IN THE SUPREME COURT OF FLORIDA

Case No. SC 10-2206

(L. C. Case No. 16-2000-CF-8117-AXXMA)

RICHARD McCOY,

Appellant, Defendant Below,

vs.

STATE OF FLORIDA,

Appellee, Plaintiff Below.

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On Direct Appeal From An October 19, 2010, Final Order Denying Defendant's Motions For Post Conviction Relief Rendered By The Circuit Court for the Fourth Judicial Circuit, in and for Duval County, Florida, in a Capital Case.

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INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is a collateral appeal to the Supreme Court of Florida of an October 19, 2010, final "Order Denying Defendant's Motions for Post Conviction Relief" (R6/1051-1097) rendered by the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida.

Appellant Richard McCoy was the defendant in the circuit court. He will be referred to as "Mr. McCoy" or as "the defendant." Appellee, the State of Florida, was the plaintiff in the circuit court and will be referred to here as "the state."

The record on appeal in the post conviction proceedings is in nine bound volumes. Each bound volume is numbered with a roman numeral. The clerk of the circuit court has placed a page number at the bottom of each page. Therefore, the record will be referred to by the letter "R," followed by an appropriate volume and page number.

When referring to the record on appeal in McCoy's original state court trial, the trial transcript will be referred to by the letters "TT," followed by an appropriate page number. The record on appeal in that case will be referred to by the letters "ROA," followed by an appropriate volume and page number. When emphasis is supplied it is duly noted.

STATEMENT OF THE CASE AND OF THE FACTS

A. Nature of the Case:

This is a collateral appeal to the Supreme Court of Florida of a final Order Denying Defendant's Motions for Post Conviction Relief (R6/1051-1097) filed per the provisions of Florida Rules of Criminal Procedure 3.850 and 3.851, rendered by the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida, on October 19, 2010. The Hon. Peter L. Dearing, Circuit Judge, presided and rendered the final order. (R6/1633).

B. Jurisdiction:

The Supreme Court of Florida has jurisdiction over the parties and subject matter of this appeal because it is, as noted above, a collateral appeal of a final order that denied McCoy's post conviction relief in a capital case. Art. V, § 3(b)(1), Fla. Const. "We have jurisdiction over all death penalty appeals." *Parker v. State*, 873 So. 2d 270, 275, f. 1 (Fla. 2004). This includes jurisdiction of collateral appeals from final orders denying post conviction relief in capital cases. *Parker v. State*, 542 So. 2d 356, 357 (Fla. 1989).

C. Course of the Proceedings:

Mr. McCoy was indicted by a Duval County Grand Jury on July 13, 2000, for the first-degree murder of store attendant Shervie Ann Elliot

(Count I), armed burglary (Count II) and armed robbery with a firearm (Count III) of the Jacksonville liquor establishment where she was working. (R1/2, 5). The date of the alleged offenses was June 13, 2000. (R1/2). Mr. McCoy's lead counsel at trial was Alan Chipperfield, Esq. (R6/990).

On May 25, 2001, after a guilt/innocence phase jury trial during which Mr. McCoy testified in his own defense, he was found guilty of first-degree murder as to Count I and armed robbery as to Count II. (R1/6; R6/1052). That was followed by a penalty phase trial held per the provisions of Section 921.141, Florida Statutes (2000). At the conclusion of that part of the trial, the jury recommended death by a vote of 7-5. After a *Spencer*[1] hearing, Judge Dearing sentenced Mr. McCoy to death for the murder and life in prison for the armed robbery. (R1/8; R6/1052). (The aggravating and mitigating circumstances considered by the trial court are referenced in the Supreme Court opinion quoted below.) A direct appeal of the judgments of conviction and sentences, including the death sentence, to this court followed.

On direct appeal of the judgments and sentences, Mr. McCoy raised seven issues: The trial court erred in (1) admitting the audiotape conversation between Mr. McCoy and Zsa Zsa Marcel into evidence; (2)

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[1] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

permitting the jury to view a transcript of the alleged conversation between the defendant and Zsa Zsa Marcel; (3) denying Mr. McCoy's motions for judgment of acquittal made at the close of the state's case as well as at the close of the evidence; (4) allowing Ms. Marcel to testify; (5) restricting the cross-examination of Ms. Marcel, (6) finding that the murder was committed in a cold, calculated and premeditated manner; and (7) ruling that the Florida death penalty is constitutional. (R1/10).

This Court affirmed Mr. McCoy's judgments of conviction and death sentence on August 21, 2003. *McCoy v. State*, 852 So. 2d 396 (Fla. 2003). *See* full Opinion at R1/2-28. The mandate was issued on September 11, 2003.

After registry counsel was appointed, a series of motions to vacate Mr. McCoy's judgments and sentences per Florida Rules of Criminal Procedure 3.850 and 3.851, each containing a host of collateral, post conviction issues, were filed on his behalf. Several of the motions were filed by Mr. McCoy himself.[2] (*See* for example, R1/82-121; R2/189-300; R2/368-396); R3/400-517; R3/525-598; R4/599-649; R4/679-735; R4/738-781; R5/787-841; R5/908-910). The first Rule 3.850 motion was filed on

[2] The trial court determined that Mr. McCoy's pro se motions were inappropriate since he was represented by counsel; thus those motions were stricken. (R6/1051, f. 1).

June 23, 2004. (R1/82-121; R5/859).

Ultimately, the undersigned (David W. Collins, Esq.) was retained by Mr. McCoy and on April 20, 2006, he submitted a sworn Second Amended Initial Motion for Post-Conviction Relief (R5/787-842) containing some 20 claims. This is the instrument relied upon by Mr. McCoy and his counsel in terms of seeking post conviction relief and is the pleading addressed by the court and the attorney general as the post conviction case went forward to final disposition. On June 21, 2006, the attorney general filed a detailed response to Mr. McCoy's April 20, 2006, second amended motion. (R5/843-R6/905).

On July 31, 2006, Mr. McCoy filed a Supplemental Sworn Addendum to 3.851 Motion for Post Conviction Relief. (R5/908-910). On August 30, 2006, the attorney general filed a State's Response to Supplemental 3.851 Motion. (R5/911-930).

A *Huff* hearing was held on September 20, 2006. (R7/1338-1382).

An evidentiary hearing on certain of the claims in the Second Amended Initial Motion for Post-Conviction Relief was held on July 23, 2007, before Judge Dearing in Jacksonville with the defendant present. (R9/1431-1633).

D. Disposition In the Lower Tribunal:

On October 19, 2010, Judge Dearing rendered his final "Order Denying Defendant's Motions for Post Conviction Relief." (R6/1051-1097).

On October 29, 2010, Mr. McCoy filed a notice of appeal to this court. (R6/1098, 1099).

E. Statement of the Facts:

(i.)

Statement of the Facts as Found by the Florida Supreme Court Regarding the Original State Court Trial

This Court made the following findings of fact regarding the evidence presented at Mr. McCoy's state court trial.[3]

> On the morning of June 13, 2000, Shervie Ann Elliott was found dead in the storage room of the Jacksonville ABC Liquors store in which she worked, and $415 was missing from the store's two safes. The evidence adduced at the appellant's trial established that the victim had been shot once in the abdomen, a wound which disabled her; once in the neck, resulting in paralysis; and once in the face, the fatal wound. The store's surveillance tape showed the robbery and murder occurring from 8:20 a.m. to 8:33 a.m. on June 13. The initial investigation of the alcoholic beverage store performed by law enforcement officers and evidence technicians revealed no evidence of a physical struggle.

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[3] McCoy does not concede that the facts found by this Court in its per curiam opinion regarding the direct appeal of the judgments and sentences, including the death sentence, were necessarily correct, in large measure because the record was not complete due to the ineffectiveness of his trial counsel.

Both circumstantial and direct evidence linked the appellant to the crime scene. Three latent fingerprints found on an ABC Liquors cash and receipt pouch within the non-public store office were matched to McCoy. While the latent fingerprint examiner could not form any conclusions regarding when the fingerprints were deposited on the pouch, ABC Liquors employees testified that the money pouches were kept within the store office at all times, and only store managers were involved with the pouches. Additionally, the store surveillance camera revealed that an African-American male had committed the robbery and murder.

