided by law. On September 19, 2003, the trial judge sentenced Reynolds to concurrent sentences of life for the murder of Danny Ray Privett and the burglary conviction, and the trial judge entered separate sentences of death for the murders of Robin and Christina Razor. In pronouncing Reynolds' sentence, the trial court found that the State had proven beyond a reasonable doubt the existence of four statutory aggravators for the murder of Robin Razor: (1) Reynolds had previously been convicted of a another capital felony or a felony involving a threat of violence to the person (great weight); (2) Reynolds committed the murder while he was engaged in or was an accomplice in the commission of or an attempt to commit a burglary of a dwelling (great weight); (3) the murder was committed for the purpose of avoiding a lawful arrest (great weight); and (4) the murder was committed in an especially heinous, atrocious, or cruel fashion (great weight). As to Christina Razor's murder, the trial court found that the State had proven beyond a reasonable doubt the existence of five statutory aggravators: (1) Reynolds had previously been convicted of a capital felony or a felony involving a threat of violence to the person (great weight); (2) Reynolds committed the murder while he was engaged in or was an accomplice in the

> commission of or an attempt to commit a burglary of a dwelling (great weight); (3) the murder was committed for the purpose of avoiding a lawful arrest (great weight); (4) the murder was committed in an especially heinous, atrocious, or cruel fashion (great weight); and (5) the victim of the murder was a person less than twelve years of age (great weight). In its analysis of the mitigation present, the trial court acknowledged the defendant's waiver of the presentation of mitigating evidence but, nonetheless, the court considered and weighed any mitigation that it found to be established. In doing so, the trial court found that the following nonstatutory mitigating circumstances had been established and were applicable to both the murders of Robin and Christina Razor: (1) that Reynolds was gainfully employed at the time of the crimes (little weight); (2) that Reynolds manifested appropriate courtroom behavior throughout the proceedings (little weight); (3) that Reynolds cooperated with law enforcement (little weight); and (4) that Reynolds had a difficult childhood (little weight). The trial court determined that the evidence did not establish that Reynolds could easily adjust to prison life. The trial court recognized that evidence was presented by Reynolds for purposes of establishing lingering doubt. However, the trial court noted that it would not consider any theory of lingering doubt as nonstatutory mitigation in its sentencing analysis.

Reynolds v. State, 934 So.2d at 1135-1139.

Direct Appellate Proceedings

On direct appeal of his judgments of conviction and sentences of death, Reynolds raised the following issues:

POINT I

THE TRIAL COURT ERRED IN REFUSING TO ADMIT THE ENTIRE STATEMENT OF AN UNAVAILABLE WITNESS WHERE THE REDACTED PORTIONS WERE NOT OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED OR WERE AN ADMISSION

AGAINST THE DECLARANT'S INTERESTS, AND WHERE THE EXCLUSION DEPRIVED THE DEFENDANT OF HIS RIGHT TO A FAIR TRIAL AND TO PRESENT HIS DEFENSE, UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION.

POINT II

THE CONVICTIONS FOR TWO FIRST-DEGREE MURDERS, SECOND DEGREE MURDER, AND BURGLARY VIOLATE THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BECAUSE THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT THE GUILTY VERDICT.

POINT III

THE TRIAL COURT ABUSED ITS DISCRETION IN DECLINING THE DEFENDANT'S EXPRESS WAIVER OF HIS RIGHT TO A SENTENCING JURY RECOMMENDATION, RENDERING HIS SENTENCE UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION.

POINT IV

THE TRIAL COURT ERRED IN ALLOWING TESTIMONY OF DETAILS OF A PRIOR VIOLENT FELONY FOR WHICH THERE HAD BEEN NO CONVICTION, DEPRIVING HIM OF HIS RIGHT TO A FAIR TRIAL AND RENDERING HIS DEATH SENTENCES UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, 17, AND 22 OF THE FLORIDA CONSTITUTION.

POINT V

PLACING A *HIGHER* BURDEN OF PERSUASION ON THE DEFENSE TO PROVE THAT LIFE IMPRISONMENT SHOULD BE IMPOSED THAN IS PLACED ON THE STATE TO PERSUADE THAT CAPITAL PUNISHMENT SHOULD BE IMPOSED VIOLATES FUNDAMENTAL FAIRNESS AND DENIES DUE PROCESS UNDER *IN RE WINSHIP* AND *MULLANEY V. WILBUR*.

POINT VI

THE TRIAL COURT ERRED IN REFUSING TO CONSIDER IN ITS DEATH SENTENCE DETERMINATION RESIDUAL DOUBT AS TO THE DEFENDANT'S GUILT, IN VIOLATION OF THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AND RENDERING HIS DEATH SENTENCES UNCONSTITUTIONAL UNDER THE FLORIDA AND FEDERAL CONSTITUTIONS.

POINT VII

THE APPELLANT'S DEATH SENTENCES WERE IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES, EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, AND FAILED TO PROPERLY FIND THAT THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCES UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §17 OF THE FLORIDA CONSTITUTION.

POINT VII[I]

FLORIDA'S DEATH PENALTY IS UNCONSTITUTIONAL UNDER *RING V. ARIZONA*.

This Court affirmed Reynolds' judgment and death sentence on direct appeal, *Reynolds v. State*, 934 So.2d 1128 (Fla. 2006). Reynolds filed his petition for certiorari in the United States Supreme Court, which was denied January 8, 2007. *Reynolds v. Florida*, 549 U.S. 1122, 127 S.Ct. 943 (2007).

Postconviction Filings

Reynolds subsequently moved for postconviction relief, pursuant to Rule 3.851, Florida Rules of Criminal Procedure, alleging the following sixteen grounds:

CLAIM 1

THE STATE COMMITTED PROSECUTORIAL MISCONDUCT WHEN IT INTRODUCED THE FALSE TESTIMONY OF A KEY WITNESS AND ALLOWED THE LIE TO REMAIN UNCORRECTED, VIOLATING MR. REYNOLDS' RIGHT TO DUE PROCESS THE STATE ALSO COMMITTED PROSECUTORIAL MISCONDUCT WHEN IT INTRODUCED A SEXUAL BATTERY THEORY UNSUPPORTED BY ANY EVIDENCE OTHER THAN THE FALSE TESTIMONY, INFLAMING THE JURY THE MISCONDUCT DEPRIVED MR. REYNOLDS OF A FAIR TRIAL IN VIOLATION OF HIS RIGHTS PROTECTED BY THE 4th, 5th, 6th, 8th AND 14th AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM 2

THE STATE VIOLATED THE REQUIREMENTS OF BRADY V. MARYLAND, 373 U.S. 83 (1963) WHEN IT FAILED TO DISCLOSE THE EXTENT OF JOHN FITZPATRICK'S POWER TO AFFECT ALL DNA RESULTS AT THE FDLE LAB, AND WHEN THE FULL EXTENT OF

DEPUTY JOHN PARKER'S DISHONESTY WAS NOT DISCLOSED TO THE DEFENSE OR AT TRIAL.

CLAIM 3

DEFENSE COUNSEL WAS INEFFECTIVE IN THE GUILT AND PENALTY PHASES UNDER THE PRECEPTS OF STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984), IN THE MANNER IN WHICH IT HANDLED THE DNA EVIDENCE AND THE SEXUAL BATTERY ARGUMENT THE INEFFECTIVENESS ON THESE ISSUES DEPRIVED MR. REYNOLDS OF A FAIR TRIAL IN VIOLATION OF HIS RIGHTS PROTECTED BY THE 4th, 5th, 6th, 8th AND 14th AMENDMENTS TO THE UNITED STATES CONSTITUTION. IAC FOR FAILURE TO OBJECT OR CURE THE FALSE TESTIMONY OF CHARLES BADGER. COUNSEL WAS INEFFECTIVE IN THE GUILT PHASE FOR FAILING TO OBJECT TO THE STATE'S UNSUPPORTED ARGUMENT THAT A SEXUAL BATTERY WAS THE MOTIVE FOR THE MURDERS.

CLAIM 4

MR. REYNOLDS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE WHEN THE DEFENSE FAILED TO OBJECT TO THE REPETITION OF THE SEXUAL BATTERY THEORY IN THE STATE'S CLOSING ARGUMENT OR EFFECTIVELY REBUT THE THEORY IN ITS CLOSING THE FAILURE TO OBJECT TO THE BADGER LIE IN THE GUILT PHASE ALSO RESULTED IN PREJUDICE IN THE PENALTY PHASE.

CLAIM 5

TRIAL COUNSEL WAS INEFFECTIVE AND PREJUDICED THE OUTCOME OF DEFENDANT'S CASE WHEN COUNSEL FAILED TO OBJECT TO A MISSTATEMENT OF THE LAW GIVEN BY THE COURT TO THE JURY. COUNSEL WAS FURTHER INEFFECTIVE AND PREJUDICED THE DEFENDANT BY NOT MOVING FOR A MISTRIAL BASED ON THIS IMPROPER AND HIGHLY PREJUDICIAL STATEMENT REGARDING THE BURDENS OF PROOF AT TRIAL.

CLAIM 6

TRIAL COUNSEL WAS INEFFECTIVE AND PREJUDICED THE OUTCOME OF DEFENDANT'S CASE BY FAILING TO CONDUCT PROPER AND REASONABLE VOIR DIRE. COUNSEL WAS ILL-PREPARED DURING VOIR DIRE AND WRONGLY RELINQUISHED HIS RIGHT TO AND OBLIGATIONS FOR CONDUCTING INDIVIDUAL QUESTIONING BY ALSO CEDING QUESTIONING TO THE COURT.

CLAIM 7

TRIAL COUNSEL WAS INEFFECTIVE AND PREJUDICED DEFENDANT WHEN, DURING VOIR DIRE, COUNSEL INFORMED THE JURY ABOUT THE DEFENDANT'S PRIOR CRIMINAL CONVICTIONS WHEN COUNSEL KNEW THE STATE HAD NOT FILED ANY MOTION

CLAIM 8

TRIAL COUNSEL WAS INEFFECTIVE AND PREJUDICED THE OUTCOME OF DEFENDANT'S CASE WHEN COUNSEL FAILED TO REQUEST A JURY INTERVIEW TO DETERMINE WHETHER ANY JURORS HAD SEEN AN IMPROPERLY CONSTRUCTED MEMORIAL OR SHRINE TO THE VICTIMS THAT WAS PLACED RIGHT OUTSIDE THE COURTROOM. COUNSEL WAS FURTHER INEFFECTIVE AND PREJUDICED THE DEFENDANT BY NOT MOVING FOR A MISTRIAL BASED ON THIS IMPROPER AND HIGHLY PREJUDICIAL STATE-SANCTIONED ACTION BY THE VICTIM'S FAMILY.

CLAIM 9

TRIAL COUNSEL WAS INEFFECTIVE AND PREJUDICED DEFENDANT WHEN HE ALLOWED 37 AUTOPSY PHOTOGRAPHS INTO EVIDENCE WITHOUT OBJECTION.

CLAIM 10

COUNSEL WAS INEFFECTIVE AND PREJUDICED DEFENDANT WHEN COUNSEL FAILED TO OBJECT TO IMPERMISSIBLE LAY WITNESS TESTIMONY CONCERNING THE METALLURGICAL CONDITION OF DEFENDANT'S TRAILER DOOR.

CLAIM 11

COUNSEL WAS INEFFECTIVE AND PREJUDICED DEFENDANT WHEN COUNSEL FAILED TO OBJECT TO IMPERMISSIBLE TESTIMONY CONCERNING DEFENDANT'S ARREST IN SEMINOLE COUNTY, FLORIDA ON A WARRANT FROM HILLSBOROUGH COUNTY, FLORIDA AND THE SUBSEQUENT TRANSPORTATION BACK TO HILLSBOROUGH COUNTY.

CLAIM 12

COUNSEL WAS INEFFECTIVE AND PREJUDICED DEFENDANT WHEN COUNSEL FAILED TO OBJECT TO IMPERMISSIBLE LAY WITNESS TESTIMONY CONCERNING THE CONDITION OF DEFENDANT'S CLOTHING ON THE DAY OF THE HOMICIDES.

CLAIM 13

TRIAL COUNSEL WAS INEFFECTIVE AND PREJUDICED THE DEFENDANT WHEN COUNSEL FAILED TO PROPERLY PRESENT CERTAIN ISSUES TO THE JURY AND FAILED TO PRESERVE THOSE ISSUES FOR APPEAL.

CLAIM 14

§ 27.702 FLA. STAT. IS UNCONSTITUTIONAL FACIALLY AND AS APPLIED IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FLORIDA AND FEDERAL CONSTITUTION

CLAIM 15

THE RULES PROHIBITING MR. REYNOLDS' LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT VIOLATES EQUAL PROTECTION PRINCIPLES, THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND DENIES MR. REYNOLDS ADEQUATE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES

CLAIM 16

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MR. REYNOLDS OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Original Motion for Postconviction Relief, *passim*.

