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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-2083

GARY RICHARD WHITTON

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF WALTON COUNTY, FLORIDA
Capital Post Conviction

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

ARGUMENT I: THE PROSECUTION WAS CORRUPT 1

INTRODUCTION (Argument I, B, Initial Brief): The Sheriff's and the Prosecutor's Exculpatory Predispositions to Terrify Witnesses, Even Law Enforcement Veterans, Impugned the Character of the Entire Prosecution 1

A. The State's False Testimony (*Giglio*) 4

1. Satan lied 4

a. Concealing his sexual perversion-State protection from jailhouse rape 5

b. Concealing his betrothed, the prosecutor's mother 6

c. Satan confessed to lying at trial . . . 7

i. Satan said that he did what the prosecutor told him to do 7

ii. Key's testimony and letters about what Satan said are admissible 8

2. Jake Ozio lied, but the State sealed his lips 9

a. Lies about his deal and that he heard Appellant say he killed the victim 9

b. The State sealed Ozio's lips by threatening perjury and opposing a deposition (IB at 14-15.) 12

B. Suggesting There Were Two DNA Samples 13

C. The Prosecution: "we are not gonna bring it up" 14

D. Cellmark - Insufficient vs. Inconclusive . . . 15

E. *Whitton v. State*, 649 So 2d 861, 863, (Fla. 1994): "a receipt indicating that Whitton obtained a car wash on October 10 at 2:37 a.m was found in his car;" *Not True* 15

F. Lying to Maureen Fitzgerald; *Not True* 17

G. The Corrupt Prosecution 17

ARGUMENT II: INEFFECTIVE ASSISTANCE AT GUILT/INNOCENCE . 18

A. Car Wash Ticket 18

B. Fingerprint Evidence Inside Sandwich Wrapper . 18

C. Obstruction of Justice 18

D. Cellmark-Desperation 19

E. Fight Lasted Five Minutes at Most (not "thirty minutes," *Whitton v. State,* 649 So.2d 861, 867 (Fla. 1994)) and It Is Not Possible to Determine if the Victim "was aware of what was happening to him." Id. 19

F. Mr. Whitton Was Not Present at the Time of Death 21

G. Evidence Rebutting Motive; Whitton Was Not Desperate 22

H. Blood - You Can't Clean It Off in the Bathroom . 23

I. Incompetent Police Investigation 23

J. Victim was Drunk, Flashing Cash, Getting Rolled 23

K. Malleable Maleszewski 24

L. Inadequate Investigation Regarding Snitches-"He Wasn't Truthful About Nothing Ever" . 25

Argument III: SECRET NOTES BETWEEN JURORS, BAILIFF, AND COURT 25

A. A New Trial was Required by Florida Statute, Rule, and Case Law 25

B. The Evidentiary Hearing Conducted Below Illustrates the Need for a Per Se Rule 28

C. The Claim is Not Procedurally Barred, and, if it is, It Can Only Be Because Trial and/Or Appellate Counsel Were Prejudicially Ineffective . 29

ARGUMENT IV: COUNSEL WERE PREJUDICIALLY INEFFECTIVE AT SENTENCING 30

A. The Duty to Investigate and the Right to a Meaningful Capital Sentencing Proceeding 30

B. The Sentencing Evidence Introduced About Gary Whitton's Upbringing - Around 10 pages From a Brother and an Aunt 30

C. Unreasonableness: Defense Did Not Go to NY Where Mr. Whitton Was Born/Raised, Seek Available Medical and Social Services Records, or Speak to Teachers and Social Workers, Thereby Depriving their Expert and the Jury of Important Background Material 31

D. Prejudice is Palpable: *What "[t]he jury heard nothing about." Johnson v. Sec'y, DOC, 643 F.3d 907, 937(11th Cir. 2011)* 32