On June 19, ABC Liquors advertised a $10,000 reward for information leading to the arrest and conviction of the person who had robbed and murdered Elliott. The following day, Zsa Zsa Marcel contacted ABC Liquors and spoke with Teresa Johnson, the ABC Liquors regional manager for the Jacksonville area. Johnson directed Marcel to Dale Galbreath, the detective leading the Sheriff's Office investigation of the robbery and murder. She related to Galbreath that on June 14, her boyfriend, Richard McCoy, had told her that he had been involved in the armed robbery of an ABC Liquors store in which a woman was killed. He had detailed to Marcel the manner in which he and his accomplice "rushed" the manager of the store as she opened the back door, forced her to turn off the alarm and video surveillance equipment, and made Elliott open the store's safes. Additionally, McCoy had told Marcel that the inside of the store was very dimly lit at the time of the robbery, his accomplice had actually shot the store manager, and he and his partner had netted $4,000 from the venture.

Following her discussion with Galbreath, Marcel agreed to initiate a conversation with McCoy regarding the ABC Liquors robbery while wearing a recording device attached to her purse. Subsequently, she listened to the tape recording of her conversation with McCoy, agreed that it was a fair and accurate depiction of their discussion that afternoon, and helped the State prepare a transcript of the conversation. On July 13, 2000, McCoy was indicted by a Duval County grand jury on charges of first-degree murder, armed burglary, and armed

robbery.

In addition to the testimony of Marcel, the ABC Liquors employees, and law enforcement officers related above, McCoy's trial jury heard testimony during the guilt phase from the medical examiner, detailing the succession of the gunshot injuries sustained by Elliott, as well as her conclusion that the second and third gunshots fired by Elliott's attacker had been fired from a distance of between six and twelve inches from the victim's body.

Following the trial court's denial of McCoy's motion for judgment of acquittal, the defense presented evidence in support of the appellant's claim that he was at the home of his girlfriend, Dorothy Small, on the morning of June 13, 2000. Sherry Cross, Small's neighbor and a Raven Transport long-haul truck driver, testified that she had spoken with McCoy for approximately five minutes outside her home on the morning of the thirteenth between 8:00 a.m. and 8:30 a.m. On cross examination, however, she admitted that she was estimating, and that the conversation could have taken place either after 8:30 a.m., or before 8 a.m. Cross's testimony was supported by the testimony of the Raven Transport Director of Safety, William Weise, who testified that the company's satellite positioning system showed that Cross was in Jacksonville on the morning of June 13. Additionally, the defense presented the testimony of Dorothy Small, who related that after spending the night at her house, McCoy had left her home early on the morning of the 13th of June, and John Bailey, a Krystal Burger employee who testified that McCoy ate breakfast at his restaurant nearly every morning. Bailey could not, however, remember whether McCoy ate breakfast at Krystal Burger on the morning of June 13. The defense then called Clarence Williams, the father of a child with Zsa Zsa Marcel, who testified that Marcel had a reputation for dishonesty in their Louisiana community.

Finally, McCoy testified in his own defense. He testified that on the morning of June 13, 2000, he left Small's house at 6:45 a.m. and went home. He returned to Small's house at around 8 a.m.

to take trash to the curb, and spoke with Cross at that time. After completion of this chore, McCoy went to Krystal Burger, ate breakfast, and then proceeded to an interview. He and Marcel had a relationship, and he knew that she was "tough"- she had confessed to him that she robbed a restaurant on June 10. McCoy testified that, therefore, he lied to her and claimed that he had robbed ABC Liquors, in an effort to impress her. He explained that his fingerprints were on the ABC Liquors receipt pouch because he had once found one of the pouches in another ABC store parking lot, and mailed it to ABC Liquors headquarters in Orlando.

In rebuttal, the State presented the testimony of Mark Bachara, a Jacksonville Sheriff's Office investigator assigned to the Office of the State Attorney, who stated that it takes six minutes to drive from Dorothy Small's home to the ABC Liquors store that was robbed on June 13, 2000. Following a renewed motion for judgment of acquittal, closing argument, and jury instruction, the jury found McCoy guilty of premeditated first-degree murder. Additionally, the jury specifically found that "the killing was done during the commission or attempted commission of a robbery."

The State's presentation during the penalty phase consisted of the introduction of judgments and sentences detailing McCoy's prior convictions for three counts of armed robbery and one count of attempted armed robbery. Additionally, the State elicited testimony from Richard Hughes, McCoy's probation supervisor, to establish that the appellant was being supervised on conditional release at the time of the ABC Liquors robbery. Finally, the victim's sister and the victim's ABC Liquors supervisor testified regarding the impact of the victim's death upon their lives, and a statement written by the victim's son was read to the jury.

The defense presented the testimony of McCoy's mother and sisters, who detailed for the jury the troubled home life to which McCoy was exposed, physical abuse, inter-parental violence, and nearly abject poverty. Paul Gillians, Diane Peterson, and Trina Rivers testified regarding McCoy's

respectful and caring nature, as well as instances in which he had performed good deeds, including his saving Paul Gillians from being burned to death. McCoy waived his right to testify during the penalty phase, and, following instruction and deliberation, the jury recommended imposition of the death penalty by a vote of seven to five.

The court held a subsequent *Spencer* hearing, and followed the jury's recommendation, concluding that "on balance, the aggravating circumstances in this case far outweigh the mitigating circumstances." The trial court concluded that the following aggravators applied: (1) Prior conviction of felonies involving the use or threat of violence; (2) the appellant was under a sentence of imprisonment or on community control at the time of the commission of the instant murder; (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP); (4) the murder was committed for financial gain and was committed while engaged in the commission of the crime of armed robbery (aggravators merged); and (5) the murder was committed for the purpose of avoiding or preventing a lawful arrest (merged with CCP aggravator). The court found no statutory mitigators, but determined that twenty mitigating circumstances had been established.[4] Each of the mitigating

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[4] The trial court found the following non-statutory mitigators: (1) The defendant suffered an abusive childhood; (2) the defendant suffered an emotionally deprived childhood; (3) the defendant suffered an economically deprived childhood; (4) the defendant's mother had relationships with different abusive and non-abusive males; (5) the defendant suffered from unstable living conditions in his childhood; (6) the defendant's parents' divorce at age ten devastated him; (7) the defendant received poor and inadequate medical care, particularly when he suffered from a high fever; (8) the defendant is a caring son to his mother, providing her food, renting movies for her, and spending time with her; (9) the defendant had a good relationship with his father; (10) the defendant was a caring brother to his sisters, Barbara McCoy and Dorothy McCoy Robertson; (11) the defendant was a caring parent, before his incarceration, to his two sons, Andre (age 17) and Kenny (age 15); (12) as a child, the defendant did poorly in school; (13) as a child, the defendant did not receive the psychological counseling

factors was given "some weight" by the trial court.

(ii.) *McCoy v. State*, 853 So. 2d at 399-402 (Fla. 2003).

Statement of the Facts Regarding the Evidentiary Hearing Conducted by Judge Dearing on Mr. McCoy's Second Amended Initial Motion For Post-Conviction Relief.

Diana Peterson was called as Mr. McCoy's first witness at the July 23, 2007, evidentiary hearing. Peterson identified herself as a very good friend of Mrs. Josey McCoy, the defendant's mother. She had known Mrs. McCoy for about 21 years. (R9/1441). Ms. Peterson testified that on June 14, 2000, she saw Richard McCoy in Josey McCoy's home at about 5:00 to 7:00 p.m. (R9/1443). Ms. Peterson said that Mr. McCoy's demeanor was normal at that time. Ms. Peterson stated that she had shared this information with Mr. McCoy's lawyer, Mr. Chipperfield, before Mr. McCoy's trial. (R9/1444).

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recommended by school officials; (14) there is no evidence that the defendant has ever been violent or abusive in his personal relationships with family members or friends; (15) the defendant is a member of the Muslim faith; (16) the defendant successfully held employment as a welder; (17) the defendant performed laudable humanitarian deeds for Paul Gillians, Diane Peterson, and Trina Rivers; (18) the defendant demonstrated good behavior during the trial after the verdict was rendered; (19) for the eleven months that he was on conditional release prior to the commission of this robbery and murder, the defendant apparently did well and complied with the requirements of conditional release; and (20) the defendant would die in prison regardless of the sentence imposed. (R6/1052, 1053).