The State filed an Answer to Reynolds' postconviction motion on January 24, 2008. At a Case Management Conference held April 3, 2008, the trial court summarily denied Claims 1, 2, 3A, 5, 10, and 12. Claims 14 and 15 did not require an evidentiary determination and the trial court deemed Claim 16, alleging cumulative error, premature. Before the evidentiary hearing, an irreconcilable conflict arose between Reynolds and collateral counsel. CCRC was discharged, and Reynolds acted *pro se* for a short time before undersigned counsel was

appointed from the conflict registry. An Amended/Corrected/Supplemented Motion to Vacate Judgments of Conviction and Sentence was filed on August 10, 2009, adding five additional grounds, designated Claims A-I through A-V:

CLAIM A-I

TRIAL COUNSEL FAILED TO INVESTIGATE AND PRESENT EVIDENCE OF SUBSTANTIAL MITIGATION, INCLUDING MENTAL HEALTH MITIGATION. TRIAL COUNSEL FAILED TO ENGAGE EXPERTS TO INTERVIEW AND EVALUATE THE DEFENDANT. TRIAL COUNSEL FAILED TO CALL WITNESSES TO TESTIFY DURING THE PENALTY PHASE WHO WOULD HAVE DEMONSTRATED THAT THE DEFENDANT WAS NOT ONE OF THE WORST OF THE WORST PERSONS TO BE CONVICTED OF CAPITAL MURDER. TRIAL COUNSEL FAILED TO INFORM THE DEFENDANT OF THE MITIGATION THE DEFENDANT COULD HAVE PRESENTED TO THE JURY AND THEREAFTER FAILED TO PRESENT THE DEFENDANT'S JURY WITH ANY REASON TO RECOMMEND LIFE OVER DEATH. MR. REYNOLDS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE WHICH VIOLATED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

CLAIM A-II

TRIAL COUNSEL FAILED TO INVESTIGATE OR PRESENT EXPERT OR CIVILIAN TESTIMONY TO SUPPORT THE DEFENSE THEORY THAT REASONABLE DOUBT EXISTED DUE TO A CONFLICT IN THE EVIDENCE OR BECAUSE THE EVIDENCE WAS LEGALLY INSUFFICIENT TO CONVICT THE DEFENDANT. TRIAL COUNSEL FAILED TO INVESTIGATE OR PRESENT EXPERT OR CIVILIAN TESTIMONY TO SUPPORT THE DEFENSE'S ALTERNATIVE THEORY

THAT PERSON(S) OTHER THAN THE DEFENDANT KILLED DANNY RAY PRIVETT, ROBIN RAZOR AND CHRISTINA RAZOR.

CLAIM A-III

THE LETHAL INJECTION OF MR. REYNOLDS UNDER THE STATE'S PROCEDURES VIOLATES HIS RIGHT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE EXECUTION BY LETHAL INJECTION IS CRUEL AND/OR UNUSUAL PUNISHMENT.

CLAIM A-IV

TRIAL COUNSEL FAILED TO REQUEST THAT SLEEPING JUROR GOLDEN BE REMOVED DURING CRITICAL TESTIMONY PRESENTED BY THE STATE AFTER THE TRIAL COURT HAD ALREADY ADMONISHED THE JUROR THAT IT WOULD REQUIRE HER STAND OR TAKE DRASTIC MEASURES IF SHE FELL ASLEEP AGAIN.

CLAIM A-V

TRIAL COUNSEL FAILED TO PREPARE THE DEFENDANT TO TESTIFY ON HIS OWN BEHALF AFTER INFORMING THE JURY THAT THE DEFENDANT WOULD TESTIFY AND AFTER TRIAL COUNSEL INFORMED POTENTIAL JURORS THAT HE WAS A CONVICTED FELON. TRIAL COUNSELS' INEFFECTIVE ASSISTANCE OF COUNSEL VIOLATED THE DEFENDANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Amended Corrected Supplemental Rule 3.851 Motion, *passim*.

At a second Case Management Conference, held on August 10, 2009, claims A-III, A-IV, and A-V were summarily denied (PCR 995-1052).

An evidentiary hearing was held between September 14 and 16, 2009, on Claims 3B, 4, 6, 7, 8, 9, 11, 13, A-I, and A-II (PCR 1-925). A review of the testimony adduced at the evidentiary hearing follows:

Postconviction Evidentiary Hearing

Audrey Skidmore testified she worked part-time with the State Attorney's Office at first appearances on weekends and as coordinator of victim services, supervising victim advocates (PCR 24), advising them on how to inform victims of proper courtroom protocol (PCR 26). Two victim advocates were assigned to Reynolds' case. (PCR 25). When the trial court asked Skidmore about a shrine outside of courtroom, Skidmore stated she had seen victims give their victim advocates flowers and hugs (PCR 28-29), but never saw the shrine (PCR 30). Skidmore repeatedly testified during the evidentiary hearing that there was never a shrine as Reynolds alleged, and testified only that the jurors could not have seen the victims' family giving the advocates flowers (PCR 28-32). The State did not rebut Reynolds' allegation that the jury could have viewed the shrine.

Stacia Adams, Reynolds' younger sister, testified she and Reynolds were close as youngsters (PCR 35-37), Reynolds would mow lawns and save his earnings (PCR 40). Their mother got sick when Adams was about 5 years old and the family moved to Titusville, Florida, where Reynolds' father drank a lot and became violent (PCR 41-42). Reynolds' father was loving towards Reynolds when Reynolds' father was sober (PCR 45). But when his father dropped an air conditioning unit on his mother's leg and Reynolds defended his mother, there was "retribution" for Reynolds' actions (PCR 46). Because Reynolds' father whipped Adams and Reynolds with a belt (PCR 47), their mother had a safe house where they hid from Reynolds' father when he was drinking and abusive (PCR 48). Reynolds' father hit the family horse between the eyes with a hammer after it kicked Adams's sister, and Reynolds' father made Adams and Reynolds dig a hole to bury it (PCR 50-51). Reynolds' father also shattered a fish tank and burned Reynolds' Jehovah's Witness books in the street (PCR 51-52). Eventually, Reynolds' father kicked him out of house and made Adams burn Reynolds' clothing (PCR 52). Reynolds' father also psychologically abused Reynolds' mother (PCR 53).

Adams was subpoenaed to testify during the penalty phase, and did not recall Reynolds ever telling her not to testify (PCR 58-59), although Reynolds' attorney, Iennaco, told Adams they would not be needing her (PCR 59). Adams saw the shrine outside the courtroom and described it during the evidentiary hearing (PCR 57). Adams testified that there were flowers, a balloon, stuffed animals, signs and pictures (PCR 57).

When Reynolds was 8 years old, according to Adams' testimony, he fell off of a trailer driven by his father and required stitches on his head (PCR 60). Reynolds' father would attack Reynolds and Adams with any handy instrument (PCR 60-61), splash ice water on their faces to wake them up (PCR 62), and routinely use them both as messengers when he had a dispute with someone (PCR 63).

After Investigator Parker told Adams that Reynolds had been arrested, Iennaco spoke with her about Reynolds' family history. She did not reveal everything revealed at deposition and the postconviction hearing (PCR 64-65), but could have testified earlier to facts she related at the postconviction hearing PCR if called to testify 65-66).

After their mother died, Adams and Reynolds had little contact with one another. Reynolds had run away and remained in juvenile detention. Adams kept in contact with Reynolds only through letters, which she had brought to court (PCR 66-67). During the mid-1980's Reynolds and Adams did not communicate with one another for about three years (PCR 69). When their mother became ill, Reynolds helped their sister who has cerebral palsy (PCR 70).

Adams testified she had met once briefly with Iennaco and told him about matters Adams testified to at the postconviction evidentiary hearing (PCR 72). Adams, at the courthouse to testify and required to remain outside of the courtroom because the Rule of sequestration for witnesses had been invoked, she did not know what was happening during the penalty phase (PCR 76-77).

Christine Houston, a licensed clinical social worker and certified addictions counselor, was qualified as an expert in forensic social work (PCR 97-109). Even though Houston bought along an "expanded report" that Reynolds sought to introduce, the trial court ruled that no supplemental report could be admitted after trial testimony (PCR 110-115). Houston evaluated Reynolds twice on death row, spoke with him once by phone, and interviewed Reynolds' sister, Stacia Adams (PCR 115-116). Houston had also reviewed Adams' deposition, Reynolds'

statement to the court, the Sentencing Order, and Drs. Herkov's, Olafsson's and Danziger's reports, as well as Reynolds' school records (PCR 116-118).

Over a State objection, Houston, who was available to testify in 2003 (PCR 118-119), diagnosed Reynolds as suffering from Post-Traumatic Stress Disorder (PTSD) (PCR 119-120), wherein a person who has experienced a traumatic event relives the trauma through nightmares and intrusive thoughts. Reynolds responds adversely to bullies and authority figures due to his earlier trauma with his father, according to Houston's testimony. In Arizona, Reynolds was threatened with a knife and felt he had to shoot to protect himself [additional evidence of PTSD (PCR 124)]. Reynolds told Houston he had not been provided treated for PTSD (PCR 126). Reynolds, according to Houston, exhibits avoidance, acts hostilely in discussing the past, is detached from others (PCR 125), and exhibits Bereavement Disorder from the loss of his mother (PCR 126-127). Houston could neither rule out, nor firmly diagnose, depression (PCR 127-128). Although Reynolds meets the alcohol dependence criteria almost "across the board," as well as cannabis and opioid dependence, and testified that Reynolds has received only minimal treatment for alcohol dependency (PCR 129-132). Even though Houston tentatively diagnosed Reynolds as exhibiting antisocial personality disorder (APD),

he does not meet all APD criteria because he shows remorse at having left his sisters in an abusive household (PCR 133-137). Houston testified that APD is treatable with cognitive behavioral therapy (PCR 140).

Houston discussed the significance of Reynolds' head trauma after he fell out of a second-story window at age 2, and when he was hit in the head with a baseball bat (PCR 141-142). Testimony was presented that Reynolds was physically and verbally abused, often without warning or understanding why. Reynolds and his sister once had to canvass the town looking for their mother, who had run away from their father (PCR 145-146). Reynolds would intervene when his father became violent toward other family members (PCR 154), and his mother would encourage Reynolds and his siblings to lie about injuries to conceal the abuse (PCR 155). Reynolds' father once kicked the family dog against the wall, killing it in front of the children, and subsequently kicked Reynolds out the house at about age 15 and ordered that his clothing be burned (PCR 155-156).

Houston testified child abuse can adversely impact brain development (PCR 172); that Dr. Herkov's report confirms many of Reynolds' early traumas (PCR 175); that school records showed he had linguistic problems (PCR 158) and that he was reading far below his grade level in 9th grade (PCR 163-164); and that she

recommended testing for brain damage (PCR 212-213). Houston testified that Reynolds functions better in an institutional setting (PCR 168-169), and that she would have testified to Reynolds' severe mental health issues as a statutory mitigator (PCR 217).

Candy Zuleger, Lab Director for Trinity DNA Solutions (PCR 221), initially hired by CCCR to review DNA evidence, stated that she would not have been available to testify in April 2003 (PCR 225). Zuleger learned Reynolds' liquid blood sample had been mislabeled, and that test results on a belt loop processed by FDLE were never reported (PCR 236). Zuleger noted Badger had incorrectly testified that Reynolds was a contributor to DNA found on victim Christine Razor's panties (PCR 237). Zuleger had concerns about how the evidence was stored and possible contamination with Reynolds' blood sample (PCR 237-238). Zuleger would have recommended additional testing had she been Reynolds' witness (PCR 240-241), noting she did not understand the time-lag between the samples' processing and Badger's report (PCR 242). The trial court granted a State motion to exclude Zuleger's testimony, holding the witness upon whom Reynolds relies must have been available at the time of trial (PCR 259-269).

Neuropsychologist, Dr. Kristjan Olafsson, (PCR 269), administered a battery of tests on Reynolds (PCR 278), and reviewed Reynolds' psychological reports, PSI, and other documents (PCR 280), testifying that Reynolds' intelligence quotient (IQ) was below average, his memory average, and impairment in executive functioning (PCR 281-282). Reynolds' symptoms and circumstances indicate he suffered a brain injury in 1990 (PCR 282-283). Reynolds exhibited visual-spatial deficiencies, but had worked in construction, suggesting his problems arose after the 1990 head injury (PCR 283). Reynolds has organic brain damage (PCR 284-285), PTSD, substance abuse and APD (PCR 286-289).

Although Dr. Olafsson could neither diagnosis nor rule-out a learning disability, he noted Reynolds was promoted in school without earning credits (PCR 293-294, 300). Dr. Olafsson criticized Dr. Danziger's conclusion that Reynolds did not have brain damage because the test Danziger used is usually used to assess dementia (PCR 303-304). Olafsson stated Reynolds has suffered from brain damage since 1990 (PCR 343), and that, whereas he could not say organic brain damage was a direct cause of the murders (PCR 347-348), he could testify brain damage impacted Reynolds' thinking in 1998 (PCR 349-350).

Dr. Gary Cumberland, a forensic pathologist (PCR 354), who has performed between 4,000 and 5,000 autopsies (PCR 358) and could have testified at Reynolds' trial, examined photographs of Reynolds' hand injury and reviewed testimony from the trial (PCR 363-364). At Reynolds' evidentiary hearing, Cumberland addressed the differences between a laceration and an incised wound (PCR 366-368), and testified that Reynolds' wound was a laceration (a tear of the flesh and not a wound caused by a knife slice (PCR 375), which is consistent with the explanation Reynolds gave police (PCR 371).

Crime Scene Reconstructionist Janice Johnson (PCR 384-338), could have testified at trial (PCR 386-387), about an FDLE analyst's findings and her own forensic opinion (PCR 392). Johnson, who reviewed the laboratory reports and trial transcripts (PCR 394-395), explained the proper protocol for analyzing evidence in a sterile environment (PCR 396), and testified that she would not sweep for the victims' and suspect's evidence on the same day, but would have waited 5-7 days (PCR 397).[1] Also, Johnson testified that the victims' and suspect's evidence must be dried separately (PCR 398). In this case, however, the

[1] Whereas the trace evidence log indicates the victims' property and Reynolds' were swept on the same day, this is a violation of FDLE policy (PCR 485).

victims' and suspect's clothes were dried together, and the trial court was not educated at the *Frye* hearing on the proper protocol (PCR 399).