E. Unrebutted Expert Mental Health Testimony Given No Weight Below 33

IV. CONCLUSION 35

CERTIFICATE OF SERVICE AND COMPLIANCE 36

TABLE OF AUTHORITIES

SUPREME COURT CASES

Green v. Georgia,

442 U.S. 95 (1979) 9

Kyles v. Whitley,

514 U.S. 419 (1995) 2, 12, 14, 17

Porter v. McCollum,

130 S. Ct. 447(2009) 21, 30, 35

Rompilla v. Beard,

545 U.S. 374 (2005) 35

Sears v. Upton,

130 S. Ct. 3259 (2010) 9

FEDERAL CASES

Cooper v. DOC,

646 F.3d 1328 (11th Cir. 2011) 33

Guzman v. DOC,

663 F.3d 1336 (11th Cir. 2011) 2, 4

Johnson v. Secretary, DOC,

643 F.3d 907 (11th Cir. 2011) 32

STATE CASES

Caldwell v. State,

340 So.2d 490 (Fla 2d DCA 1977) 26, 29

Holzapfel v. State,

120 So.2d 195 (Fla. 4th DCA 1960) 25, 26, 29

Ivory v. State,

351 So.2d 26 (Fla. 1977) 26

Lightbourne v. State,

644 So.2d 54 (Fla. 1994) 8

Simmons v. State,

105 So.3d 475 (Fla. 2012) 30, 31, 34, 35

Slinsky v. State,

232 So.2d 451 (Fla 4th DCA 1970) 26, 29

State v. Franklin,

618 So.2d 171 (Fla. 1993) 27

State v. Merricks,

831 So.2d 156 (Fla. 2002) 26

Whitton v. State,

649 So.2d 861, 867 (Fla. 1994) 15, 19

Wright v. CTL Distribution, Incorporated,

650 So.2d 641 (Fla. 2d DCA 1995) 26

MISCELLANEOUS AUTHORITY

Charles W. Ehrhardt, Florida Evidence,

(2012 Edition) 22, 24

The Justice Project, Jailhouse Snitch Testimony:

A Policy Review (2007) 4

ARGUMENT I: THE PROSECUTION WAS CORRUPT

INTRODUCTION (Argument I, B, Initial Brief): The Sheriff's and the Prosecutor's Exculpatory Predispositions to Terrify Witnesses, Even Law Enforcement Veterans, Impugned the Character of the Entire Prosecution[1]

The Sheriff and the prosecutor in this case were utterly, brazenly, out-of-control when putting their case against Mr. Whitton together. They so successfully threatened and intimidated Federal Department of Law Enforcement Agent Ziegler she was forced to arrive to be a witness with armed FDLE escorts-**to protect her *from the sheriff and the prosecutor*.**[2] The State writes this does not matter because ultimately the agent testified to the truth of what she knew. BA at 16. But even if that is so, which it is not,[3] *Brady* is not so limited.

The jurors were entitled to know just how far the Sheriff

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[1]This Argument was presented as "I, B" in the Initial Brief of Appellant ("IB"). It is repositioned in this Reply Brief because it makes the unscrupulous hubris of the prosecution stand out clearly and places it in context with the prosecution's other bad acts. Appellee's assertion that this is a "sort of generalized due process claim" is incorrect. Brief of Appellee ("BA")at 16. The post-hearing brief plainly labels the claim a *Brady* claim (Suppress Exculpatory Evidence), as did the Amended 3.850 Motion, V. XII, 2270, and the Argument. *See* IB at 6 (Argument I introduction) and 15 ("exculpatory desperation").

[2]The lower court "concede[d]," the actions by state actors were "not admirable" and cannot be "condoned." V. 24, 4714. The lower court erred by not taking the next step - finding their uncondonable conduct undermined confidence in the result.

[3]The FDLE agent testified about her scientific findings in the case, not about her armed guards.

and the prosecutor were determined to go in this prosecution; there were key State witnesses - snitches - who did not have armed, FDLE, escorts. How would jurors assess *their* testimony, and the prosecution in general, if they knew the desperate, oppressive, and frightening predilections of the prosecution?

Exculpatory facts include facts that:

> raise "opportunities to attack" the "good faith" of the prosecution;[4]
>
> carry "the potential" for discrediting the "methods employed in assembling the case;"[5]
>
> could "undermine the ostensible integrity of the investigation," and its "reliability;"[6]
>
> reveal "a remarkably uncritical attitude," or downright hostility about, what is true;[7] and/or
>
> "attack[] the process by which" the prosecution "assembled the case."[8]

With full knowledge of what the prosecution did in this case, "[t]he defense could have challenged the prosecutor's good

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[4]*Kyles v. Whitley*, 514 U.S. 419, 445 (1995).

[5]514 U.S. at 44 (citations omitted).

[6]514 U.S at 448, 449; see also *Guzman v. DOC*, 663 F.3d 1336, 1344, 1354 (11th Cir. 2011) (The "defense attorney could have argued" that the evidence impugned "the character of the entire investigation.")

[7]514 U.S. at 445.