On cross-examination, Ms. Peterson testified that at the June 14 gathering, the defendant, his mother, his sister, and Ms. Peterson were present. (R9/1446). Ms. Peterson stated that she had shared this information with Mr. Chipperfield. She said that Mr. McCoy drove to the June 14 gathering in his car. She did not know where he was before the gathering or where he went after he left. She stated that Mr. McCoy lived with his father at the time. She did not know if he had a girlfriend during this period of time. (R9/1448).

On redirect examination, Peterson said that she had testified to the above facts before, but she could not recall if she had testified at the trial or at a pretrial hearing. Ms. Peterson said that Dorothy Small was not present on June 14th at the gathering at Josey McCoy's residence. (R9/1449).

The second witness was Assistant State Attorney John Guy. He testified that he prosecuted the case against the defendant. He was assisted by Melissa Williamson, Esq. He did not recall any court orders to restrict conversation regarding religious issues. (R9/1451). He reviewed page 228 of volume 8 of the transcript of the original record on direct appeal. He said that the transcript reflects that he had asked the jury to "promise to apply your God-given common sense." (R9/1452). He did not dispute the trial transcript in which Ms. Wiley testified that she and the victim were related

in Christ and were born again Christians. (R9/1454). Mr. Guy added that the body bug audiotape was provided to him before the trial. He had a transcript of the audiotape produced. He then had Ms. Marcel review the transcript to fill in inaudible portions. Mr. Guy did not recall any other persons who listened to the tape. (R9/1455). He agreed that parts of the tape were inaudible. (R9/1456). He was not aware of the defense having employed an expert to determine if inaudible portions of the tape could be enhanced. (R9/1457) He considered Ms. Marcel a cooperating witness for the state. He stated that he had not had any significant contact or discussion with Ms. Marcel within the past year. (R9/1459).

On cross-examination, Mr. Guy acknowledged that before a trial, he generally asks witnesses to provide a written statement, which he then presented to the defense. (R9/1460). He could not clearly recall if he had sent the audiotape to an expert to enhance. (R9/1461).

On redirect examination, Mr. Guy stated that a transcript of the audio-tape was prepared and given to Ms. Marcel to review. He did not recall if jurors had any issues about the defendant's religion. (R9/1462).

The third witness was Alan Chipperfield, Esq., Mr. McCoy's lead trial counsel.[5] He testified that he was a member of the Florida Bar and had been a practicing attorney for approximately 31 years. He works at the Public Defender's Office as an Assistant Public Defender. (R9/1471) He acknowledged that he did not call Victor Lynn Williams to testify. Chipperfield said that while Mr. Williams had been outside the store on the morning of the crime, he had not been in a position to see the crime or the perpetrator. (R9/1474) Mr. Chipperfield did not call the defendant's mother, Mrs. Josey McCoy, as a witness either. Mr. Chipperfield recalled that the she told him prior to trial that she was with Mr. McCoy the night after the murder/robbery. (R9/1476). Upon reviewing the trial transcript, Mr. Chipperfield recognized the apparent discrepancy in Ms. Marcel's testimony as to the time when the defendant allegedly confessed to the crime. Mr. Chipperfield did not know why he did not impeach Ms. Marcel regarding the discrepancy. (R9/1478).

In response to Claim II, the failure to use depositions and sworn statements to impeach certain state witnesses, R5/794, Mr. Chipperfield stated that he did not know why he had not impeached Detective Gilbreath (R9/1481) with them.

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[5] Mr. Chipperfield was assisted by Ronald P. Higbee, Esq.

As to Claim IV (the failure to present evidence that someone other than Mr. McCoy committed the robbery/murder, R5/799), Mr. Chipperfield stated that he did not remember Kenneth Simmons or Charles Gerwin, two persons who were deposed by his office. (R9/1481, 1482). He did recall that someone else was seen leaving the crime scene near the time of the robbery/homicide. (R9/1482) Mr. Chipperfield was not aware of any investigation that produced evidence indicating a perpetrator other than Mr. McCoy, but he did recall that Ms. Marcel stated that Mr. McCoy told her that he had perpetrated the crime with another person. (R9/1483).

As to Claim V, the failure to object to defendant being referred to by his Muslim name, "Jamil Rashid" (R5/803), Mr. Chipperfield could not remember why he had not made a motion in limine to restrict Mr. McCoy from being referred to in this manner. Mr. Chipperfield acknowledged that the defendant was known by one of the two names to different people. (R9/1483-4). He did not contest the fact that a prospective juror raised an issue of the defendant's Muslim faith. He did not make a motion to request a new jury. (R9/1485). He did not recall which jurors were present when the comment was made, but agreed that probably the whole panel was present. (R9/1486). He could not remember for certain, but he stated that he probably did not make a motion or objection to the prosecutor referring to

the defendant by his Muslim name. (R9/1487). He acknowledged that he believed that he should have objected to Mr. Guy's asking jurors to use their "God-given common sense," but he did not object to prosecutor Guy's use of this phrase at the time of the trial. (R9/1488).

As to Claim VII (the failure to challenge the fact that there was not proof of an actual robbery as opposed to a theft by a store employee; R5/809), Mr. Chipperfield explained his reasoning for conceding that a robbery had taken place. He noted that there was a videotape of someone leading a store employee through the store, testimony of money missing from the store, and fingerprints belonging to Mr. McCoy on a bank bag. (R9/1489). Mr. Chipperfield stated that during jury selection, he conceded that there was a robbery, and the issue was whether or not the defendant was the perpetrator. Mr. Chipperfield added that, in his opinion, there was not a good argument that a robbery had not occurred. He believed such an argument would have caused him to lose credibility with the jury. However he could still make an argument that the robbery was not committed by the defendant, which is what he ultimately did. (R9/1491).

As to Claim VIII (the failure to present foundational evidence prior to presenting substantive evidence, R5/811), Mr. Chipperfield stated that he had not thought of pursuing the issue of possible employee theft in the ABC

Store. He noted that Ms. Marcel stated that $4,000 had been stolen, but the ABC store reported only $400 missing. He assumed that "someone had actually tallied up the money that was missing." (R9/1491).

As to Claim IX (failure to use an expert to establish that the audiotape was substantially inaudible, R5/814), Mr. Chipperfield listened to the audio-tape several times and took the tape to Hoyt Studio to listen to it on professional equipment. He believed that, being familiar with Mr. McCoy's voice, he was able to understand some portions of the tape. He also had Mr. McCoy help him understand portions of the tape. Mr. Chipperfield stated that he did not believe an expert could have provided a better understanding of the police audiotape. (R9/1492). He did not have a voice expert review the tape. (R9/1493). Mr. Chipperfield was aware that there were experts who could have helped identify voices and filter out background noise. During trial, Mr. Chipperfield made the argument (to the judge) that the tape was too inaudible to be admitted in evidence, but he was not successful and his objection was denied. (R9/1494-5).

As to Claim X (failure to present witnesses to impeach Zsa Zsa Marcel, R55/817), Mr. Chipperfield stated he did not call Ms. Marcel to testify again regarding Mr. McCoy's claim that she had been involved in the robbery of a restaurant. He believed Ms. Marcel would simply deny the

allegation. He thought it better to leave the situation unrebutted rather than contested. (R9/1497).

As to Claim XI (failure to advise Mr. McCoy not to testify, R5/821), Mr. Chipperfield explained his reasons for having the defendant testify. He believed it would be helpful to have the defendant "explain where he was at the time of the crime." (R9/1501). He also wanted the defendant to have an opportunity to explain why his fingerprints appeared on the bank bag. He stated the decision to testify was ultimately the defendant's. (R9/1501).

In regards to Claim XII (the failure to provide jury with chronology of key events during closing argument, R5/824), Mr. Chipperfield did not have a specific reason for not presenting such a chronology to the jury that would explain the order of events and the defendant's alibi. (R9/1505).

In response to Claim XV (the failure to present surveillance videos and still photos of the defendant, R5/830), Mr. Chipperfield said that he reviewed the videotape that purportedly showed the defendant in the store the day prior to the crime. He found the video unhelpful for the defendant's case. It was not possible to clearly identify the defendant on the video. (R9/1506). He added that the video of the crime was not clear enough to

allow a positive identification of the perpetrator, and thus was not useful for providing a comparison with the previous day's video. (R9/1507).