Johnson testified that while she would have expected a trail of blood if the killer injured his hand (PCR 410-411), the blood was located primarily near the victims (PCR 408); blood in the kitchen was not analyzed (PCR 409-410); a pair of panties was not processed to learn who had worn them (PCR 415); a transfer blood stain on wood purported to be Reynolds' could have been transferred during storage (PCR 418); sofa cushions should have been tested (PCR 421); bloody cushions should not have been packaged in plastic (PCR 422); and one of the concrete blocks appearing to have stains, was only partially processed (PCR 423-424). Johnson testified that she would have advised defense counsel to process an apparent blood stain atop Reynolds' door (PCR 430-432). Johnson reminded the court that unknown shoe impressions at the scene were not matched to Reynolds (PCR 427-428), implying another person was present (PCR 429).[2]

Johnson noted no report materialized on the blood found on a torn belt loop (PCR 435), and that storing a pink pillow and another cloth in same bag could contaminate the evidence (PCR 438). As there was no blood on panties found (PCR 439), Johnson testified that she would have advised the defense to test them

[2] While a shoe print at the scene was size 8 ½ , Reynolds wears size 12 (PCR 483).

to determine who wore them (PCR 441). Blood smears around sofa cushions were not identified as Reynolds' (PCR 446-447).

Johnson could not explain how Reynolds' blood was found commingled with Christina's without Reynolds' DNA being found on her (PCR 451-452), and testified it simply did not make sense that panties were found *under* Robin's body (PCR 457). Johnson said the defense should have called DNA experts (PCR 454).

Reynolds then testified that during his trial he repeatedly insisted that his counsel to object to the State's closing argument that the motive for the murders was sexual battery (PCR 514), but that his trial counsel told him the State could say what it wanted during closing (PCR 515). Reynolds also testified his trial counsel never told him they were going to tell prospective jurors about his prior convictions (PCR 519).

During a mid-morning break at Reynolds' trial, Reynolds saw a shrine (PCR 523) with a wreath on a stand and sympathy cards. Reynolds also saw a heart-shaped balloon (PCR 524-526). At the evidentiary hearing, Judge Lester interrupted the State's cross-examination of Reynolds (PCR 634) after Reynolds explained that if he could see the shrine, and he did not enter the courtroom via the main entrance either, jury members also had the opportunity to view the shrine

(PCR 524-526, 529). Judge Lester stated that he wanted to complete the record by inserting missing information (PCR 634). Judge Lester stated that the jury could have seen the shrine that he so vehemently objected to during Reynolds' trial (PCR 634-635) and then concluded in his Order denying Reynolds relief that even if the jury did see the shrine, it would not have made any difference given the fact that the courtroom was filled with angry family members (PCR 1648). Judge Lester again interrupted – his word – the proceedings at the evidentiary hearing when Reynolds was testifying on Re-Direct about the shrine (PCR 660). Judge Lester responded to questions posed by Reynolds' counsel and stated that he knew when the shrine was placed outside of the courtroom and knew when it was removed (PCR 661).

Reynolds testified at the evidentiary hearing that he did not waive his right to object to autopsy photos, or to object to the State eliciting testimony about Reynolds' arrest in Seminole County (PCR 531). Reynolds had always wanted to take the stand, but when the time came he had a staph infection and fever, and requested counsel seek a continuance, Although they did not move the court for one (PCR 532-534). Reynolds' defense counsel told him the State had not proved its case, and that Reynolds' testifying would open the door to his record (PCR

536). Reynolds noted attorney Laurence himself admitted he told Reynolds testifying would "f---ing kill him." (PCR 537).

Reynolds testified that although his trial counsel told him that he had no mitigators (PCR 567), he now has a better understanding of mitigation (PCR 564) –it is not just about reporting family background but also about describing previous injuries and presenting testimony about personal ailments. Reynolds did not recall reading a mitigation waiver, but although he was devastated after he was convicted of the murders, he remembered signing it (PCR 585). Reynolds testified he was sick and upset at the State's closing suggesting he committed the murders to sexually assault the minor victim (PCR 609-611). He testified his counsel did not explain mitigation (PCR 612-613), and that, had he known more about mitigation, he would not have waived it (PCR 614). Reynolds testified he cooperated with the psychologist who interviewed him one time and did not return as promised to conduct an evaluation (PCR 640).

Even though Reynolds asked his counsel to do so, they refused to hire crime scene or forensic experts (PCR 616), a wound expert (PCR 618), or a DNA expert (PCR 617). Reynolds pointed out to his counsel that palm and fingerprints at the scene did not match his, and insisted counsels have the belt loop tested (PCR 622).

Attorney Francis Iennaco testified Reynolds' trial was the third or fourth death penalty case he had tried (PCR 670). Iennaco attended mitigation seminars (PCR 672), and was assigned the penalty phase in Reynolds' case, but did mostly guilt-phase work, as Reynolds focused on that (PCR 676). Iennaco stated it was hard to get Reynolds to talk about mitigation (PCR 678), and that Sandy Love was hired as a mitigation specialist (PCR 680), but did not recall notations made by Love that she did not have all of Reynolds' school records (PCR 687).

Iennaco stated Reynolds did not want to present mitigation or meet with psychologists, Although he convinced Reynolds to meet with Dr. Herkov (PCR 691), as he suspected Reynolds had a mental problem, but could not nail it (PCR 696). Iennaco recalled his knowledge of Reynolds' abused upbringing (PCR 706-707), and suggested Reynolds did not want his family history made public (PCR 708).

Iennaco believed there were no statutory mitigators for Reynolds (PCR 710). Reynolds agreed to let counsel present mitigation, but then changed his mind after he was convicted, and Iennaco prepared a mitigation waiver form (PCR 710-711).

Iennaco said he has greater knowledge of DNA evidence than the average attorney (PCR 717), and he cross-examined the DNA witnesses without benefit of

a DNA expert (PCR 718-719, 764). Whereas Iennaco could not recall why blood spatter expert Stuart James was not called, he said it was for a "very good reason" (PCR 724). Iennaco acknowledged the FDLE report and Badger's trial testimony that Reynolds' DNA was found on Christina's vaginal swab are contradictory (PCR 768-770), but did not recall objecting when Badger testified Reynolds' DNA was found on the vaginal swab (PCR 772). The State then played Badger's audio taped testimony, which Iennaco interpreted as contradicting the trial transcript and to which he ascribed to a scrivener's error contributing to a misunderstanding about Reynolds' DNA on the vaginal swab (PCR 777).

Geriatric/addictions psychiatrist Jeffrey Danziger, (PCR 790), interviewed Reynolds, who insisted he was innocent (PCR 807), and he was drinking less and not taking other drugs in 1998 (PCR 809). Danziger said the facts in this case are consistent with APD (PCR 817), opining Reynolds does not meet the criteria for PTSD (PCR 818), Although Reynolds has cognitive issues (PCR 827), deferring to neuropsychologists who may have found problems with his executive functioning (PCR 835). Reynolds scored 61 in GAF testing, which is a crude estimate, noting that a score below 50 suggests severe mental deficiency (PCR 837-838).

Attorney Steve Laurence, who handled his first death penalty case in the 1990's (PCR 851), said he took depositions in Reynolds' case, but did not know where they were (PCR 853). Laurence said he and Iennaco handled DNA issues in Reynolds' case (PCR 858), and that he believed Dr. Litman was qualified to handle DNA issues (PCR 859), even though Litman was not present for the Frye hearing (PCR 863-864). Laurence admitted it would have been a good idea to have a crime scene expert to testify about the crime scene's inconsistencies (PCR 863), but believes the defense effectively rebutted the State's expert opinion testimony (PCR 867). Laurence did not object to the sexual battery innuendo by the State as he believed it was a fair inference (PCR 869). While aware ABA guidelines recommend hiring a mitigation specialist (PCR 874), Laurence testified he discussed mitigation, but mitigation was primarily the responsibility of Iennaco and Love (PCR 870-871). During *voir dire*, Laurence did not try to rehabilitate the juror who was against the death penalty as the juror made a negative comment about a little girl being stabbed, and Laurence decided she would be a bad juror (PCR 878-880). Laurence did not rehabilitate juror Kamarano as the court attempted this and it seemed fruitless (PCR 884). Laurence revealed Reynolds'

priors to the jury panel so he could deal with the issue early, as Reynolds had, at that time, planned on testifying (PCR 888-889).

Laurence did nothing to deal with the victims' shrine issue (PCR 889-890), and did not object to Parker mentioning Reynolds' incarceration in Tampa as the jailhouse witnesses were going to reveal Reynolds was incarcerated (PCR 892). Laurence did not call Stuart James as a witness as James noticed scratch marks on Reynolds' hands consistent with a struggle (PCR 892-893). Laurence had some of Reynolds' blood re-tested for preservatives to explore potential tampering, but there was not enough of Reynolds' blood to obtain useful results (PCR 896). Laurence admitted it would have been better to ask for another expert to address Reynolds' wounds (PCR 906), but testified at the evidentiary hearing that he had spent between $75,000 and $100,000 on the case, and the amount of money being spent became a consideration when deciding whether to hire experts (PCR 907).

When the State asked Laurence whether he had given Reynolds advice about whether to testify, he replied, over defense objection, that Reynolds had voluntarily decided not to testify (PCR 901-902), Although, on cross, Laurence stated he had advised Reynolds on more than one occasion not to testify (PCR 910), and that his advice not to testify came long before trial (PCR 913). Asked whether he told

Reynolds if he testified “it’ll f---ing kill you,” Laurence replied: “It sounds like something I would say, but I don't recall saying it.” (PCR 911-912).

The defense written closing was submitted on February 5, 2010. The State's response was filed March 2, 2010, and the Defendant's reply April 5, 2010. The trial court entered an order denying the motion. Order Denying Relief, *passim*.

Reynolds timely filed a Notice of appeal.

This Initial Brief follows.

SUMMARY OF ARGUMENT

The trial court erred in summarily denying Claims 3A, 5, 10, 12, A-III, A-IV and A-V, as they are facially sufficient and not conclusively refuted by the record.

The trial court erred in denying Reynolds' Claims 3B, 4, 8, A-I and A-II, after an evidentiary hearing as the trial court's factual findings are not supported by competent substantial evidence, and its legal ruling are erroneous.

ARGUMENT

I.

THE TRIAL COURT ERRED IN SUMMARILY DENYING CLAIMS 3A, 5, 10, 12, A-III, A-IV & A-V WITHOUT AN EVIDENTIARY HEARING AS THEY ARE FACIALLY SUFFICIENT AND NOT CONCLUSIVELY REFUTED BY THE RECORD

Standard Of Review

Orders on Rule 3.851 motions are subject to *de novo* review, *Seibert v. State*, Nos. SC08-708, 08-1615, --- So.3d ----, 2010 WL 2680239 (Fla. 2010), accepting the motion's factual allegations as true, and affirming only if the motion fails to state a facially sufficient claim or there is no issue of material fact. *Id.*

Summarily Denied Claims

The trial court summarily denied Claims 1, 2, 3A, 5, 10, 12, A-III, A-IV, and A-V, adopting the State's Answer.[1] As Reynolds asserts he was denied the effective assistance of counsel, and because the files and records attached to the order fail to conclusively show he is entitled to no relief, reversal is required. The summary denials of Claims 3A, 5, 10, 12, A-III, A-IV and A-V will be examined individually.

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[1] Claims 14 and 15 did not require an evidentiary determination and the trial court deemed Claim 16, cumulative error, premature. (PCR 996-1052). The denial of claims not raised herein as points on appeal are conceded on procedural grounds.

SUMMARY DENIAL OF CLAIM 3A

INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO OBJECT OR CURE THE FALSE TESTIMONY OF CHARLES BADGER

At trial, Charles Badger testified before Reynolds' jury as follows:

> And those results that were obtained were found to be consistent or matched the DNA results that were obtained were found to be consistent or matched the DNA profile of Christina Razor and Michael Reynolds. Robin Razor and Danny Privett were excluded from being the donors of the DNA profile observed.

(Vol. 17, R2015). Although the State moved the postconviction court to "correct" this misstatement of the evidence, which the State deemed a "scrivener's error," the transcript was never "corrected" or altered. The record speaks for itself: Badger told Reynolds' jury his DNA was found inside the minor Christina's vagina, and counsel's failure to object to this damning scientific testimony played directly into the State's Attempted Sexual Battery theory argued in closing argument, falling far below objective standards of reasonably effective assistance of counsel in a capital murder trial, prejudicing Reynolds in jurors' eyes and contributing to the verdict.

"The proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury disregard the remarks."

Duest v. State, 462 So.2d 446, 448 (Fla. 1985). At bar, trial counsel's failure to object to the State's presentation of this false scientific testimony discarded Reynolds' right to a fair trial and barred the misconduct from direct review. *Garcia v. State*, 644 So.2d 59 (Fla.1994). Prejudice flowing from counsel's failure to object to this false expert testimony is manifest as "[t]estimony emanating from the depth and scope of specialized knowledge is very impressive to a jury. The same testimony from another source can have less effect." *Ake v. Oklahoma,* 470 U.S. 68, 82 n7 (1985). An evidentiary hearing is needed to properly analyze the recording and trial transcript.

SUMMARY DENIAL OF CLAIM 5

TRIAL COUNSEL WAS INEFFECTIVE AND PREJUDICED THE OUTCOME OF DEFENDANT'S CASE WHEN COUNSEL FAILED TO OBJECT TO A MISSTATEMENT OF THE LAW GIVEN BY THE COURT TO THE JURY. COUNSEL WAS FURTHER INEFFECTIVE AND PREJUDICED THE DEFENDANT BY NOT MOVING FOR A MISTRIAL BASED ON THIS IMPROPER AND HIGHLY PREJUDICIAL STATEMENT REGARDING THE BURDENS OF PROOF AT TRIAL

The trial court told jurors: "the State doesn't have to do anything, you can't hold it against them" (V9, R571). Counsel neither objected nor moved for mistrial.