[8]514 U.S at 449, n. 19.

faith." 514 U.S. at 449, n. 19.[9] There is no requirement that Appellant show a "nexus between the alleged misconduct" and a certain witness's testimony, BA at 16, and it would be

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[9]The State writes this is not a *Brady* claim because defense counsel knew what happened with Ziegler and brought it to the court's attention. BA, at 12-13. But Appellee did not respond to Appellant's statement of what defense counsel did and did not know, as set out in the IB at 19. All defense counsel learned was *Sheriff McMillian* had asked Ziegler to leave the lab so she could not be served by subpoena. Defense counsel was not told:

> Ziegler knew "FDLE had investigations going on here in DeFuniak about the sheriff and some of the things that were going on in the office and frankly I was very upset. I didn't like the **menacing tone of voice** that was being used by both the sheriff and the state's attorney in this case. I figured I was just one individual. They had an entire office of deputies and that I could disappear very easily if they wanted." (V.17, 3201);
>
> Ziegler had worked for FDLE for 15 years and testified over 100 times and "never saw anything like this;"
>
> These circumstances caused Ziegler's FDLE supervisor to be "concerned for her well-being" and so he sent armed FDLE agents with her to Court "for her personal safety" inasmuch as she felt she had been physically threatened by the prosecutor and the Sheriff;
>
> When Ziegler arrived at the Courthouse the prosecutor grabbed hold of her arm and forcefully told her she was going with him to the Sheriff's office, but the armed agents intervened; and
>
> This law enforcement officer, had she been at the courthouse alone, "would have been petrified." IB pp. 16-19.

For prosecutors and Sheriffs to petrify witnesses is exculpatory. The lower court erred as a matter of law by holding that "trial counsel would not have been permitted to inquire of Agent Ziegler in front of the jury regarding the State's alleged intimidation tactics." V.24 at 4723.

"objectively unreasonable" for this Court to cabin *Brady* in such a manner. *Guzman,* 663 F.3d at 1353.

> In determining the impact of the State's action in suppressing favorable evidence, courts should consider how the defense's knowledge of the withheld information would have impacted not just the evidence presented at trial, but also the strategies, tactics, and defenses that the defense could have developed and presented to the trier of fact.

Id. (emphasis added). If Defendant had been advised by the FDLE agents, the Sheriff, or the prosecutor of the battery on Agent Ziegler-both mentally and physically-it would have "impugned...the character of the entire investigation." *Id.*

A. The State's False Testimony-Giglio v. U.S., 405 U.S. 150(1972)

The State does not deny that jailhouse snitches Satan and Ozio were key witnesses for the State or suggest that the case against Appellant was strong without their testimony.[10]

1. Satan lied[11]

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[10]Jailhouse snitch testimony is fraught with peril. *See* The Justice Project, Jailhouse Snitch Testimony: A Policy Review 11-13 (2007)(snitch testimony is still regarded as the least reliable type of testimony in the criminal justice system").

[11]The State argues "[t]rial counsel extensively impeached McCollough at trial. (Tr. Vol. VIII 1647-1652)." BA p. 7. While it is unlikely that anything can be extensive that occurs in 5 pages of transcript, those five pages show that Satan had prior convictions and very little else. And the re-cross that the State does not mention (*Id.* 1655-58) was even less effective.

But even if the state's characterization of the cross-examination is fair, it is not pertinent. Despite "'ample impeachment,'" *Guzman*, 663 F.3d at 1344, and "fully recogniz[ing] that [the state witness] was impeached," *id.* at 1350, it would be

a. Concealing his sexual perversion-State protection from jailhouse rape

The prosecutor knew Satan was charged with and jailed for criminal conduct - deriving support from prostitution. Satan's wife, the prostitute, swore to the prosecution that Satan's desire and practice was to make her have unprotected sexual intercourse with men after which Satan would perform oral sex on her. He especially like performing oral sex immediately after black men had ejaculated. The State cannot deny this - it's their own, once concealed tape, that says it.

George Broxson was an inmate in the same jail cell with Satan. He testified below that Satan told him that he was charged "with a sexual deviant crime" and "didn't want it known" in the jail so he "made an offer to the state attorney's office and the sheriff had worked out a deal for him." V. 20, at 3927-30. Satan stated "he would do whatever it took for this crime not to" be revealed. The State has not denied this happened.

Thus, Satan had a deal to help the prosecution in any way possible so long as it was not revealed to other inmates that Satan sought out semen. The State argues "Whitton has never offered any evidence to support the notion that McCollough's

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objectively unreasonable to conclude that this witness's testimony could not have affected the jury's decision. *Id.*

alleged[12] sexual proclivities constitute *Brady* material." BA 6-7. Really? Consider the following hypothetical closing argument:

> "Ladies and gentlemen of the jury, in return for the state protecting him from serial rape in jail, Satan agreed to do whatever the state needed. And he has."

b. Concealing his betrothed, the prosecutor's mother

In documents created before the trial, which the prosecutor had, Satan listed the prosecutor's mother, Katie Inez Adkinson, as his "next of kin." Also before the trial in this case, Satan wrote to prison authorities that the prosecutor's mother was his girlfriend and that "we have plans to get married when I get home." IB at 9. The State cannot deny this.