As to Claim XVI (the failure to explain McCoy's purported admissions as "bragging," R5/832), Mr. Chipperfield did not have a reason that he could recall for not highlighting the apparent inconsistencies in the testimony of Ms. Marcel and the other facts of the case. (R9/1508).

As to Claim XX (the failure to use a fingerprint expert, R5/838), Mr. Chipperfield testified that he retained two fingerprint experts. (R9/1509-10). Both experts identified the fingerprints as belonging to the defendant, which would have hurt the defendant's case. (R9/1515). He stated that in hindsight, he could have hired an expert who could have given a general statement to the effect that partial fingerprints are not as good as full fingerprints for identification purposes -- and that fingerprints can stay on objects for a long time. He could not recall specifically why he did not call such an expert, other than, in his opinion, such testimony would not have contributed significantly to the defendant's chance for an acquittal. (R9/1516).

Mr. Chipperfield said that he did not call as a witness Mr. Ramirez, who had testified that the bank bags were imprinted with the store address so

they could be easily returned. He stated that he believed the prosecutor would exploit the unlikely probability of the bag that Mr. McCoy returned ending up in this particular branch of the ABC liquor store that was robbed. (R9/1519).

On cross-examination, Mr. Chipperfield stated he was able to give Mr. McCoy's case his full professional attention. He participated directly in the discovery process and personally reviewed what the state provided. (R9/1552). He noted that his defense was one of a lack of a positive identification of Mr. McCoy as the robber/murderer. (R9/1553). He added that Victor Williams and Mrs. Josey McCoy were available as witnesses, but he had not called them because he believed their testimony would not help Mr. McCoy's case. (R9/1553). He did not at any time have doubts that the voice on the audiotape was indeed Mr. McCoy's. (R9/1554).

Mr. Chipperfield repeated that he believed arguing that a robbery had not occurred would have caused him to lose credibility with the jury. He did argue to keep the audio recording from being admitted in evidence because it was inaudible. (R9/1555). He did not think Ms. Marcel's involvement in a robbery of a restaurant would have affected the evidence presented in the trial. (R9/1556). As far as he could recall, at least one of the two

fingerprint experts who he had retained identified Mr. McCoy's fingerprints on the bank bag. (R9/1559).

On redirect, Mr. Chipperfield could not recall if there was a witness from law enforcement who personally saw Mr. McCoy in a vehicle with Zsa Zsa Marcel. (R9/1563).

The next witness was Ms. Zsa Zsa Marcel. She testified that at the trial she had worn a shirt that covered her neck as well as hair extensions. (R9/1536) She had a scar on her neck. (R9/1537). She identified Mr. McCoy and acknowledged that she testified against him at trial. (R9/1539). As far as the original investigation of the case was concerned, Ms. Marcel reiterated that she wore an audio device to record her conversation with the defendant shortly after the robbery/homicide. She later listened to the audiotape of the recording and was asked to fill in the parts of the transcript that were inaudible. (R9/1540). She was given a transcript by the prosecutor while she listened to the recording. (R9/1541). She recalled telling defense counsel that some of the transcript was inaccurate. Ms. Marcel did not recall telling Mr. Guy that she thought the transcript was not entirely correct. (R9/1542). She added that she could not say whether the audiotape accurately and correctly reflected her conversation with the defendant. At one point, she felt pressured into making statements about

the tape. (R9/1543). Ms. Marcel could not recall how long she spent working on the tape and transcript. (R9/1544). Nor did she recall whether she had previously testified that she felt a sense of pressure. (R9/1546).

On cross-examination, Ms. Marcel said no one told her what to put in the transcript. Instead, she was told to listen to the recording again and to try to fill in the blanks. (R9/1548).

The next witness was the defendant, Mr. Richard McCoy, also known as "Jamil Rashid." Mr. McCoy testified that Victor Williams, who was not called as a witness at trial, would have been able to testify that he had been in a position to see anyone waiting to ambush the victim. Mr. McCoy and Mr. Chipperfield had not discussed whether to call Mr. Williams as a witness before the trial, but they discussed it after the trial was over. (R9/1569).

Mr. McCoy was also aware of another potential witness, Kenneth Simmons, who saw a car leaving the crime scene. (R9/1572). Mr. McCoy and Mr. Chipperfield had not discussed calling Simons as a witness, either before or after the trial. (R9/1573). Mr. McCoy stated there was no discussion with Mr. Chipperfield as to why he did not use depositions from Mr. McCoy's mother or sister. (R9/1575-6).

Mr. McCoy said that Chipperfield did not follow up on Gerwin. Nor was there an investigation into who owned the vehicle that Simmons saw leaving the crime scene. (R9/1577-8). Mr. McCoy stated that it was his understanding that Mr. Chipperfield would refer to him by his Muslim name, and he did not have a problem with that. (R9/1579). He did however become concerned when a member of the jury made a disparaging comment about Muslims, but he did not discuss this with Chipperfield. (R9/1580).

Mr. McCoy and Mr. Chipperfield did not discuss the tactical decision to concede the robbery (that is, that a robbery in fact occurred as opposed to an employee theft) before the trial, and the defendant was surprised to hear it during opening statements. (R9/1581). Mr. McCoy received timely discovery disclosures from Mr. Chipperfield. (R9/1582) He (Mr. McCoy) was aware there was an issue of employee theft at the ABC Store and that one of the employees was under investigation, but this was not brought up by defense counsel at trial. While Mr. McCoy was incarcerated, Ms. Marcel visited him and discussed the body bug. (R9/1583). Mr. McCoy heard the audiotape one time before the trial and was in jail for one year between the time he heard the tape and the time the trial started. (R9/1584).

Mr. McCoy testified that he learned that Mr. Chipperfield intended to use the Lee's Chicken robbery as a strategy to impeach Ms. Marcel's

credibility when Chesterfield was cross-examining her. But the trial judge informed them that McCoy would first have to testify before they could impeach Ms. Marcel. (R9/1588). Prior to this, McCoy had not agreed to testify and had in fact told Mr. Chipperfield that he was not planning to take the stand. The defendant changed his mind about testifying because he would need to let the jury know that Ms. Marcel showed him the gun and the money from the robbery of the Lee's Chicken Store. (R9/1589). After Mr. McCoy testified at his trial, Ms. Marcel was not called again to testify about the Lee's Chicken robbery. (R9/1590).

On cross-examination, Mr. McCoy stated that his was the voice on the recorded tape, but that the tape had been tampered with. (R9/1606). He stated that he recalled his conversation with the judge outside the presence of the jury in which the judge told him it was his decision whether to testify, not his attorney's decision. (R9/1607).

SUMMARY OF THE ARGUMENT

A defendant is entitled to the effective assistance of trial counsel during the guilt/innocence and penalty phases of a Florida capital trial. Amend. VI and XIV, U.S. Const.; Art. I, Sec. 16, Fla. Const. *Strickland v. Washington*, 466 U.S. 668 (1984). While deference must be shown to trial counsel in evaluating whether the client was properly represented -- and "Monday morning quarterbacking" should be avoided by the reviewing court -- death penalty cases are different and defense counsel must be up to the task of zealously and competently meeting the state's evidence and doing everything within reason to establish that the state was unable to prove the defendant's guilt beyond a reasonable doubt and/or that the death penalty was not appropriate under the circumstances. *Ferrell v. State*, 918 So. 2d 163 (Fla. 2005).

Issue I:

The trial court erred in denying Mr. McCoy's Claim I of the Second Amended Initial Motion for Post-Conviction Relief (R5/787-842) to the effect that his trial counsel erred in failing to call his mother, Mrs. Josie McCoy, and other alibi witnesses at trial. Mrs. McCoy would have testified that her son was with her on the evening of June 14, 2000, the day after the June 13, 2000 murder/robbery when he supposedly partially admitted to Ms.

Marcel that he committed these crimes, at a birthday party in another part of Jacksonville. Other witnesses would have corroborated Mrs. McCoy's testimony in whole or in part. Mr. McCoy suffered prejudice as a result of this omission by defense counsel because the testimony would have significantly undermined the testimony of Ms. Marcel to the effect that Mr. McCoy confessed to the robbery/ murder to her that evening.