Although the State's Answer (adopted by the trial court) urges "this claim should have been raised on direct appeal and is procedurally barred" as the "record

shows on its face that the judge failed to correct the misstatement," State's Answer, page 21, the State's position fails as a matter of law. The trial court erroneously concluded Reynolds' ineffective assistance of counsel claim should have been raised on direct appeal. *Bruno v. State*, 807 So.2d 55 (Fla. 2001) ("Whereas the main question on direct appeal is whether the trial court erred, the main question in a *Strickland* claim is whether trial counsel was ineffective. Both claims may arise from the same underlying facts, but the claims themselves are distinct and--of necessity--have different remedies: A claim of trial court error generally can be raised on direct appeal but not in a [3.851] motion, and a claim of ineffectiveness generally can be raised in a [3.851] motion but not on direct appeal"); *Meeks v. State*, 382 So.2d 673 (Fla.1980) (ineffectiveness appropriate for postconviction motion); *Hartley v. State*, 933 So.2d 685 (Fla. 2nd DCA 2006) (same).

Case law does not support the trial court's conclusion that the erroneous instruction, placing the burden of proof on Reynolds, was made non-prejudicial by giving instructions properly noting the State's burden, State Answer, pages 21-24, as "there is no reason to believe that [jurors] are likely to intuit which is the correct one and which is the erroneous one," and "[t]he conclusion is therefore inescapable

that the jury may well have decided this case under an erroneous instruction as to the burden of proof." *Murray v. State*, 937 So.2d 277, 280 (Fla. 4th DCA 2006).

In *Murray*, jurors were instructed that the defense had the burden of proof beyond a reasonable doubt (an erroneous instruction), while also providing that if jurors had reasonable doubt whether the accused was justified in using force, they should find him not guilty (a proper instruction). In reversing, *Murray* reasoned:

> We emphasize that the defect involves an erroneous reasonable doubt standard. Jurors were forced to choose between two contradictory standards: (1) that defendant was required to prove self-defense beyond a reasonable doubt, and (2) that if they had reasonable doubts about his claim of self-defense they should find him not guilty. When jurors are faced with both correct and erroneous instructions as to the applicable legal rules, there is no reason to believe that they are likely to intuit which is the correct one and which is the erroneous one.
>
> * * *
>
> The conclusion is therefore inescapable that the jury may well have decided this case under an erroneous instruction as to the burden of proof.

Murray, 937 So.2d at 280.[2]

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[2] The *Murray* court found such an error was fundamental. *Id.*, 937 So.2d at 281. Whereas Reynolds raises a claim of ineffective assistance of counsel, rather than fundamental error, *Murray*'s finding of fundamental error illustrates the degree of prejudice flowing from the failure to object to erroneous instructions on the burden on proof, as fundamental error "goes to the foundation of the case or goes to the merits of the cause of action." *Sanford v. Rubin*, 237 So.2d 134, 137 (Fla. 1970).

Here, as in *Murray*, "there is no reason to believe [jurors were] likely to intuit which [wa]s the correct [instruction] and which [wa]s the erroneous one," and the "conclusion is therefore inescapable that the jury may well have decided this case under an erroneous instruction as to the burden of proof," *id.*, 937 So.2d at 280, rendering Reynolds' trial unfair. Although the usual remedy on summary denial of relief where attachments fail to show conclusively that the defendant is entitled to no relief is to remand for an evidentiary hearing, here, as the State acknowledges, the "record shows on its face that the judge failed to correct the misstatement," State Answer, page 21, and Reynolds' counsel failed to object, move for a curative instruction, or move for a mistrial. A new trial is required.

SUMMARY DENIAL OF CLAIM 10

COUNSEL WAS INEFFECTIVE AND PREJUDICED DEFENDANT WHEN COUNSEL FAILED TO OBJECT TO IMPERMISSIBLE LAY WITNESS TESTIMONY CONCERNING THE METALLURGICAL CONDITION OF DEFENDANT'S TRAILER DOOR

At trial, the State elicited the testimony of Detective Parker that Reynolds told Parker he broke the notch on his door frame with channel locks and a screwdriver when he got back from the hospital. Reynolds told Parker a burr caused the cut on his hand.

Parker and Detective Coy returned to the trailer and found the notch on the ground near the door. (V12, 1179-1184). Parker testified he didn't believe Reynolds about the notch:

BY MR. HASTINGS: . . .

Q. Now, you said that the Defendant told you that he used channel locks and a screwdriver to remove what he termed as a burr; correct?

A. Correct.

Q. And from your examination have that V notch, from your experience, as Mr. Laurence indicated, did you believe that?

A. No, I did not.

Q. Why not?

A. Because as I said earlier, the entire notch was nice and shiny. If it had been cracked and a piece of it sticking out, first place, it would have to be really sticking out to cut his finger like that, in my opinion. Secondly, it would have been gray somewhere in that crack. And the piece that we found and the entire notch that it went to is nice and shiny as though it had just been created.

Q. Now he had already come up with that explanation at that time when you were out there, did he not?

A. Yes.

Q. And wasn't that explanation also provided back at the Sheriff s office?

A. Yes.

Q. So of what significance, if any, do you find with the fact that the Defendant never went back to his trailer after that night?

A. After –

Q. He had already come up with that explanation; correct?

A. Correct. He never, as far as I know, until he came home on the night of the 23rd, he had not been home since early the morning of the 23rd. He was gone all day.

MR. HASTINGS: Nothing further.

(V12, 1196-1199; V13, 1205-1207) (emphasis added).

Reynolds' postconviction motion alleges defense counsel unreasonably failed to object to Parker's opinion about the door notch causing Reynolds' injury because Parker was not qualified as an expert in metallurgy or the rate of oxidation of aluminum, and such testimony prejudiced Reynolds as the State used it to persuade jurors Reynolds' explanation of his injury was false.

Section 90.701, Florida Statutes, provides:

> If a witness is not testifying as an expert, the witness's testimony about what he or she perceived may be in the form of inference and opinion when:
>
> (1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and
>
> (2) The opinions and inferences do not require a special knowledge, skill, experience, or training.

Section 90.701, Florida Statutes (2007).

Parker lacked the special knowledge, experience, skill or training required to express an opinion whether the condition or makeup of the aluminum door had actually "cracked", whether the notch was sticking out enough for Reynolds to cut himself, or whether the door notch should have been "gray" instead of "nice and shiny." *Nardone v. State*, 798 So.2d 870 (Fla. 4th DCA 2001) (officer's opinion testimony that metal planter strip used during assault was deadly weapon reversible error where officer did not witness assault, testimony was not based on officer's personal observations on how metal strip was used, and there was no predicate for expert testimony on whether strip was deadly

weapon as there was no evidence as to how defendant used strip and no showing such factual determination was not within realm of ordinary juror's knowledge and understanding); *Bartlett v. State*, 993 So.2d 157 (Fla. 1st DCA 2008) (detective's testimony he ruled out possibility killing was in self-defense was reversible error as officer was lay witness, evidence was in dispute, jurors could have held detective's opinion in higher regard than other lay witnesses reinforcing prejudice from detective's conclusions, jury could have inferred detective had evidence undisclosed to jurors, and finding why defendant stabbed victim was critical). This is the rule even under the standards applied in civil cases. *Fino v. Nodine*, 646 So.2d 746 (Fla. 4th DCA 1994) (lay witness opinion on whether driver could have done anything to avoid accident inadmissible).

The admission of this unqualified opinion by a lay person resulted in prejudice. See, e.g., *Thorp v. State*, 777 So.2d 385 (Fla. 2000) (cellmate's opinion testimony on what he thought the defendant meant when he had said he “did a hooker” was harmful error, even where the evidence, including defendant's DNA, statement to his cellmate and physical appearance on night of murder, was sufficient to support conviction of capital murder of prostitute).

The State's questions eliciting Parker's opinion to discredit Reynolds' account were improper and prejudicial--and should have been objected to. Defense counsel's failure to object to this opinion testimony by a lay person amounted to ineffective assistance. Whether defense counsel's failure to object to this unqualified lay witness opinion testimony was a reasonable strategy must be determined through an evidentiary hearing, as an evidentiary hearing is required in order to conclude that a particular action or inaction by defense counsel was, in fact, a reasonable strategic defense decision. See, e.g., *Collins v. State*, 671 So.2d 827 (Fla. 2nd DCA 1996) ("Matters of trial strategy should not be determined without an evidentiary hearing."); *Button v. State*, 941 So.2d 531 (Fla. 4th DCA 2006) (same).

SUMMARY DENIAL OF CLAIM 12

COUNSEL WAS INEFFECTIVE AND PREJUDICED DEFENDANT WHEN COUNSEL FAILED TO OBJECT TO IMPERMISSIBLE LAY WITNESS TESTIMONY CONCERNING THE CONDITION OF DEFENDANT'S CLOTHING ON THE DAY OF THE HOMICIDES

Reynolds' Claim 12 points out that, at trial, Reynolds' landlord testified she led investigators to a washing machine and Reynolds' clothes on a clothesline fifty feet from the washer, and was allowed to offer a lay witness opinion that the

clothing had been bleached, without explaining how or why she knew it had been bleached, as opposed to simply faded. Postconviction Motion, pages 58-61.[3]

Reynolds asserts that, because his landlord was neither a chemist, nor in the clothes cleaning business, counsel was ineffective and prejudiced the fairness of his trial by failing to object to this impermissible lay witness opinion testimony on the condition of Reynolds' clothing on the day of the homicides. Id.

Section 90.701, Florida Statutes, provides testimony of a lay witness may be in the form of opinion or inference only when special knowledge, experience, skill or training is not required. Reynolds' landlord lacked the special knowledge, experience, skill or training required to express an opinion as to whether the

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[3] Reynolds' landlord's trial testimony in this regard consisted of the following:

> Q. Okay. Now, clothes, did you see any clothes that appeared to have been washed -
> A. Yes.
> Q -- recently? And tell us about that.
> A. There was a clothesline approximately fifty feet from where the washing machine was, and it was full of clothing that had been washed.
> Q. Were these men's clothes or women's clothes?
> A. Men's clothes.
> Q. Anything that appeared to be significant about any of those clothes?
> A. They appeared to be bleached, strongly bleached They were very faded.

(V13, 1307).

condition or makeup of Reynolds' clothing showed that it had been bleached. See, e.g., *Nardone v. State*, 798 So.2d 870 (Fla. 4th DCA 2001) (officer's opinion testimony metal strip used during assault was deadly weapon reversible error where officer did not witness assault, testimony was not based on officer's personal observations on how metal strip was used, and there was no predicate for expert testimony on whether strip was deadly weapon as there was no evidence how defendant used strip and no showing such factual determination was not within the realm of ordinary juror's knowledge and understanding).

Admitting this unqualified opinion by a lay person resulted in prejudice. *Thorp v. State*, 777 So.2d 385 (Fla. 2000) (cellmate opinion on what he thought accused meant when saying he "did a hooker" harmful, even where evidence, including accused's DNA, statement to his cellmate and physical appearance on night of murder, sufficient to support conviction of capital murder of prostitute).

The State's questions eliciting Reynolds' landlord's opinion to discredit Reynolds were improper and prejudicial--and should have been objected to. Defense counsel's failure to object to what amounted to expert opinion testimony by a lay person resulted in ineffective assistance of defense counsel.

The implication the State sought to impose was that Reynolds' landlord believed Reynolds had specially washed and bleached his clothes on the day of the murders to eliminate the victims' blood. Reynolds' defense counsel unreasonably failed to object to the landlord's lay opinion that Reynolds' clothing had been bleached. The landlord had no background allowing her, in the form of an opinion, to comment on the condition or makeup of the clothing. She had no chemical or business background allowing her to render an opinion on whether Reynolds' clothes had been bleached. This testimony, elicited as an opinion to show consciousness of guilt, should have been objected to as it was unfairly prejudicial, especially in light of counsel's failure to cover the basis for the opinion on re-cross.

Whether defense counsel's failure to object to this unqualified lay witness opinion testimony was a reasonable trial strategy must be determined after conducting an evidentiary hearing, as an evidentiary hearing is required in order to conclude whether a particular action or inaction by defense counsel was, in fact, a reasonable strategic defense decision. See, e.g., *Collins v. State*, 671 So.2d 827, 828 (Fla. 2nd DCA 1996) ("Matters of trial strategy should not be determined without an evidentiary hearing."); *Button v. State*, 941 So.2d 531 (Fla. 4th DCA 2006) (same).

SUMMARY DENIAL OF CLAIM A-III

THE LETHAL INJECTION OF MR. REYNOLDS UNDER THE STATE'S PROCEDURES VIOLATES HIS RIGHT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE EXECUTION BY LETHAL INJECTION IS CRUEL AND/OR UNUSUAL PUNISHMENT

Reynolds' Claim A-III asserts the current method of execution used in Florida by lethal injection, pursuant to § 922.105, Florida Statute (2007), violates Eight Amendment proscriptions against cruel and unusual punishment, and those in Article I, Section 17, Florida Constitution, as drugs used in such executions cause extreme and unnecessary pain, Although the combination of chemicals masks the pain experienced from the sight of those administering or viewing the execution.