So...Satan (the sexual deviant) was to marry the prosecutor's mother, as soon as possible. The prosecutor would not want this known to the jurors. Thus Satan was passed off as a "close personal friend" of the prosecutor's mother.[13] Plainly

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[12]Not *alleged*. It was discovered by the prosecution speaking to Satan's wife, recording her, and then charging Satan. Whitton did not allege it; the State did.

[13]The state argues that the defense brought the relationship between the prosecutor's mother and Satan out at trial. BA at 7. The only thing the defense could get out of Satan was that the prosecutor's mother visited him in jail and they were close personal friends. The prosecutor did not say:

"Hold on there, future step-dad--tell the truth."

Instead, the prosecutor feigned indignation: "disbelieve his testimony, I suppose, because my mother knows him. And what that has to do with this case, I don't know." Tr. at 1996(emphasis added). This is the same prosecutor who scared an FDLE agent senseless in an attempt to have her not testify to the truth.

this is material exculpatory evidence.

c. Satan confessed to lying at trial

i. Satan said that he did what the prosecutor told him to do

Paula Saunders is a public defender and was assigned Mr. Whitton's appeal. She testified that her office received correspondence from Billy Key dated October 23, 1993, a little over a year after the trial.[14] Keys wrote he had met Satan in jail and Satan wanted to retract his testimony against Whitton because he only testified to what prosecutor Adkinson told him to say after he made a deal. Satan did not actually know or hear the things he testified to. IB at 10-13.

Ms. Saunders talked with Mike Minerva, then with CCR-N, who told her to get a sworn statement from Satan immediately. She also spoke with Bill Bishop, one of the defense attorneys at trial. Bishop told Saunders he would go and see Satan. Ms. Sanders noted a later conversation with Bishop in which he said he saw Satan and Satan would not talk with him because he was afraid of a perjury charge.[15] Key wrote to Saunders again and said that Bishop had visited Satan and told him he would face a

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[14]Mr. Key also testified. At the time of his testimony he had his own business in Fort Walton Beach, but at the time he wrote the letter he was a prison librarian. In his testimony he verified everything that was in his letters.

[15]Bishop testified below that he never went to see Satan. This is the opposite of what Saunders says Bishop told her.

perjury charge which Bishop would help prosecute! Key said Satan now would only talk to Whitton's appellate attorney "since the others were from the county he was prosecuted in 'Walton County.'" *Id.* Ms. Saunders promised Appellant she would go see Satan as soon as possible. She never did; and Satan died.

ii. Key's testimony and letters about what Satan said are admissible

The State cannot deny Satan said what he said to Key - he lied at trial and Adkinson put him up to it. Key testified and was fair game for cross-examination and there is no finding that Satan did not say what Key recounted. The only question now is whether Satan's statements can be considered for the truth. These statements were against Satan's interest. He, like everyone else - including FDLE agents - knew to fear this prosecutor and sheriff in this county. Saying what he said to Key was almost certain to cause him criminal or other adverse consequences. A perjury charge in a capital case was a real possibility.[16] And there were sufficient indicia of trustworthiness to believe these statements. First, the statements were made close to the time of the trial testimony.[17]

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[16]The state proved this by threatening Ozio with perjury because he said his trial testimony was false.

[17]*Cf. Lightbourne v. State*, 644 So.2d 54, 57 (Fla. 1994) (statement declarant lied inadmissible: "it cannot be said that a reasonable person would believe they were subject to a perjury penalty eight years after providing testimony at trial....[T]he statute of limitations had run so that [the witness] could no

Second, Satan's statements are credible because we know what this prosecutor is capable of. Even FDLE agents endure his intense pressure not to tell the truth.[18]

2. Jake Ozio lied, but the State sealed his lips

a. Lies about his deal and that he heard Appellant say he killed the victim

Jake Ozio testified he: was not promised anything for his statement and testimony against Mr. Whitton (TT at 12 & 20, July 30, 1992); did not think he needed to help himself out of his situation in jail (*Id.* at 15); was not trying to lessen his sentence by testifying (*Id.* at 16); never thought he could help himself out by giving a statement or testifying (*id.* at 20): "I had no idea." (*Id.* at 33); and never believed he would be sentenced to prison for his offenses. *Id.* at 32. However, in his post-trial sworn affidavit, he stated:

> In April 1991, I was arrested on burglary, grand theft and felony possession of a short-barreled shotgun and taken to the Walton County (Florida) jail. I was arrested with a friend of mine, Kelvin Wallace, who was placed in a different cell. Kelvin and I had come to Florida together from Texas for spring break.
>
> I was in a cell with Gary Whitton, Kenneth Wayne McCollough and Michael Wayne "Patches" Johnson. **I had**

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longer be prosecuted for perjury." Not true here).