Issue II:

The trial court erred in denying Mr. McCoy's Claim VI to the effect that defense counsel was ineffective for failing to object to references to religion and other statements that appealed to jurors' emotions. Separate statements by the state, a witness, and a potential juror all referenced religion. These statements were particularly significant because the defendant was known to be a Muslim. There is a very strong, reasonable probability that these and other statements influenced the jury's emotions and adversely affected the verdict.

Issue III:

The trial court erred in denying Mr. McCoy's Claim VII that trial counsel was ineffective for conceding before the jury that a robbery had taken place. By making this concession, defense counsel opened the defendant to the charge of felony murder. The robbery was also used as an

aggravating circumstance by the state during the penalty phase. Defense counsel's actions constituted an unnecessary concession of guilt since the charge could have been contested by reference to the videotape of the robbery which did not show money being taken, and by the strong inference of employee theft, which had been a problem at this liquor store.

Issue IV:

The trial court erred in denying McCoy's Claim XI that defense counsel was ineffective for having the defendant testify in court. The state's primary evidence was the testimony of Ms. Marcel and the presence of the defendant's fingerprints on a bank bag used by ABC Liquors. The audiotape provided by Ms. Marcel was largely inaudible, and her own motivations for testifying were highly suspect. Expert testimony could have shown that the fingerprints on the bank bag were partial fingerprints and could not provide a complete match to the defendant's. In his testimony, the defendant admitted to having the damaging conversation with Ms. Marcel, admitted that it was his voice on the audiotape, admitted he was on probation at the time of the conversation, admitted to having four prior felony convictions, and stated that he had touched the bag on a previous occasion. The defendant's testimony severely damaged his case. Defense counsel should have kept him off the witness stand.

Issue V:

The trial court erred in denying McCoy's Claim X to the effect that defense counsel should have used the facts regarding a restaurant robbery committed by Zsa Zsa Marcel to impeach her. Defense counsel had the impeachment witnesses at the courthouse and could have had them identify Marcel as the robber, but he simply failed to do so.

Issue VI:

Mr. McCoy argues that any one of the above instances of ineffective assistance of counsel is sufficient to warrant a reversal of the trial court's order denying him post conviction relief. In addition, he asserts that, when considered in their cumulative totality, post conviction relief is certainly required.

Issue VII:

The law now clear that Mr. McCoy was denied a full and fair jury trial in state court because the trial judge, not the jury, made all the factual determinations as to whether he could be sentenced to death per the provisions of Section 921.141, Florida Statutes (2000). The trial court erred in not granting Mr. McCoy's claim that his death sentence should be set aside on this basis and in the context of *Ring v. Arizona*, 536 U.S. 584 (2002).

ARGUMENT

Issue I.

The trial court erred in denying Mr. McCoy's Claim I of the Second Amended Initial Motion For Post-Conviction Relief to the effect that his trial counsel was ineffective for failing to call his mother, Mrs. Josie McCoy, and others as alibi witness at trial to refute the testimony of Zsa Zsa Marcel.

Standard of Appellate Review

This is an ineffective assistance of counsel claim. An order denying a capital defendant's post conviction motion to vacate his judgments of guilt and sentence based upon alleged ineffective assistance of counsel necessarily involves mixed questions of law and fact, especially when an evidentiary hearing was held to resolve the issues. In those situations, review by this Court is *de novo* except that the trial court's factual findings are entitled to deference so long as there is competent and substantial evidence in the record to support them. *Lewis v. State*, 838 So. 2d 1102, 1112 (Fla. 2002). "In reviewing a trial court's ruling after an evidentiary hearing on an ineffective assistance of counsel claim, (the Florida Supreme Court) defers to the factual findings of the trial court to the extent that they are supported by competent, substantial evidence, but reviews *de novo* the application of the law to those facts." *Mungin v. State*, 932 So. 2d 986, 998. (Fla. 2006). *See also Stephens v. State,* 748 So. 2d 1028 (Fla. 1999).

Merits

The Ineffectiveness

In its order denying post conviction relief, the trial court refers to this claim as "Claim I, sub-claim (b)." (R6/1056). The trial court rejected the claim, finding essentially that Ms. McCoy had been unsure of whether she saw the defendant at the time that he was supposedly with Zsa Zsa Marcel on June 13, 2000 (supposedly admitting to her that he had committed the ABC liquor store robbery the day before); thus she could not have helped refute Marcel's testimony. And, according to the trial court, it follows that there was no reason for defense counsel to call her as a defense witness. (R6/1056-57.) This was reversible error.

At trial, Mr. McCoy took the stand in his own behalf and testified that he could not have been the person who committed the robbery and murder at the ABC liquor store on June 13, 2000, at between 8:20 a.m. and 8:33 a.m.[6] because he just left his girlfriend, Dorothy Small's, residence at about 8:12 a.m. and was on his way to have breakfast at a local Krystal restaurant during this time. *McCoy v. State*, 853 So. 2d at 400. Obviously, if the jury had believed Mr. McCoy, he would have been acquitted. But the

[6] ABC liquor store Manager Teresa Johnson testified at trial that the surveillance cameras indicated that the robbery/murder occurred between 8:20 a.m. and 8:33 a.m. on June 13, 2000.

defendant's trial counsel did very little to corroborate what his client testified to.

Victor Lynn Williams gave a sworn deposition stating that he was at the ABC liquor store parking lot at 8:14 a.m. on the 13th and observed only the victim in the parking lot about to enter the store. (*See* Victor Lynn deposition of September 19, 2000, pp. 30-34). Lynn's testimony would have contradicted the testimony of Zsa Zsa Marcel to the effect that Mr. McCoy told her that he and one other person rushed the victim at this time. *McCoy v. State*, 853 So. 2d at 399-402 (Fla. 2003).

More relevant to this issue, Diana Peterson was called as a witness for the defense during the post conviction hearing because Mrs. Josey McCoy was not available to do so. She (Ms. Peterson) testified to what she and Mrs. McCoy would have testified to at Mr. McCoy's trial had Mr. Chipperfield asked them to do so. Ms. Peterson was a good friend of Mrs. McCoy, having known her for some two decades. (R9/1441). She was confident that on June 14, 2000, she saw the defendant in Mrs. Josey McCoy's home at about 5:00 to 7:00 p.m. (R9/1443).[7] This of course is about the time that Zsa Zsa Marcel claimed that Mr. McCoy was with her at another location

[7] It goes without saying that the state relied heavily upon the testimony of Zsa Zsa Marcel regarding the events of June 14, 2000, to discredit Mr. McCoy's testimony as to his alibi for the previous day. Thus, witnesses who could have refuted Ms. Marcel's testimony qualify as alibi witnesses.

admitting to the robbery/ homicide. *McCoy v. State*, 853 So. 2d at 399-402 (Fla. 2003). Peterson added that she had shared this information with Mr. McCoy's lawyer, Mr. Chipperfield, before Mr. McCoy's trial, but she was not asked to be an alibi witness for Mr. McCoy -- nor was Mrs. McCoy. (R9/1444).

On cross-examination, Peterson testified in more detail regarding the June 14, 2000, birthday party attended by Mr. McCoy. His mother, his sister, and Ms. Peterson were all present. (R9/1446). Peterson stated that she shared this information with Mr. Chipperfield as well. Mr. McCoy drove to the June 14 gathering in his car. She did not know where he was before the gathering or where he went after the party was over. Not calling Mrs. McCoy as a defense witness at trial was extremely prejudicial to Mr. McCoy because, had she testified, she would have created a reason for the jury to reject Zsa Zsa Marcel's questionable testimony. Mr. Chipperfield admitted during the post conviction proceedings that he would have called her as a witness had he thought her testimony would have helped the defendant. (R6/1057).