Although the State's Answer to Reynolds' Amended Motion lists a number of cases in which this Court rejected challenges to Florida's lethal injection protocol during the previous year (State's Answer to Amended Motion, pages 6-7), the State makes no case-specific argument to overcome Reynolds' constitutional challenges *in this case*. This case should be reversed and remanded for an evidentiary hearing to determine whether the particular lethal injection protocol used in Florida violates

Eight Amendment proscriptions against cruel and unusual punishment, and those contained in Article I, Section 17, Florida Constitution.[4]

SUMMARY DENIAL OF CLAIM A-IV

TRIAL COUNSEL FAILED TO REQUEST THAT SLEEPING JUROR GOLDEN BE REMOVED DURING CRITICAL TESTIMONY PRESENTED BY STATE AFTER THE TRIAL COURT HAD ALREADY ADMONISHED THE JUROR THAT IT WOULD REQUIRE HER TO STAND OR TAKE DRASTIC MEASURES IF SHE FELL ASLEEP AGAIN

Reynolds' Claim A-IV asserts that, at trial, Juror Golden was seen sleeping on at least two separate occasions in the midst of critical testimony by two key State witnesses. The first time Juror Golden was seen sleeping, Teri Creswell, an evidence specialist, was presenting critical testimony regarding evidence discovered at the scene where the victims were found, including hair, fibers and other items

[4] The Eighth Amendment prohibits governmental imposition of cruel and unusual punishments, and bars infliction of unnecessary pain in the execution of the death sentence. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464, 67 S. Ct. 374 (1947) (plurality opinion). Punishments are cruel when they involve torture or lingering death. *In re Kemmler*, 136 U.S. 436, 447, 10 S. Ct. 930 (1890). The meaning of "cruel and unusual" must be interpreted in a flexible and dynamic manner, *Gregg v. Georgia,* 428 U.S. 153, 171, 96 S.Ct. 2909 (1976) (joint opinion), and measured against evolving standards of decency that mark the progress of a maturing society, *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590 (1958) (plurality opinion). Florida's lethal injection method of execution creates a foreseeable risk of unnecessary and extreme human pain and therefore violates both the Eighth Amendment to the United States Constitution and Article I, Section 17 of the Florida Constitution, prohibiting cruel and unusual punishments.

submitted for testing. (V11,12, 921-1035). The State was asking Creswell about the hairs she received on glass slides when the trial court requested the State and defense approach the bench, where the parties discussed the sleeping juror, who was summoned and admonished. (V11, 968-976).

After the trial court's admonishment, Juror Golden was seen nodding off again during the critical testimony of FDLE Crime Lab DNA Analyst, Charles Badger, who was addressing the results of DNA testing. (V17,18, 1878-2216). During Badger's testimony, the trial court called another bench conference with the State and defense counsel, excused the jury, and further discussed Juror Golden's conduct and how other jurors were being distracted by trying to keep her awake or having to notify the trial court that she was sleeping. (V17, 2022-2026).

The trial court then brought the jury back and resumed Badger's testimony without re-addressing Juror Golden's sleeping. (V17, 2027). During Badger's testimony, the trial court recessed for lunch and excused the jury. (V17, 2036). After the recess, when the court told the parties to address Golden's sleeping during Badger's testimony, defense counsel replied: "we want her to continue as a juror." (V17, 2038-2039). Juror Golden remained on Reynolds' jury despite the court's

admonishment the first time she fell asleep that if she fell asleep again the court would require her to stand or take drastic measures. (V11, 976).

Defense counsel's failure to request Juror Golden be removed epitomizes ineffective assistance of counsel. Defense counsel misstated Reynolds' position when it told the trial court that Reynolds wanted Golden to remain on the panel. Although the trial court attempted to obtain Reynolds' position--rather than only defense counsel's--about whether to retain or remove Juror Golden, defense counsel interrupted the court, refusing to allow Reynolds to speak. (V17, 2038-2039).

Juror Golden distracted other jurors during critical testimony and distracted the defense, who the trial court told to pay special attention to Golden to ensure she was not falling asleep. Defense counsel should have reported repeated instances of Juror Golden's sleeping during critical testimony, and should have asked she be removed, but failed to, undermining the adversarial testing process and rendering the verdict unreliable. During neither bench conference did defense counsel ask, or request the trial court to ask, what specific testimony Golden heard while she slept. Juror Golden merely told the trial court that she was following what was happening.

Having argued that the defense theory was one of reasonable doubt arising from evidence presented by State witnesses, defense counsel's failure to request

Juror Golden's removal cannot be said to have been a strategic decision. Golden, who was sleeping during the testimony of these crucial State witnesses, could not possibly know whether critical testimony was presented by State's witnesses in a credible or convincing manner, leaving Golden to simply rely on the opinions of other jurors as she could not fulfill her duty to consider all of the evidence.

As Reynolds is entitled to an evidentiary hearing on this claim, the trial court erred in its summary denial. *Terrell v. State*, 9 So.3d 1284, 1290 (Fla. 4th DCA 2009) (remand for evidentiary hearing on postconviction claim of ineffective assistance of counsel required where defendant alleged counsel was ineffective for failing to object to a sleeping juror); *Simo v. State*, 790 So.2d 1190, 1191 (Fla. 4th DCA 2001) (claim counsel failed to object to sleeping juror legally and factually sufficient and error to summarily deny claim); *Erlsten v. State*, 842 So.2d 967 (Fla. 4th DCA 2003) (summary denial of postconviction motion alleging counsel ineffective for failing to object to a sleeping juror improper as counsel may have had strategic reasons for not seeking to replace the sleeping juror during trial); *Kesick v. State,* 448 So.2d 644 (Fla. 4th DCA 1984) ("[r]eversed and remanded for an evidentiary hearing on appellant's allegations in his motion for post-conviction relief of . . . ineffective assistance of counsel. Specifically, appellant alleges that his counsel failed to act

when informed by the prosecutor that one of the jurors was sleeping during a portion of the trial"); *Bieser v. State*, 677 So.2d 59 (Fla. 1st DCA 1996) (same).

Although the State's Answer to this Amended Corrected and Supplemental Claim states "Counsel consulted with Reynolds and Reynolds did not want the juror removed," State's Answer to Corrected Amended and Supplemental Motion, page 7, no such statement by Reynolds appears on the record, and the Motion alleges "Defense Counsel misstated Mr. Reynolds's position when it told the Court that Mr. Reynolds wanted the juror to remain on the panel." Amended Corrected and Supplemental Motion, Page 33. As whether defense counsel misstated Reynolds' position on removing the sleeping jury is a disputed issue of fact, an evidentiary hearing is required in order to resolve this claim. *Seibert v. State*, Nos. SC08-708, 08-1615, --- So.3d ----, 2010 WL 2680239 (Fla. 2010) (this Court accepts motion's factual allegations as true and affirms only it fails to state facially sufficient claim or there is no issue of material fact to be determined). See also *Amendments to Fla. Rules of Crim. Pro. 3. 851, 3.852, & 3.993,* 772 So.2d 488, 491 n. 2 (Fla.2000) ("an evidentiary hearing is mandated on initial motions which assert . . . legally cognizable claims which allege an ultimate factual basis").

SUMMARY DENIAL OF CLAIM A-V

TRIAL COUNSEL FAILED TO PREPARE THE DEFENDANT TO TESTIFY ON HIS OWN BEHALF AFTER INFORMING THE JURY THAT THE DEFENDANT WOULD TESTIFY AND AFTER TRIAL COUNSEL INFORMED POTENTIAL JURORS THAT HE WAS A CONVICTED FELON. TRIAL COUNSELS' INEFFECTIVE ASSISTANCE OF COUNSEL VIOLATED THE DEFENDANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

Reynolds' summarily denied Claim A-V alleges that, in its opening statement, defense counsel twice promised jurors Reynolds would testify to facts the defense intended to prove (V11, 828, 830); that his counsel told the *voir dire* panel he was a convicted felon who had been in prison (V10, 721-722); that while Reynolds knew the jury was expecting him to testify to the facts alluded to in defense counsel's opening statement, counsel did not prepare him to testify on his own behalf and misadvised him not to testify; that prior to his response to the trial court's on-the-record inquiry into whether Reynolds wanted to testify, defense counsel told him that if he testified he would get the death penalty; and that Reynolds reasonably perceived defense counsel's statement as a threat prompting a coerced waiver of his right to testify (See V20, 2730-2731); that the colloquy with Reynolds reveals he was not questioned about whether his purported decision not to testify was voluntary

and knowing; and that counsel provided ineffective assistance when, after informing potential jurors Reynolds was a convicted felon, and told seated jurors Reynolds would testify, defense counsel coerced Reynolds' waiver of his right to testify. Amended Corrected & Supplemental Motion, pages 36-40.

Claim A-V further alleges that had defense counsel prepared Reynolds to testify and not threatened him that if he testified he would get the death penalty, Reynolds would have testified in his own defense. Reynolds also alleges that, had he testified, he would have provided evidence defense counsel could only allude to in its opening statement, informing the jury investigators did not believe Reynolds' explanation for his injuries; that although State witnesses testified Reynolds did go to the hospital for treatment, Reynolds could have testified to what happened when he sustained the injuries, what he experienced at the hospital, and why he was so cooperative with police, voluntarily providing hair and blood samples; that before his arrest and throughout his custody, he had maintained his innocence; that he had a friendly relationship with victim Danny Privett, and did not kill Danny Privett, Robin Razor, or their daughter, Christina Razor; that he often socialized with Danny and liked the family so much he gave Danny's brother his dog; that he could have explained inconsistencies and conflicting evidence by State experts and civilian

witnesses, including how his DNA could have been found in the victims' trailer, Although he had never personally been inside; that the small towel purportedly found in the victims' trailer actually belonged to him, and was mishandled evidence collected during the search he authorized of his residence; that since before his arrest, he never changed his version of events; and that his testimony would have been a powerful contribution to the defense. Reynolds' motion alleges jurors would have been able to make a determination of his credibility if they would have had the opportunity to hear his testimony, as promised in the opening statement by defense counsel; that Reynolds is articulate and respectful, and his sincerity would not have been lost on the jury; and that Reynolds could have also refuted testimony of two convicted felons who testified that their verbal exchanges with Reynolds amounted to confessions. Amended Corrected & Supplemental Motion, pages 40-42.

Claim A-V further alleges defense counsel failed to investigate or effectively challenge the State's jailhouse witnesses, and that Reynolds could have explained to his jury how this testimony could have been obtained if his counsel had interviewed jail personnel present during the alleged exchanges; that at the close of the penalty phase, the trial court asked Reynolds only if he wanted to present evidence of mitigation (See V25, 74); that the trial court did not ask Reynolds if he wanted to

waive his right to testify, or if his decision not to present evidence of mitigation was voluntary; that Reynolds told the trial court, without contradiction by defense counsel, that he believed he was going to be sentenced to death and saw no purpose in presenting evidence. Amended Corrected & Supplemental Motion, page 42.

Reynolds' motion notes that, at the *Spencer* hearing, he told the trial court he should have testified (See V26, 3641), regretted taking defense counsel's misadvise, and realized the chilling effect his counsel's advise had on him during the inquiry at the *Spencer* hearing, telling the trial court what he would have testified to if he had had the opportunity: His own side of the story and his own version of the facts. (V26, 3610-3701). Amended Corrected & Supplemental Motion, pages 42-43.

A criminal defendant's right to testify is a fundamental right under both the Florida and United States Constitutions. *Deaton v. Dugger*, 635 So.2d 4 (Fla.1993). "This right is personal to the defendant and cannot be waived either by the trial court or by defense counsel." *United States v. Teague*, 953 F.2d 1525 (11th Cir.1992). To waive this right, an accused must make a knowing, voluntary and intelligent waiver. *Deaton*, 635 So.2d at 8. Here, Reynolds has both alleged and testified attorney Laurence told him if he were to testify, it would "f---ing kill him." (PCR 537).

Asked at evidentiary hearing on other claims whether he told Reynolds if he testified "it'll f---ing kill you," Laurence replied: "It sounds like something I would say, but I don't recall saying it." (PCR 911-12). Thus, Reynolds' testimony counsel told him if he testified he would die is not contradicted. *Tal-Mason v. State*, 700 So.2d 453, 455 (Fla. 4th DCA 1997) (where counsel testified at evidentiary hearing "I don't recall as I sit here now what the exact situation was at that period of time. But I think that certainly would be the type of information that I would discuss--would have discussed," defendant's allegation and testimony concerning attorney's misadvise deemed uncontradicted). "When the record does not conclusively demonstrate that a defendant is entitled to no relief, it is necessary to return the case to the trial judge for the development of the record on any unresolved issues." *Id.*, 700 So.2d at 456; *Cobb v. State*, 582 So.2d 81 (Fla. 1st DCA 1991) (claim attorney told accused she would get death if she did not plead to first-degree murder, rendering plea coerced, stated *prima facie* case, requiring remand for either attachments conclusively showing no entitlement to relief or evidentiary hearing); *Visger v. State*, 953 So.2d 741 (Fla. 4th DCA 2007) (counsel's deficiency in advising burglary defendant not to testify resulted in prejudice as

testimony would be only evidence supporting his defense he was invited into home to buy drugs).

As Reynolds' testimony Laurence said if he testified "it'll f---ing kill you" (PCR 537), is uncontradicted by Laurence's testimony "[i]t sounds like something I would say" (PCR 911-912), and because, moreover, the State's only attachment to its Answer (adopted by the trial court) is a reference to the trial record indicating the trial court "conducted a complete colloquy regarding whether he would testify and Reynolds stated that he did not want to testify" State's Answer, pages 8-9, no files or records conclusively show that Reynolds is not entitled to relief on this claim concerning what Laurence told Reynolds *off-the-record* just prior to that colloquy.[5]

An evidentiary hearing is required at which to adduce evidence on whether defense counsel's advice that if Reynolds were to testify he would receive the death penalty rendered Reynolds' decision not to testify unintelligent and unknowing; whether Reynolds reasonably understood such advice to mean his right to testify had

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[5] Contrary to the State's contention, the colloquy with Reynolds reveals he was not asked whether his decision not to testify was knowing, voluntary and intelligent. The court made no inquiry into whether Reynolds had received threats or promises. (V20, 2730-2731). Instead, the record shows the court's suggestions for Reynolds to "listen very carefully to your attorneys...this is your case, your life, so to speak, you make the final decision" (V20, 2730), may have unintentionally reinforced Laurence's advice that, if Reynolds were to testify, it would kill him. (PCR 537).

been thwarted, as alleged in his motion, *Tal-Mason v. State*, 700 So.2d at 455; and whether the thwarting of Reynolds' putative trial testimony resulted in prejudice.