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court made it clear that effective legal representation in a capital case within the context of the Sixth Amendment includes counsel's obligation to conduct a

reasonable investigation of the client's circumstances in order to locate and present available exculpatory evidence. The failure to call a defense witness, including an alibi witness, to support an alibi defense, can constitute ineffective assistance of counsel and warrant a new trial in a capital case. *Beasley v. State*, 18 So. 3d 473 (2009); *Lott v. State*, 931 So. 2d 807 (Fla. *2006); Johnson v. State*, 729 So. 2d 970 (Fla. 1999); *Greesen v. State*, 729 So. 2d 397 (Fla. 1998). While the attorney's performance is entitled to deference, especially when it comes to tactical decisions, this is no excuse for non-performance. *Pickens v. Lockhart*, 714 F.2d 1455 (8th Cir. 1983).

The Prejudice

Defense counsel's failure to call all available exculpatory witneses as referenced above cannot be excused as a tactical decision under these circumstances. However, that is what the trial court erroneously determined to be the case. (R6/1057). Mr. McCoy suffered prejudice since, as noted above, Zsa Zsa Marcel was the state's most damaging witness against him. Had her testimony been effectively discredited, there is every reason to conclude that the defendant would have been acquitted and not sentenced to death. A new trial is warranted under these circumstances.

Issue II:

The trial court erred in denying Mr. McCoy's Claim VI to the effect that defense counsel was ineffective for failing to object to references to religion and other statements that appealed to jurors' emotions.

Standard of Appellate Review

This is another ineffective assistance of counsel claim. In those situations, review by this Court is *de novo* except that the trial court's factual findings are entitled to deference so long as there is competent and substantial evidence in the record to support them. *Lewis v. State*, 838 So. 2d 1102, 1112 (Fla. 2002); *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999).

Merits

The Ineffectiveness

During voir dire, defense counsel made no objection to the jury being informed that Mr. McCoy was a Muslim and had changed his name to "Jamil Rashhid" prior to the robbery/homicide. (TT/128). Seizing on this revelation (that the defendant was a Muslim), again without objection from defense counsel, the prosecutor sought the potential jurors' assurance that they would apply their "God-given common sense" in evaluating the evidence presented in the case. (TT/228). In other words, the prosecutor, without objection from defense counsel, made it clear that this case was about a Muslim who did not fear death -- killing a Christian who did. This

prompted a lengthy statement from prospective juror Craig Ingersoll to the effect that McCoy was of "Moslem descent" and that for people of the Muslim faith "death is not that big of a deal." (TT/357). The trial court found no ineffectiveness here in part because the trial was prior to the events of September 11, 2001 and the terrorists attacks. (R6/1065.) Insodoing, the trial court failed to acknowledge that terrorists attacks by extremist Muslim groups had been ongoing well prior to the attack on the twin towers in New York City.

During the penalty phase, again without objection from defense counsel, the prosecutor presented emotional testimony from Linda Wiley, the victim's sister, that she and the victim were "related in Christ" (TT/1309) and that the victim "gave her life to Jesus and was a born-again Christian living her life in a Godly way, learning and spreading the good of our Lord and Jesus Christ." (TT/1310). Clearly, this was yet another improper, emotionally charged signal to the jury that McCoy deserved the death penalty because he was a person who had adopted an unpopular faith and who did not fear death for killing a Christian; the same faith presumably as most if not all of the jurors.

The Resulting Prejudice

Had defense counsel taken steps to blunt the injection of religion into the jurors' analysis of the case by objecting to the prosecutor's comments and the offending testimony, it would have been excluded per the provisions of Section 90.403, Florida Statutes (2000) because the prejudicial effects of the testimony far outweighed any probative value it may have had (if it had any at all to begin with). The failure of a defendant's attorney to object to the state's appeal to emotions can be evidence of ineffective assistance of counsel and can warrants a new trial. *Brooks v. State*, 762 So. 2d 879 (Fla. 2000); *Rachael v. State*, 714 So. 2d 192 (Fla. 2d DCA 2001). In *Brooks*, the prosecutor impermissibly inflamed the passions and prejudices of the jury with elements of emotion and fear. The prosecutor also crossed the line in terms of dehumanizing the defendants and indicating that they were incapable of anything but random violence. That same situation is extant in the case at bar where Mr. McCoy was portrayed as a member of a violent, radical religious order -- compared to the sweet nature of the Christian victim. It is simply not proper for the prosecution to demonize a defendant in the course of attempting to prove his guilt of the crimes charged in an indictment. *Gore v. State*, 719 So. 2d 1197, 1201 (Fla. 1998); *King v. State*, 623 So. 2d 486, 488 (Fla. 1993). The trial court found no ineffectiveness here even though Mr. Chipperfield testified at the post conviction hearing

that " . . . he probably should have objected to this comment." (R6/1066). Mr. Chipperfield added that he did not think about the significance of it until a few months before the post conviction hearing. (R6/1066).

The trial court determined in this regard that, " . . . in the Jacksonville community, any objection by defense counsel to the State's mention of 'God given common sense" could have adversely affected the panel's view of the defense." (R6/2633). This comment from the trial court makes clear why it was so important for defense counsel to protect the defendant from the prosecutor's ill-advised comments as well as the statement about the victim's ardent Christian faith from Linda Wiley, the victim's sister. The Jacksonville community is very religious in the sense of being committed to Christianity. This was all the more reason for defense counsel to protect his client from the efforts of the state to paint him (Mr. McCoy) as someone not of the Christian faith who, perhaps for that reason, was willing to commit a violent crime. Given the fact that there was no eyewitness to the robbery/murder, there is every likelihood that, but for the ineffectiveness described above, Mr. McCoy would have been exonerated. Denying the defendant's Claim VI was therefore reversible error.

Issue III:

The trial court erred in denying Mr. McCoy's Claim VII that trial counsel was ineffective for conceding that a robbery had taken place.

Standard of Appellate Review

This is another ineffective assistance of counsel claim. An order denying a capital defendant's post conviction motion to vacate his judgments of guilt and sentence based upon alleged ineffective assistance of counsel necessarily involves mixed questions of law and fact, especially when an evidentiary hearing was held to resolve the issue. In those situations, review by this Court is *de novo* except that the trial court's factual findings are entitled to deference so long as there is competent evidence in the record to support them. *Lewis v. State*, 838 So. 2d 1102, 1112 (Fla. 2002); *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999).

Merits

The Ineffectiveness

Mr. McCoy was convicted as charged in Count I based upon both a "premeditated first-degree murder" theory and the theory that "the killing was done during the commission or attempted commission of a robbery" (ie. felony-murder). (R1/7). The state was aided in this regard when defense counsel inexplicably conceded during *voir dire* that "there is no question about that there was a robbery and that there was a murder." (TT/242). Defense counsel added, "(t)he issue in this trial will be is he (McCoy) the

one who did it, have they arrested the right guy or the wrong guy?" (TT/ 242; ROA Vol. VII, p. 242).

The trial court found no ineffectiveness here determining that "Mr. Chipperfield made a reasonable tactical decision to concede that the robbery and murder occurred." (R6/1068). This was error.

In the landmark case of *Florida v. Nixon,* 543 U.S. 175; 125 S.Ct. 551; 160 L Ed. 2d 565 (2004), the Supreme Court made it clear that, while there are certain instances where defense counsel can strategically concede the client's guilt, only in exceptional circumstances where the evidence of guilt is undisputed can this be sanctioned in a capital case. The opposite is true in the case at bar. There were no eyewitnesses to the homicide. McCoy had a viable alibi. There was evidence that the crime was an "inside job," possibly committed by a store employee.[8] At best, all the state could show is that ". . . $415 was missing from the store's two safes." *McCoy v. State,* 853 So. 2d at 399. This is inconsistent with Zsa Zsa Marcel's trial testimony to the effect that McCoy told her that ". . . he and his partner had netted $4,000 from the venture." *McCoy v. State,* 853 So. 2d at 400. Clearly

[8] The surveillance videotape does not seem to indicate that someone was in he store and killed the victim between 8:20 and 8:33 a.m. In addition, the 35 mm "still surveillance photos shows no one in the vicinity of the case drawers.

then, trial counsel was ineffective for conceding that the homicide was committed during the course of a robbery.

The Resulting Prejudice

McCoy suffered prejudice because his counsel essentially conceded that the defendant was guilty of first-degree murder and, in the process, established the aggravator that the murder was committed during the course of a robbery. (R1/8; *see* Sec. 921.141(5)(b), Fla. Stat. [2000]). Had counsel not done that, there is a distinct likelihood that Mr. McCoy would not have been found guilty based upon a felony murder theory since there was no proof beyond a reasonable doubt of a robbery. Furthermore, the subject aggravator would not have been proven beyond a reasonable doubt.