II.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S CLAIMS 3B, 4, 8, A-I & A-II, AFTER AN EVIDENTIARY HEARING AS ITS FINDINGS ARE NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE

Standard Of Review

On review of a trial court's ruling after an evidentiary hearing on an ineffective assistance claim, this Court gives deference to the trial court's factual findings to the extent they are supported by competent, substantial evidence, but reviews *de novo* the court's determinations of deficiency and prejudice, which are mixed questions of fact and law. *Arbelaez v. State*, 898 So.2d 25, 32 (Fla. 2005).

Claims Denied After Evidentiary Hearing

An evidentiary hearing was held September 14th through 16th 2009, on Claims 3B, 4, 6, 7, 8, 9, 11, 13, A-I, and A-II, which the trial court denied in a written order. The trial court's denial of Claims 3B, 4, 8, A-I & A-II after the testimony at the evidentiary hearing will be examined in the following sections.

CLAIM 3B

COUNSEL WAS INEFFECTIVE IN THE GUILT PHASE FOR FAILING TO OBJECT TO THE STATE'S UNSUPPORTED ARGUMENT THAT A SEXUAL BATTERY WAS THE MOTIVE FOR THE MURDERS

Claim 3B asserts counsel's ineffectiveness in failing to object to the State's arguing in guilt phase closing that Reynolds' motive was the Attempted Sexual Battery of an 11-year-old. The order denying relief after evidentiary hearing states:

> At the evidentiary hearing, Attorney Laurence explained he believed the argument was a fair comment on the evidence. (EH 868 70). Witnesses had testified that the child victim always slept in her panties, but those panties had been removed and there was one of the Defendant's pubic hairs found near her body. Even though there was no injury consistent with the commission of a sexual battery or semen found on the child victim, the State is permitted to review the evidence and make inferences which may reasonably be drawn from that evidence. *Bertolotti v. State*, 476 So.2d 130, 134 (Fla. 1985); *Mann v. State*, 603 So.2d 1141, 1143 (Fla. 1992). The attempted sexual battery motive was a fair inference from the evidence presented. Accordingly, counsel was not ineffective for failing to object. *Spann v. State*, 985 So.2d 1059, 1068 (Fla. 2008), citing *Mungin v. State*, 932 So.2d 986, 997 (Fla. 2006). Next, the Defendant argues that counsel should have rebutted the improper argument about a sexual battery in his closing argument, but failed to do so. As noted above, the State's argument was a fair comment on the evidence.[2] As cited in the original Motion to Vacate, trial counsel argued in closing that there was no actual evidence of a sexual battery, and that the proffered motive was speculative. Therefore, it cannot be said that counsel took no action to rebut the State's argument. Just because counsel could have spent more time on it does not mean that counsel was ineffective; such a finding would require this Court to make a hindsight determination that is improper under *Strickland*.

Order Denying Relief, page 3.

The trial court's stated rationale for denying this claim ignores that the State, in suggesting Reynolds committed the murders and did so in attempting to commit Sexual Battery, was accusing Reynolds of committing an uncharged crime—the alleged Attempted Sexual Battery of the 11-year-old victim Christina—to which defense counsel made no objection, request for instruction, or motion for mistrial.[6]

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[6] The order denying this claim also misconstrues record facts, as the trial court's conclusion that "[t]he attempted sexual battery motive was a fair inference from the evidence," rests on two flawed propositions: (1) that "[w]itnesses had testified that the child victim always slept in her panties, but those panties had been removed," and (2) that "there was one of [Reynolds'] pubic hairs found near her body." Order Denying Relief, page 3. Those notions are unsupported by the record: (1) First, Christina was seated on the couch (V11, 876-877, 926), when found with her mother, with no sign of sexual assault. (V11, 942, 947; V12, 1008; V15, 1657, 1691-1692). No evidence indicated any panties were "removed." Although her grandmother, Shirley Razor, who she had not lived with for eight months to a year (V11, 854), replied "yes" to the State's suggestive question "did she normally wear panties when she slept?", Shirley had already testified that when Christina slept at her home, "She either had on a big T-shirt or she had on a little gown." (V11, 855). (2) Second, Although the trial court concluded "there was one of [Reynolds'] pubic hairs found near her body," the record reveals when the evidence folder marked as containing a pink pillow was opened to sweep for evidence, it also contained a blue towel, which FDLE Forensic Technologist Sabrina Gayer testified was contrary to agency protocols and caused cross-contamination. (V14. 1451-1489). While DNA from a pubic hair in the folder matched Reynolds (V14, 1513-1514; V16, 1968-1972), Gayer agreed that due to cross-contamination, there was "no way of telling what came from what." (V14, 1480). Reynolds' DNA was not found on Christina (V15, 1769-1781; V16, 1941-1944, 1963-1967, 1982-1991; V17, 2008-2012, 2020-2022, 2027-2029) and Christina's not found on Reynolds. (V17, 2017-2020).

This Court, in *Foy v. State*, 115 Fla. 245, 155 So. 657 (1934), long ago warned prosecutors against such *innuendo,* urging jurors to believe an accused should be found guilty for ostensibly committing crimes he is not on trial for:

> [T]he prosecution in a criminal case cannot . . . lead the jury to believe that the accused should be found guilty of the particular crime charged, because of his being suspected or accused of other offenses.

Id., at 658. See also *Coverdale v. State*, 940 So.2d 558, 561 (Fla. 2nd DCA 2006) ("the comment that Coverdale tried to molest Nina's daughter is far more egregious. Few criminal allegations would be more prejudicial to a defendant than molesting a child. If the jury believed the statement that Coverdale was a child molester, this gratuitous statement would deny him a fair trial on the aggravated stalking charge, and no curative instruction could un-ring that bell. We conclude that under these circumstances, the trial court abused its discretion in denying the motion for mistrial with respect to the comment that Coverdale tried to molest Nina's daughter.").

The opinion in *Bertolotti v. State*, 476 So.2d 130 (Fla. 1985)--cited by the trial court—did not, as here, entail State *guilt phase* comments, nor, as here, argument accusing a defendant of uncharged crimes, but other State *penalty phase* comments. Id., at 132-133. *Bertolotti* set a higher bar for reversal based on improper penalty

phase argument: "[W]here, as here, the determination of guilt has already been made . . . [i]n the penalty phase of a murder trial resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence." Id., at 133. This Court nonetheless went on to warn that argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." Id., at 133-134.

The trial court also cites *Mann v. State*, 603 So.2d 1141 (Fla. 1992) (argument that psychologist had implied acts were excusable as accused was child molester was fair comment *in penalty phase* where made to negate psychologist's testimony that mental mitigators applied). The trial court's reliance on *Mann* is flawed, as it too entailed *penalty phase* argument subject to *Bertolotti's* post-guilt egregiousness test.

The trial court's reliance on *Spann v. State*, 985 So. 2d 1059 (Fla. 2008), also lacks force, as that case entailed improper bolstering to negate an accused's alibi; not whether, as here, the State may accuse a defendant in closing of uncharged crimes.

In *Dawkins v. State*, 605 So.2d 1329 (Fla. 2nd DCA 1992), the State suggested an attempted first-degree murder defendant was in unlawful possession of a firearm by a convicted felon--an uncharged crime--and the trial court denied a mistrial.

Dawkins held mentioning the uncharged crime put the accused's character in issue. Id., at 1330. As the facts concerning Dawkins's guilt of attempted murder were in dispute and jurors would be less likely to believe him if they knew he had committed other unlawful acts, the error could not be harmless. Id. At bar, as in *Dawkins*, character was central as Reynolds gave exculpatory statements. As his credibility was critical to the jury's verdicts, the State's accusing him of Attempted Sexual Battery resulted in prejudice. *Gleason v. State*, 591 So.2d 278 (Fla. 5th DCA 1991) (closing that defendant in attempted sexual battery and false imprisonment case committed uncharged crimes and was about to commit another reversible error); *Birren v. State*, 750 So.2d 168 (Fla. 3rd DCA 2000) (remarks in closing that accused had stolen resources from State and other fishermen improper where accused not charged with stealing); *Ford v. State*, 702 So.2d 279 (Fla. 4th DCA 1997) (in sexual battery case where movie was claimed to be model for consensual sex, State's insinuation in closing that movie had sinister ending unfair comment as no evidence of movie's ending presented); *Watson v. State*, 50 So.3d 685 (Fla. 3rd DCA 2010) (argument that accused had tried to conceal drugs under car seat before stop based on facts not in evidence, constituting prejudicial error in drug trafficking case as no evidence indicated accused hid drugs and knowledge of drugs in car was in dispute).

The foregoing cases illustrate the rule against stretching facts to suggest uncharged crimes, Although the facts might allow for a *mere possibility* they occurred.

"Unsubstantiated statements that concern references to other crimes committed by a defendant are particularly condemned," *Ford v. State*, 702 So.2d 279, 280 (Fla. 4th DCA 1997), and the "implication of a defendant in other crimes is considered presumptively prejudicial," id., because of "the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." *Straight v. State*, 397 So.2d 903, 908 (Fla. 1981).

In *Huff v. State*, 437 So.2d 1087 (Fla.1983), a man convicted of murdering his mother and father appealed, asserting the trial court erred in denying his motion for mistrial when the State implied in closing he had forged his deceased father's name on a guarantee as evidence of a motive to kill him, as the State offered no evidence that a forgery occurred. This Court held the trial court erred in denying a mistrial as the State implied Huff forged his father's name, yet offered no evidence of forgery. The innuendo of forgery "clearly denied [Huff] a fair trial," id., at 1091, Although the State argued that testimony showing financial problems the accused had at the time of the murders went to the motive it intended to prove. The State introduced a

civil complaint with the guarantee, arguing it was forged, Although the record was devoid of evidence the signature on the guarantee had been forged. As there was no record evidence of forgery, the "[S]tate's injection of this important element into its closing argument to intimate [the defendant's] motive for the murders violates the rule that argument of counsel be channeled by the evidence produced at trial." *Huff*, at 1091.

Similarly, at bar, had defense counsel objected and moved for an instruction or mistrial when the State argued Reynolds was attempting to rape the 11-year-old child as a motive to kill her and her parents, the objection would have been sustained and a curative instruction or mistrial granted, as the State offered no evidence that an Attempted Sexual Battery occurred. The State's closing deprived Reynolds of a fair trial, contributed to his convictions and was so harmful and fundamentally tainted to require a new trial. The argument was so inflammatory it may have influenced jurors to convict Reynolds out of shear horror the motive seemed to be child sexual battery.

"The proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury disregard the remarks." *Duest v. State*, 462 So.2d 446, 448 (Fla. 1985). At bar, defense counsel's failure to object to the State's accusation that Reynolds was committing the crime of

Attempted Sexual Battery fell measurably below that standard of reasonably effective assistance in this capital case, and prejudiced the outcome of both the guilt phase and penalty phase proceedings, as "[f]ew criminal allegations would be more prejudicial to a defendant than molesting a child." *Coverdale*, 940 So.2d at 561.

CLAIM 4

MR. REYNOLDS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE WHEN THE DEFENSE FAILED TO OBJECT TO THE REPETITION OF THE SEXUAL BATTERY THEORY IN THE STATE'S CLOSING ARGUMENT OR EFFECTIVELY REBUT THE THEORY IN ITS CLOSING. THE FAILURE TO OBJECT TO THE BADGER LIE IN THE GUILT PHASE ALSO RESULTED IN PREJUDICE IN THE PENALTY PHASE

The denial of this claim essentially incorporates the trial court's own rationale for denying Claims 3A and 3B. Order Denying Relief, pages 3-4.

But Reynolds' defense counsel failed to object to the State's Sexual Battery motive argument in its penalty phase closing argument, notwithstanding the State's argument that this accusation supported its position that Christina's death was heinous, atrocious or cruel (HAC). Instead of confronting the State's HAC argument, defense counsel argued that a Sexual Battery motive did not support the aggravator that the murders were committed to avoid arrest. (V25, 109-110).

Defense counsel failed to dispute the State's Attempted Sexual Battery accusation in its argument concerning the HAC aggravator, which the State urged was supported on that ground, and failed to object when the State argued Reynolds was attempting to commit Sexual Battery in support of the HAC aggravator. (Id.).

Additionally, defense counsel had a second opportunity to refute Badger's uncorrected record testimony in the penalty phase by calling him as a witness, and counsel's failure to do so left unrefuted in jurors' minds the notion that Reynolds' DNA was found inside the vagina of the 11-year-old murder victim in arriving at its advisory verdict concerning the appropriate punishment, despite the reality that "[f]ew criminal allegations would be more prejudicial to a defendant than molesting a child." *Coverdale*, 940 So.2d at 561. A new penalty phase proceeding is required.

CLAIM 8

TRIAL COUNSEL WAS INEFFECTIVE AND PREJUDICED THE OUTCOME OF DEFENDANT'S CASE WHEN COUNSEL FAILED TO REQUEST A JURY INTERVIEW TO DETERMINE WHETHER ANY JURORS HAD SEEN AN IMPROPERLY CONSTRUCTED MEMORIAL OR SHRINE TO THE VICTIMS THAT WAS PLACED RIGHT OUTSIDE THE COURTROOM. COUNSEL WAS FURTHER INEFFECTIVE AND PREJUDICED THE DEFENDANT BY NOT MOVING FOR A MISTRIAL BASED ON THIS IMPROPER AND HIGHLY PREJUDICIAL STATE-SANCTIONED ACTION BY THE VICTIM'S FAMILY.

At Reynolds' postconviction evidentiary hearing, there was no reasonable defense strategy presented by Reynolds' trial counsel when they failed to determine whether jurors observed or were prejudiced by the shrine erected in a courthouse foyer.

Judge Lester, Stacia Adams and Reynolds all stated that the shrine had been erected and they were able to describe it (PCR 57, 523, 635). The victim advocate/witness coordinator denied that a shrine or memorial was erected and stated that she responded to the trial court's admonishment during trial after victim family members gave hugs and flowers to the advocates in appreciation (PCR 28-29). During a mid-morning break at Reynolds' trial, Reynolds saw a shrine (PCR 523) with a wreath on a stand and sympathy cards. Reynolds also saw a heart-shaped balloon (PCR 524-526). At the evidentiary hearing, Judge Lester interrupted the State's cross-examination of Reynolds (PCR 634) after Reynolds explained that if he could see the shrine, and he did not enter the courtroom via the main entrance either, jury members also had the opportunity to view the shrine (PCR 524-526, 529). Judge Lester stated that he wanted to complete the record by inserting missing information (PCR 634). Judge Lester stated that the jury could have seen the shrine that he so vehemently objected to during Reynolds' trial (PCR

634-635) and then concluded in his Order denying Reynolds relief that even if the jury did see the shrine, it would not have made any difference given the fact that the courtroom was filled with angry family members (PCR 1648). Judge Lester again interrupted – his word – the proceedings at the evidentiary hearing when Reynolds was testifying on Re-Direct about the shrine (PCR 660). Judge Lester responded to questions posed by Reynolds' counsel and stated that he knew when the shrine was placed outside of the courtroom and knew when it was removed (PCR 661). The State did not present any evidence that the shrine issue was addressed, removed or that the jury did not see it. Reynolds' trial counsel stated that when the trial court brought the matter to their attention, they did not want to draw attention to the issue and so, no objection, no inquiry and no instructions for the jury were given to avoid potential prejudice created by the shrine.

The trial court had good reason to admonish the victims' advocates or witness coordinators for what he stated during trial and at the evidentiary hearing was a repeated violation or misconduct over the years. The display of a shrine or memorial to the victims in this case was impermissible state action. The United States Supreme Court recognizes that improper state action may affect a juror's judgment. *Holbrook v. Flynn*, 475 US 560, 567-68 (1886). The Supreme Court

recognizes that impermissible state action such as in this case requires a hearing (at the time of the violation) to determine whether the display of a memorial to the victims outside of the courtroom was so inherently prejudicial as to require a new trial. The display, as well as the behavior of family members in the courtroom during trial (which required admonishment from the bench to avoid outbursts or symbolic acts such as leaving the courtroom in the middle of critical evidentiary presentations), created an inherently prejudicial atmosphere attributable to both state action of the victims' advocates in placing the memorial and the victims' family. Trial counsel, seemingly oblivious to the existence or significance of the shrine, was ineffective for failing to object and demand a hearing – they only agreed to the instruction that the Judge gave the victim advocate to remove the shrine. Yet, it is disturbing that the victim advocate both during the trial and at the evidentiary hearing could not testify as to the description or location of the shrine or how long the shrine had been in place – and certainly not that it was removed at any time. The victim advocate responded to the trial court's admonishment during trial with the same information about just receiving flowers from the victims as she did when testifying at Reynolds' postconviction evidentiary hearing. The victim

advocate did not know anything about the shrine and could have possibly understood the trial court's instruction to remove it.

Reynolds trial was tainted by impermissible state action that prejudiced Reynolds right to a fair trial where trial counsel was ineffective by failing to demand a hearing and investigate the matter fully and prejudice, acknowledged by the court was more that merely feared – otherwise the instruction to remove a shrine or memorial would have been unnecessary. A new trial is required.

CLAIM A-I

TRIAL COUNSEL FAILED TO INVESTIGATE AND PRESENT EVIDENCE OF SUBSTANTIAL MITIGATION, INCLUDING MENTAL HEALTH MITIGATION. TRIAL COUNSEL FAILED TO ENGAGE EXPERTS TO INTERVIEW AND EVALUATE THE DEFENDANT. TRIAL COUNSEL FAILED TO CALL WITNESSES TO TESTIFY DURING THE PENALTY PHASE WHO WOULD HAVE DEMONSTRATED THAT THE DEFENDANT WAS NOT ONE OF THE WORST OF THE WORST PERSONS TO BE CONVICTED OF CAPITAL MURDER. TRIAL COUNSEL FAILED TO INFORM THE DEFENDANT OF THE MITIGATION THE DEFENDANT COULD HAVE PRESENTED TO THE JURY AND THEREAFTER FAILED TO PRESENT THE DEFENDANT'S JURY WITH ANY REASON TO RECOMMEND LIFE OVER DEATH. MR. REYNOLDS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE WHICH VIOLATED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

The trial court's order denying relief relies mainly on Reynolds' "waiver" of mitigation in denying this claim. Order Denying Relief, pages 7-8. But the complete absence of any evidence Reynolds' counsel meaningfully investigated mitigation in order to ensure his waiver of mitigation would be knowing and voluntary reveals Reynolds' waiver was not. There is no indication trial counsel performed any meaningful investigation into the evidence in mitigation for the penalty phase of trial before Reynolds' waiver of mitigation. See *Ferrell v. State*, 29 So.3d 959 (Fla. 2010) (defense counsel's failure to investigate mitigation was the basis for concluding the waiver of mitigation was not knowing and voluntary).

Reynolds presented competent, substantial evidence at the evidentiary hearing to support a finding that trial counsel failed to adequately investigate potential mitigation evidence, which in turn rendered his waiver *not* knowing, voluntary, and intelligent. See *State v. Lewis*, 838 So.2d 1102, 1113 (Fla. 2002) ("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."); *State v. Pearce*, 994 So.2d 1094 (Fla. 2008) (noting counsel never contacted any of defendant's family members in

an attempt to discover potential mitigation in concluding there was competent, substantial evidence trial counsel failed to do anything to prepare for the penalty phase). See also *Wiggins v. Smith*, 539 U.S. 510, 534-38, 123 S.Ct. 2527 (2003) (holding defense counsel's decision not to expand their investigation of petitioner's life history for mitigating evidence beyond the presentence investigation report and department of social services records fell short of prevailing professional standards and that such an inadequate investigation by counsel prejudiced the defendant).

At bar, no mitigation was presented to Reynolds' jury to support a recommendation for the alternative to the death penalty: a sentence to life without the possibility of parole. The explanation for this deficiency by counsel in a death penalty case is not attributable to the defendant or an unknowing and involuntary waiver to present mitigation, as Reynolds' counsel had done almost nothing to investigate the evidence in mitigation. Although Reynolds' defense counsel once hired a mitigation specialist, Sandra Love, her trial testimony reflects she was not working to develop mitigation, but was, instead, directed to locate a potential witness/suspect for the guilt phase portion of Reynolds' trial. (V18 2336-2409).

There are no documents in the trial record or defense files that verify Reynolds' birth or family records. School records admitted into evidence at the

evidentiary hearing, however, indicate Reynolds' long struggle to master even the most basic skills, and that, despite this lack of academic progress, he was socially promoted from one grade level to the next. (PCR 158-165).

There are no documents in the trial record or defense files that chronicle Reynolds' medical history beyond the prison record inventory, despite the fact Reynolds suffered from numerous blows to his head and body, suffered trauma and has been afflicted with blood and liver disorders in existence prior to defense counsel's representation. There are no documents in the trial record or defense files to corroborate Reynolds' long history of drug and alcohol use, other than a presentence investigation report (PSI), which is woefully inaccurate and incomplete, as defense counsel did not develop the content to submit along with the PSI data. There are no documents in the trial record or defense files to verify Reynolds' work experience, except for a log of hours Reynolds worked during the time when the victims were killed. Reynolds had developed work skills and some experience that trial counsel could have investigated and presented. (PCR 35-87).

There are no documents in the trial record or defense files documenting any interviews conducted with Reynolds' family, friends and neighbors to develop evidence in mitigation. When the defense listed Reynolds' sister, Stacia Adams, as

a mitigation witness, the State took her deposition, but she was not called to testify at Reynolds' penalty phase trial, despite her ready availability to testify. An enormous amount of mitigation evidence existed chronicling Reynolds' life history, the violence he endured as a child and young adult in his home, and injuries he sustained when his father beat and humiliated him. (PCR 35-87).

There are no documents in the trial record or defense files that document Reynolds' mental health history through an analysis or conclusion drawn, and no report filed with the court. He was never thoroughly interviewed or evaluated by an expert or specialist, such as a forensic social worker or neuropsychologist.

Testimony adduced at the evidentiary hearing suggests both defense counsel were focused on the guilt phase of trial (PCR 676; 718-719), but defense counsel should have conducted a mitigation investigation, engaged experts, and presented the evidence of mitigation to Reynolds before placing a waiver in front of him.

Also at the evidentiary hearing, two experts who interviewed, tested and evaluated Reynolds established that mitigation existed and should have been investigated and developed. (PCR 97-220, 269-345). A licensed clinical social worker was engaged who was available to testify at Reynolds' penalty phase trial, and who could have informed the jury Reynolds suffers from diagnosable

disorders, and could have explained portions of his life history that should have been admitted as evidence of mitigation. (PCR 97-220). A board certified neuropsychologist was engaged who would have also been available to testify at Reynolds' penalty phase trial, and could have informed the jury Reynolds suffered numerous head injuries throughout his life, and could have explained how these injuries impacted Reynolds' judgment and decision making. (PCR 269-345).

Chris Houston, a licensed clinical social worker, who was available to interview and evaluate Reynolds, and testify at the penalty phase trial, testified at the evidentiary hearing that Reynolds suffers from multiple clinically-diagnosable disorders including, *inter alia*, "Chronic Post-Traumatic Stress Disorder," "Bereavement Disorder," "Major Depressive Disorder," "Recurrent Alcohol Dependence Disorder," "Cannabis Dependence Disorder," "Opioid Dependence," "Polysubstance Dependence," "Antisocial Personality Disorder," "Cirrhosis of the Liver," "Hepatitis," "Multiple Head Injuries" and "Victim of Child Abuse." (PCR 119-172). Houston testified Reynolds meets the diagnostic criteria for "Major Mental Disorders" and "Substance Dependence Disorder," and that if she would have been called to testify at Reynolds' penalty phase trial, the evidence presented would have met the criteria for a statutory mental health mitigator. (PCR 217).

Also at the evidentiary hearing, Neuropsychologist Dr. Kristjan Olafsson, who interviewed and evaluated Reynolds, and was available to testify at Reynolds' penalty phase trial, testified that Reynolds suffers from "Cognitive Disorder," "Post-Traumatic Stress Disorder," "Mood Disorder Due to Traumatic Brain Injury," and "Polysubstance Dependence." (PCR 281-287; 305-306). Dr. Olafsson further testified he disagreed with Dr. Danziger's conclusion that Reynolds does not have brain damage, and that the problem with Danziger's analysis was that the test Danziger used to evaluate Reynolds is properly used only to assess dementia. Olafsson testified Reynolds has suffered from brain injury since 1990. (PCR 300).

Defense counsel offered no reasonable or credible explanation at the evidentiary hearing for failing to engage mitigation experts, call civilian witnesses, or prepare to present mitigation to Reynolds' jury. Whether defense counsel did not feel Reynolds' case would ever reach a penalty phase, or believed presenting mitigation to Reynolds' jury was a waste of time, counsel had a responsibility to prepare for the penalty trial. Reynolds testified at the evidentiary hearing that had he known what "mitigation" consisted of, and that there was a significant amount

of mitigation that could be developed and presented to his jury, he would not have signed the waiver placed before him on the eve of the penalty trial. (PCR 614).

Reynolds' defense counsel failed to meet minimum standards of reasonably effective performance in their representation, and their deficiency during this critical phase of Reynolds' case prejudiced Reynolds, leading to his improper sentence of death. Had counsel properly investigated the evidence in mitigation, there remained a reasonable probability the penalty phase jury would not have recommended his death, and the trial court would not have sentenced him to die.

This case is analogous to *Deaton v. Dugger*, 635 So.2d 4 (Fla. 1993), where this Court affirmed the trial court's order granting a new sentencing proceeding on the grounds the defendant's waiver of his right to testify and the right to call witnesses to present evidence in mitigation was not knowing, voluntary and intelligent as trial counsel failed to adequately investigate mitigation. *Id.* at 8-9. This Court noted "clear evidence was presented that defense counsel did not properly investigate and prepare for the penalty phase proceeding." *Id.* at 8. The Court recognized "no evidence whatsoever was presented to the jury in mitigation and the trial judge found only one mitigating factor, even though evidence presented at the . . . evidentiary hearing established that a number of mitigating

circumstances existed." *Id.* The Court held counsel's deficiencies were sufficiently serious to have deprived the defendant of a reliable penalty phase. *Id.,* at 9.