Issue IV:

The trial court erred in denying Mr. McCoy's Claim XI to the effect that defense counsel was ineffective for not advising McCoy as to the dangers of testifying in his own behalf.

Standard of Appellate Review

This is another ineffective assistance of counsel claim. Review by this Court is *de novo* except that the trial court's factual findings are entitled to deference so long as there is competent evidence in the record to support them. *Lewis v. State*, 838 So. 2d 1102, 1112 (Fla. 2002).

Merits

The Ineffectiveness

The trial court erred in denying McCoy's Claim XI that defense counsel was ineffective for having the defendant testify in court. (R6/1078, 1079). The trial court misunderstood Mr. McCoy's claim in this regard. It was not a matter of whether he was advised of his right to testify or not to do so, as the trial court surmised. (R6/1078, 1079). It was a matter of defense counsel not advising the defendant of the dangers of doing so, as Mr. McCoy testified during the post conviction proceedings. The state's primary evidence was the testimony of Ms. Marcel and the presence of the defendant's fingerprints on a bank bag used by ABC Liquors. The audiotape provided by Ms. Marcel was largely inaudible, and her own motivations for testifying were highly suspect. Expert testimony could have shown that the fingerprints on the bank bag were partial fingerprints and could not provide a complete match to the defendant's. In his testimony, the defendant admitted to having the damaging conversation with Ms. Marcel, admitted that it was his voice on the audiotape, admitted he was on probation at the time of the conversation, admitted to having four prior felony convictions, and stated that he had touched the bag on a previous occasion. (see for example R9/1606 where Mr. McCoy acknowledges admitting that is was his voice on the tape). *McCoy v. State*, 853 So. 2d at 399-402 (Fla. 2003).

The Resulting Prejudice

The defendant's testimony severely damaged his case. Had he not testified, there is a distinct likelihood that he would not have been found guilty of the murder or the robbery. Defense counsel should have kept him off the witness stand.

Issue V:

Did the trial court err in rejecting McCoy's claim that defense counsel was ineffective for failing to recall Zsa Zsa Marcel to impeach her.

Standard of Appellate Review

Review is *de novo* except that the trial court's finding are entitled to deference regarding the factual findings. *Lewis v. State*, 838 So. 2d 1102, 1112 (Fla. 2002).

The Ineffectiveness

Mr. McCoy's claim X (R5/817-821) in his second amended motion for post conviction relief centered around defense counsel's failure to use all appropriate means necessary and proper to impeach the testimony of Zsa Zsa Marcel. In particular, Mr. McCoy asserted that defense counsel should have used extant evidence to the effect that Ms. Marcel participated in a very serious robbery at Lee's Chicken Restaurant where a store manager was shot to impeach this key state witness. That evidence was in the form of eyewitnesses to the restaurant robbery who were actually subpoenaed to and

appeared at the Duval County Courthouse during Mr. McCoy's trial to identify Marcel. (TT 994-996). One of those witnesses was Restaurant Manager Pat Carrioggia who was shot in the incident. (TT 821). He could identify Marcel by the large scar she had on her neck. In addition, according to Mr. McCoy, Ms. Marcel admitted committing the robbery to him. (R6/1127).

In order to be able to lay a proper predicate for defense counsel to be able to call the eyewitnesses to the restaurant robbery to attack Ms. Marcel's credibility, the trial court required Mr. Chipperfield to first have Mr. McCoy testify. Then, according to the trial court's ruling, Mr. Chipperfield could call Ms. Marcel to the stand who could either admit or deny participation in that robbery. (R6/1126). Mr. McCoy did this (took the stand and told the jury what Marcel had told him about the restaurant robbery), noting that Mr. Marcel had provided him with details of the robbery including showing him the gun she had used and money she had taken. (ROA Vol. XII, pp. 1013, 1014). However, defense counsel inexplicably failed to call Ms. Marcel and failed to call the eyewitnesses to the restaurant robbery. (R6/1126, 1127).

Mr. Chipperfield testified during the post conviction evidentiary hearing that he did not use this evidence (the testimony of the eyewitnesses to the restaurant robbery committed by Ms. Marcel) because he did not think

Ms. Marcel's involvement in that felony offense would have affected the evidence presented in Mr. McCoy's trial. (R9/1556). Furthermore, he said that if recalled during his case in chief, Ms. Marcel would simply deny committing the robbery. (R6/1128). The trial court, in denying this claim, gave Mr. Chipperfield the benefit of the doubt. (R6/1073-1078). This was error.

The failure to call key exculpatory witnesses can constitute a basis for an ineffective assistance of counsel claim. *Roth v. State*, 479 So. 2d 848, 849 (Fla. 3d DCA 1985). Clearly, if the jury had been advised of the fact that Ms. Marcel had committed the very same type of crime that Mr. McCoy was merely accused of, her testimony would have been rejected by the jury.

The Prejudice

Without question, Ms. Marcel's testimony was extremely prejudicial to Mr. McCoy because she insisted at trial that he effectively confessed to the murder/homicide (TT 748, 749) -- and she referred to and helped authenticate the secret audiotape where Mr. McCoy supposedly made the damaging admissions. *McCoy v. State*, 853 So. 2d at 399-402 (Fla. 2003). With Ms. Marcel's credibility destroyed, there is the distinct likelihood that Mr. McCoy would have been found not guilty on all counts -- and certainly not sentenced to death. The prejudice was exacerbated by the fact that Mr.

Chipperfield had Mr. McCoy take the stand as a condition precedent to his (Chipperfield's) ability to recall Marcel. Then, he failed to call Marcel and the eyewitnesses to the restaurant robbery. Thus, Mr. McCoy not only had to endure the damage caused by the jury finding out that he was a convicted felon, but he was left alone to claim that Marcel had in fact committed the restaurant robbery. In other words, due to defense counsel's ineffectiveness, Ms. Marcel's credibility was not seriously compromised and Mr. McCoy was left with the worst of all worlds as far as the presentation of evidence was concerned.

Issue VI:

The trial court erred in denying Mr. McCoy's Claim XVIII to the effect that the cumulative effect of trial counsel's alleged ineffective warranted a new trial for Mr. McCoy.

Standard of Appellate Review

Review is *de novo* except that the trial court's finding are entitled to deference regarding the factual findings. *Lewis v. State*, 838 So. 2d 1102, 1112 (Fla. 2002).

The Ineffectiveness

The trial court determined that, since it rejected all of Mr. McCoy's alleged ineffective assistance of counsel claims, it followed that it should

also reject his claim of cumulative ineffectiveness warranting a new trial. (R6/1087). This was error.

No one put Mr. McCoy at the scene of the crime. *McCoy v. State*, 853 So. 2d at 399-402 (Fla. 2003). He had a logical explanation as to why his fingerprints would be on the money bag belonging to ABC Liquors. Zsa Zsa Marcel's character was compromised and the audiotape that supposedly included the defendant admitting to the robbery/homicide was subject to attack in terms of the quality of the recording. Witnesses were available to impeach Marcel's testimony, but they were not called to the stand.

The Resulting Prejudice

Had defense counsel exploited all of these weaknesses and cracks in the state's case, without question no first-degree murder conviction would have resulted. And under those circumstances, it follows that no death penalty could have been imposed.

Issue VII:

The trial court erred in denying McCoy's Claim XIV to the effect that he was denied a jury trial regarding the penalty phase of the trial.

Standard of Appellate Review

This is a pure legal claim which is reviewed by this court *de novo*. *Davis v. State*, 990 So. 2d 459 (Fla. 2008).

Merits

McCoy has challenged his death sentence ever since *Ring v. Arizona*, 536 U.S. 584 (2002), declaring that state's death penalty scheme unconstitutional, was rendered by the Supreme Court of the United States. This included raising the claim on direct appeal. (R6/1083). The essence of the claim is that McCoy was only provided with one-half a jury trial.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the court clarified what a true trial by jury means in terms of the extent to which the jurors must make findings of fact upon which a sentence is based: "If a State makes an increase in the defendant's authorized punishment contingent on the finding of a fact, *that fact -- no matter how the state labels it, must be found by a jury beyond a reasonable doubt*." *Apprendi*, supra, 530 U.S. at 482-83, emphasis added.

In *Ring v. Arizona*, 536 U.S. 584 (2002) the *Apprendi* holding was applied to that state's death penalty scheme. The *Ring* court said that "(t)he dispositive question . . . is one not of form but of effect," citing *Apprendi*, 530 U.S. at 495. That is to say, at the point that Ring was convicted of murder, he could not be sentenced to death under Arizona's capital punishment scheme since additional facts had to be determined in order to do so. Those additional factual findings were made by the judge. That, the

Ring court held, violated the Sixth and Fourteenth Amendments to the United States Constitution. The same death penalty scheme existed in Florida at the time of Mr. McCoy's state court jury trial.

Per the provisions of Section 921.141 (2000), the authority to have a jury decide the facts in McCoy's trial beyond a reasonable doubt was strictly limited to the determination of whether he was guilty of murder in the first-degree based upon whether he either,

(1) acted with premeditation as provided for in Section 782.04(1)(a)1, Florida Statutes (2000) -- or

(2) committed felony murder per subsection 2 of that statute.

Once guilt or innocence of the crime charged was made, the proceedings were bifurcated and the jury was relegated -- demoted -- subjugated -- downgraded -- reduced -- to at best an "advisory" role. Sec. 921.141(2), Fla. Stat. (2000). It was Judge Dearing who not only ultimately sentenced the defendant -- but more importantly who made the factual findings as to whether the death penalty would be imposed. ("Upon conviction or adjudication of guilt of a defendant in a capital case, *the court* shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment . . ." Sec. 921.141(1), Fla. Stat. (2000). (Emphasis added.) "Notwithstanding the

recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based . . ." Sec. 921.141(3), Fla. Stat. (2000).

So that there is no doubt about this: Upon a conviction for first-degree murder, as the Supreme Court noted in *Ring*, Judge Dearing did not have the authority to sentence Mr. McCoy to death. This is because *additional facts* had to be considered and resolved by the fact finder (Judge Dearing) as to:

1. whether "aggravating circumstances" as set forth in Section 921.141(5), Fla. Stat. (1988) had been proven beyond a reasonable doubt;

2. whether mitigating circumstances had been established per the provisions of Section 921.141(6); and

3. whether the mitigating factors outweighed the aggravating factors. Sec. 921.141(3).

Pursuant to Florida law, Judge Dearing made all these necessary factual findings regarding aggravating and mitigating factors, not the jury. Sec. 921.141(3), Florida Statutes (2000). *See* also Judge Dearing's sentencing order where he discusses each aggravating factor and sets forth

the factual basis for deciding that each factor had been proven beyond a reasonable doubt. (R2/pp. 200-205.) In fact, Judge Dearing was prohibited by Florida law from using a special verdict form in order to have the jurors make unanimous findings as to whether the state had proven even one of the statutory aggravators beyond a reasonable doubt. *See State v. Steele*, 921. So. 2d 538, 545-48 (Fla. 2005).[9]

Lest there be any doubt about Florida's and Judge Dearing's non-compliance with what it means to have a jury trial as expressed by the Ring/Apprendi decisions, on June 20, 2011, the United States District Court for the Southern District of Florida held in *Evans v. McNeil*, Case No. 2:08-cv-14402, that the Florida capital sentencing scheme does not comply with the constitutional jury trial requirement and violates *Ring.*[10] The court ruled that the advisory sentencing scheme in Section 921.141 is unconstitutional because it is the judge rather than the jury who makes the factual findings with respect to aggravating circumstances necessary for imposition of the

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[9] "In *Steele*, the Florida Supreme Court implored the Florida Legislature to amend the death penalty statute to allow for unanimous jury findings of aggravators and the use of special verdict forms." *Evans v. McNeil*, U.S. Dist. Ct., So. Dist. of Fla. (June 20, 2011) at p. 84, decision of Martinez, J., emphasis added.

[10] Evans was entitled to relief under *Ring* because his sentence became final after *Ring* was decided and did not involve a prior conviction aggravator.

death penalty. The court concluded that the jury's advisory sentence is not a factual finding sufficient to satisfy the jury finding requirement because it is "simply a sentencing recommendation made without a clear factual finding. In effect, the only meaningful findings regarding aggravating factors are made by the judge."[11]

As the court in *Evans* correctly noted, there are many other reasons why the jury's advisory recommendation is insufficient to satisfy the jury trial right. The jury makes no specific findings of fact. A reviewing court has no way of knowing what aggravating or mitigating factors the jury found and relied upon, or if a majority of the jurors found any one aggravator proven beyond a reasonable doubt and not outweighed by the mitigating factors presented by the defense. In addition, after the jury makes its recommendation, a separate proceeding is held before the judge only, where additional evidence and argument may be presented. The judge then makes specific findings on aggravating circumstances that may be based on evidence not presented to the jury. Rather than merely reviewing the findings of the jury, the judge makes independent findings that may differ from those of the jury. The judge then relies on those independent findings

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[11] This decision is currently pending appeal in the Eleventh Circuit Court of Appeals in Case No. 11-14498.

in imposing the death penalty, "notwithstanding the recommendation of a majority of the jury." Sec. 921.141(4), Fla. Stat. (2000).

Judge Martinez, at opinion, p. 87, concluded by noting that, "(c)apital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment" quoting *Ring*, 536 U.S. at 589. *Evans*, supra, opinion, p. 88. But Mr. McCoy was denied this jury determination because, according to Judge Martinez at page 90 of his opinion in *Evans*:

> In Florida, a separate sentencing hearing is conducted in front of a jury. The jury returns its recommendation as to life imprisonment or death based on the existence of an aggravating circumstance, which then outweighs any mitigating circumstances. There are no specific findings of fact made by the jury. Indeed, the reviewing courts never know what aggravating or mitigating factors the jury found (*Steele* citation omitted.) It is conceivable that some of the jurors did not find the existence of an aggravating circumstance, or that each juror found a different aggravating circumstance, or perhaps all jurors found the existence of an aggravating circumstance but some thought that the mitigating circumstances outweighed them.

In sum, Judge Martinez determined that Florida's "death penalty is an 'enhanced' sentence under Florida law and the Sixth Amendment requires that the enumerated aggravating factors necessary to enhance the sentence be found by a jury." *Evans*, supra, p. 90. As Justice Scalia stated in his concurring opinion in *Ring*:

> (I) believe that our people's traditional belief in the right of trial by jury is in perilous decline. That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because a *judge* found that an aggravating factor existed.

Ring v. Arizona, 536 U.S. at 612; 122 S. Ct. 2428 (Scalia, J., concurring)(emphasis in original).

Clearly, McCoy did not receive a full jury trial in state court and must be granted another regarding the penalty phase of the trial.

CONCLUSION

Wherefore, for the reasons set forth above, the Court is asked to:

1. Reverse the Order Denying Defendant's Motions for Post Conviction Relief (R6/1051-1097).

2. Remand the cause to the circuit court, requiring it to grant Mr. McCoy's Second Amended Initial Motion For Post-Conviction Relief (R5/787-842) and to vacate and set aside his judgments of conviction for murder and armed robbery, and the sentences imposed, including the death sentence.

3. Order that Mr. McCoy be granted a new trial on both counts.

4. Grant Mr. McCoy such other relief as is deemed appropriate in the premises.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the Initial Brief of Appellant has been provided counsel for the State of Florida, John Guy, Esq., the Office of the State Attorney, 4th Judicial Circuit of Florida, 220 East Bay Street, Jacksonville, Florida 32202-3429, and Charmaine Millsaps, Esq., the Office of the Attorney General of Florida, the Florida Capitol, Plaza Level One, Tallahassee, FL 32399-1050, this 1st day of November, 2011, by U.S. mail delivery (and by email delivery to Ms. Millsaps as well).

CERTIFICATE OF COMPLIANCE

It is certified that the foregoing Initial Brief of Appellant was prepared using a 14 point Times New Roman font, not proportionally spaced, in conformity with Florida Rule of Appellate Procedure 9.210(a)(2).

s/David W. Collins
David W. Collins, Esq.

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