The legal principles governing ineffective assistance of counsel claims were established in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984). An ineffective assistance claim has two components: (1) that counsel's performance was deficient, and (2) that the deficiency prejudiced the defense. *Id.,* at 687, 104 S.Ct. 2052. To establish deficient performance, a petitioner must show defense counsel's representation "fell below an objective standard of reasonableness." *Id.,* at 688, 104 S.Ct. 2052. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*

At bar, as in *Strickland*, *Wiggins v. Smith*, and *Williams v. Taylor,* 529 U.S. 362, 396, 120 S.Ct. 1495 (2000), defense counsel's conduct fell short of the standards for capital defense articulated by the American Bar Association (ABA)– norms to which the United States Supreme Court has long referred as "guides to determining what is reasonable." *Strickland, supra,* at 688, 104 S.Ct. 2052. The ABA Guidelines provide investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA

Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (emphasis added). Despite these norms, however, Reynolds' defense counsel abandoned their investigation of Reynolds' background after having acquired only rudimentary knowledge of his history from a narrow set of sources. See, id., 11.8.6, p. 133 (among the topics defense counsel should consider presenting are medical, educational, employment and training history, family and social history, prior adult and juvenile correctional experience, religious and cultural influences; 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 ("The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. . . . Investigation is essential to fulfillment of these functions").

Although Reynolds' defense counsel sought to excuse their failure to conduct even a cursory investigation into the evidence in mitigation of the death penalty in Reynolds' case by handing Reynolds a waiver of mitigation before mitigation was even investigated, as the United States Supreme Court noted in *Wiggins*:

> *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.

Wiggins v. Smith, 539 U.S. 510, 527, 123 S.Ct. 2527.

At bar, the scope of defense counsel's investigation was unreasonably limited to the passive receipt of a PSI (without providing the PSI investigator any additional information), speaking briefly with Reynolds' sister, and asking the lone psychologist who examined Reynolds whether *defense counsel* should pursue the opinions of other mental health professionals. The scope of investigation was particularly unreasonable in this case in light of counsel's decision to present Reynolds with an eleventh-hour waiver of mitigation form without having conducted any reasonable investigation into just what evidence in mitigation was available. Any reasonably competent attorney would have realized that pursuing these leads was necessary to Reynolds' making an informed, knowing, intelligent and voluntary choice among the limited possibilities, including any waiver.

The mitigating evidence counsel failed to discover and present is powerful. Reynolds experienced severe privation and abuse in the custody of his abusive alcoholic father, who treated Reynolds to physical torment, killed family pets in his presence as a child, and forced him to work at a young age. Reynolds suffered repeated head injuries. His time spent homeless when his father threw him out of the house and his diminished mental capacities further augment his case in

mitigation. Reynolds thus has the kind of troubled history relevant to assessing a defendant's moral culpability, and, given the nature and extent of the abuse, there remains a reasonable probability a competent attorney, aware of this history, would have educated Reynolds on the available evidence in mitigation, introducing it at the penalty phase trial. There remains a reasonable probability a jury confronted with such mitigating evidence would have recommended a life sentence.

Ineffective assistance of counsel resulted. But for counsel's unreasonable decision to forego a reasonable investigation of mitigating evidence--illustrated through testimony at the evidentiary hearing--there remains the reasonable probability the jury, who had heard only the negatives about Reynolds--that he had a criminal history and was accused of horrendous crimes--might have felt enough empathy for him as a person to have recommended a penalty less than death.

In sum, Reynolds' defense counsel's ineffectiveness denied him a fair penalty trial, and Reynolds therefore requests this Court reverse the trial court's order denying relief, vacate his death sentence and order a new penalty phase trial.

CLAIM A-II

TRIAL COUNSEL FAILED TO INVESTIGATE OR PRESENT EXPERT OR CIVILIAN TESTIMONY TO SUPPORT THE DEFENSE THEORY THAT REASONABLE DOUBT EXISTED DUE TO A CONFLICT IN THE

EVIDENCE OR BECAUSE THE EVIDENCE WAS LEGALLY INSUFFICIENT TO CONVICT THE DEFENDANT. TRIAL COUNSEL FAILED TO INVESTIGATE OR PRESENT EXPERT OR CIVILIAN TESTIMONY TO SUPPORT THE DEFENSE'S ALTERNATIVE THEORY THAT PERSON(S) OTHER THAN THE DEFENDANT KILLED DANNY RAY PRIVETT, ROBIN RAZOR AND CHRISTINA RAZOR

No expert was called to testify at trial to counter the State's numerous expert witnesses. The trial court ascribes defense counsel's omission to *investigate* or call any expert witness to a notion that their testimony would not have been favorable:

> "No written reports were prepared by Dr. Herkov, Dr. Feegel, or Dr. James because the results were not helpful, at best, or were unfavorable, at worst, and counsel worried that he could be obligated to turn over the unfavorable results if memorialized in written form during discovery. (EH 696)."

Order Denying Relief, page 8. But that notion is not supported by the evidentiary record. In the portion of the transcript cited by the trial court, defense attorney Iennaco actually testified he believes it is wrong to request an expert's written report *in any case,* as he would be obligated to disclose the report in discovery:

> Q. No, I'm sorry. We don't have an evaluation.
>
> A. Okay. Yeah, no, I wouldn't -- If I get a written report from an expert I intend to use, I have to turn it over in discovery.
>
> Q. Uh-huh.
>
> A. So I don't ask for a written report. That comes up all the time, and it's -- I think it's wrong to ask for a written report, frankly.

(PCR 696). The trial court did not address testimony any *investigation* of potential mental health experts halted after just one said Reynolds had Antisocial Personality Disorder, and "he didn't think that anyone reputable would disagree." (PCR 697).

The trial court arrived at a conclusion, supported nowhere in our adversarial system of justice, that since "Dr. Herkov believed that the Defendant suffered from antisocial personality disorder," and since "[t]he State's expert witness, Dr. Jeffrey Danziger, concurred with this diagnosis," defense counsel's decision not investigate Reynolds' mental health, consulting *other* professionals and having Reynolds properly evaluated, was reasonable. Order Denying Relief, page 8.[1]

Although the trial court notes that the State's expert at the evidentiary hearing, Dr. Danziger, disagreed with the opinion of the defense expert, Dr. Kristjan Olafsson, who testified at the evidentiary hearing that Reynolds suffers from Post-Traumatic Stress Disorder, id., page 8, it is precisely this species of

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[1] Laurence made no further investigation into Reynolds' mental health after speaking with Dr. Herkov, despite his strong belief Reynolds had mental issues:

> Q. Did you ever, from your armchair kind of thinking, did you ever observe Mr. Reynolds act in a way that you would -- you might think he might have some mental health disorder?
> A. Oh, yeah, definitely.

(PCR 696).

conflicting expert opinion testimony that makes placing such evidence before the trial jury indispensable to ensuring the reliability of the adversarial testing process.[2]

A jury might also take into account, moreover, that, whereas Dr. Danziger is a geriatric psychiatrist (PCR 790), Dr. Olafsson is a neuropsychologist. (PCR 269). Dr. Danziger's *voir dire* at the evidentiary hearing illustrates the importance of adversarial testing in arriving at a reliable result, and demonstrates why a jury might place greater weight in Olafsson's opinion than Danziger's, as unlike

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[2] At the evidentiary hearing, Neuropsychologist Dr. Kristjan Olafsson, who interviewed and evaluated Reynolds, and was available to testify at Reynolds' penalty phase trial, actually testified Reynolds suffers from "Cognitive Disorder," "Post-Traumatic Stress Disorder," "Mood Disorder Due to Traumatic Brain Injury," and "Polysubstance Dependence." (PCR 281-287; 305-306). Dr. Olafsson further testified he disagreed with Dr. Danziger's conclusion that Reynolds does not have brain damage, and that the problem with Danziger's analysis was that the test Danziger used to evaluate Reynolds is properly used only to assess dementia. Olafsson testified Reynolds has suffered from brain injury since 1990. (PCR 300). Also unmentioned in the trial court's order is that Chris Houston, a licensed clinical social worker, who was available to interview and evaluate Reynolds, and testify at the penalty phase trial, testified at the evidentiary hearing that Reynolds suffers from multiple clinically-diagnosable disorders including, *inter alia*, "Chronic Post-Traumatic Stress Disorder," "Bereavement Disorder," "Major Depressive Disorder," "Recurrent Alcohol Dependence Disorder," "Cannabis Dependence Disorder," "Opioid Dependence," "Polysubstance Dependence," "Antisocial Personality Disorder," "Cirrhosis of the Liver," "Hepatitis," "Multiple Head Injuries" and "Victim of Child Abuse." (PCR 119-172). Houston testified Reynolds meets the diagnostic criteria for "Major Mental Disorders" and "Substance Dependence Disorder," and that if she would have been called to testify at Reynolds' penalty phase trial, the evidence presented would have met the criteria for a statutory mental health mitigator. (PCR 217).

Olafsson's opinion, Danziger's opinion was not based on any empirical testing or test interpretation, but one interview and third-party documents. (PCR 795-841).[3]

The trial court noted that while an expert that counsel consulted, Dr. Feegel, "opined that the shape of the wound on [Reynolds'] hand did *not necessarily* mean that it was a laceration caused by a burr in the door frame[, c]ounsel decided that the jury could be convinced that the wound was caused by the burr in the door

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[3] Dr. Danziger's *voir dire* at the evidentiary hearing proceeded as follows:

> BY MS. SMITH:
> Q. Just to be real clear. You're not here to testify as a person with -- who can testify to any neuropsychological damage, is that correct?
> A. I am not a neuropsychologist, I am a psychiatrist.
> Q. And so any neuropsychological results or any -- any discussion about organic brain damage, or anything like that, you wouldn't be qualified to testify to today?
> A. No, I would say that organic brain conditions do fall within the realm of psychiatry. I'm not a neuropsychologist, I don't do neuropsychological testing, but as a psychiatrist, we are often called upon to evaluate and treat people with head injuries, dementia, mental retardation, other organic conditions.
> Q. What are the -- What is the testing that you would use to determine if a person had organic brain damage?
> A. Well, in a case like that, I typically would refer someone to a neuropsychologist to do the specific testing, and then my role would be to look at that result and, as a physician, come up with a treatment plan.
> Q. ... And I don't want to sound redundant, but I will, probably. Do you have any experience or training in interpreting neuropsychological exams results?
> A. No.

(PCR 791-793).

frame based on simple logic, rather than presenting an expert to refute that premise," Order Denying Relief, pages 8-9, the reality is that, at trial, the State presented expert testimony (i.e., *evidence*) to the contrary (V13 1347-1354)– evidence untested by anything more than counsel's own opinion and argument.

The same is true of defense counsel's reaction to the DNA evidence. Whereas one of the attorneys consulted a Dr. Litman[4] before trial, defense counsel called no expert witness whatsoever to counter the State's four DNA experts (V18 2227, V16 1878-2216, V19 2519-2521, V20 2735-2760, V15 1724-1877, V19 2512-2518, V15 1608-1723, V19 2539-2563), including Dr. Tracey Martin, Professor of Biological Sciences at Florida International University. (V18 2227). Rather than calling qualified expert witnesses formally educated in the *science* of DNA analysis to confront the State's seasoned experts, defense counsel opted to rely on their own persuasive abilities after a *pre-trial* consultation with an expert who could not have assisted in understanding scientific nuances arising during the course of the State's DNA testimony, in order to effectively cross-examine them.

The trial court's reliance on the notion that "Attorney Laurence testified that [co-counsel] Frank Iennaco did an effective job rebutting the inferences made from the DNA evidence, so retaining a DNA expert for the defense was unnecessary,"

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[4] Dr. Litman was not present either at trial or for the *Frye* hearing. (PCR 863).

Order Denying Relief, page 9, suffers a like illogic, as Laurence is not qualified to make such an assessment. Although the trial court notes "[w]hile Attorney Laurence also testified that he would do it differently if he had it to do over again, that type of hindsight analysis is expressly contrary to the dictates of *Strickland*," Id., page 9, the decision not to counter the State's DNA expert testimony (*evidence*) with expert testimony (*evidence*), rather than rhetoric, was not a judgment call, but counsel's ethical duty in protecting Reynolds' right to a fair trial.

This was not the species of strategic decision made in *Occhicone v. State*, 768 So.2d 1037 (Fla. 2000), where counsel made a tactical decision not to call a DNA expert in order to maintain first and last closing arguments in the days of the "sandwich," as there was nothing to be gained here by not calling one qualified expert, or to at least have an expert present at trial to advise counsel on the vicissitudes of testimony on DNA analysis. Nor was it comparable to the decision in *Taylor v. State*, --- So.3d ----, 2011 WL 446216 (Fla. 2011), where the State put on a single DNA expert, as here DNA evidence was at the heart of the State's case.

Although the trial court rejected Reynolds' claim counsel was ineffective for failing to *investigate* potential expert witnesses, concluding that "[c]ounsel was not

obligated to shop for more experts until finding ones that would be helpful to [Reynolds'] case," Order Denying Relief, page 9, it would hardly qualify as "expert-shopping" had counsel investigated potential DNA experts after consulting a single DNA "expert" who had never testified as an expert. (PCR 864-865).

CONCLUSION

The trial court erred in summarily denying Claims 3A, 5, 10, 12, A-III, A-IV and A-V, as they are facially sufficient and not conclusively refuted by the record, and erred in denying 3B, 4, 8, A-I and A-II, after an evidentiary hearing, as its findings are unsupported by competent substantial evidence, and its legal rulings erroneous. The order denying each of these claims should be reversed and remanded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished to (1) Thomas Hastings, Esquire, Office of the State Attorney, 101 Bush Boulevard Sanford, FL 32773, (2) Barbara Davis, Esquire, Office of the Attorney General, 444 Seabreeze, Daytona Beach, FL 32118, and (3) Mr. Michael Gordon Reynolds, #324170, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, FL 32026, by United States Mail, this 31st day of March, 2011.

CERTIFICATE OF FONT AND TYPE SIZE

This brief is word-processed utilizing 14-point Times New Roman type.

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