[18]Finally, state rules of evidence cannot trump the Eighth Amendment. These statements would at the very least be admissible in a capital sentencing proceeding, whether they are hearsay or not. *Sears v. Upton,* 130 S.Ct 3259, 3263(2010); *Green v. Georgia*, 442 U.S. 95, 97 (1979) (Georgia's hearsay rule violates the Due Process Clause).

just turned 18 in December 1990, and when I was arrested I was very scared, since I'd never been arrested on felony charges before. **Walton County Sheriff officers told me that the weapons charge carried a 5-year minimum mandatory sentence which made me even more scared.** I was terrified of having to do hard time, a long way from my family and friends, and in an unfamiliar place. I have never been more scared in my life than I was at this time. I was committed to getting out as fast as possible.

I testified at Gary Whitton's trial that I overheard Gary admit to stabbing a man. **I also testified that no one made me any promises in exchange for my testimony. The truth is that I was scared and felt pressured by the police and knew this testimony could help me and Kelvin.** The conversation that I overheard involved three people - Gary Whitton, Kenneth Wayne McCollough, and Michael Wayne "Patches" Johnson, but **I never heard Gary Whitton admit he had killed anyone, and I never heard him say that he stabbed anyone.** The Whitton case was big news around the jail at that time. I remember a guard poking around the cells trying to find information about the Whitton case.

I took a ride with Walton County Sheriff officers to show them the pawnshops where I'd stolen items, and hopefully to recover those items in order to reduce any restitution that might have to be paid. **During the ride, Captain Trusty told me that I could really help myself if I could tell him anything about Gary Whitton's case. Captain Trusty was the one who brought the subject up.**

I had daily contact with my co-defendant and close friend, Kelvin Wallace. I felt great pressure to help him in any way I could. **Walton County Sheriff officers told me repeatedly that I was going to do five years. I was told point blank that if I wanted to get out of doing five years, that I had to help them. I was told explicitly that in exchange for my testimony against Gary Whitton, the five-year minimum mandatory weapons charge would be dropped. I felt like I had no choice. I was terrified at the thought of spending five years in Florida prison. I felt like the only way out was to give them what they wanted - to testify against Gary**

Whitton. I told them that anything having to do with me had to include Kelvin Wallace as well. They told me explicitly that if I testified against Gary, Kelvin would get the same deal I got. Had Kelvin and I not both been getting out, I never would have agreed to testify.[19]

Before I had these conversations with members of the Walton County Sheriff's office, there was no movement in my case. Following my agreement to testify, my case moved so fast I could barely keep up with it. I was also given a trusty position at the Walton County jail. There is no doubt in my mind that this was a result of my agreeing to testify against Gary Whitton. I was told by Walton County Sheriff officers that they wanted my case wrapped up before the Whitton trial, so that I could appear in street clothes and thus would appear to be more reputable.

Both Kelvin Wallace and I were given probation on our charges. We walked out of the jail together, went back to Texas together and moved in together. Kelvin received his probation paperwork and orders to report almost immediately thereafter, despite the fact that there had been some mix-up with his social security number or driver's license and he had to resubmit some information.

When Gary Whitton went to trial, I was flown to Florida for my testimony. After my testimony, I was told never to return to Florida. I never received any paperwork from Florida, nor had to serve any conditions of my parole. Ex. 47.

Ozio testified he was not scared and was not offered a deal when in fact he was terrified and was offered a very significant deal, which he accepted. The State argues that "no-where in

[19]The prosecutor contended Wallace, who did not testify, got out of jail just like Ozio had, so Ozio did not have a special deal. TT at 23-27, July 30, 1992. As Wallace testified below, when they got out of jail, **Ozio told Wallace that if it was not for Ozio they would both still be in jail in Walton County**. He did not go into detail and Wallace did not ask. PC 18, at 297.

Ozio's affidavit did Ozio claim he told the police or the prosecutor that he intended to lie at trial" and "absent any evidence that the prosecutor knew Ozio's testimony was false, the collateral court correctly denied Whitton's *Giglio* claim." BA at 11-12. The State is incorrect. Ozio swears: "I was told explicitly that in exchange for my testimony against Gary Whitton, the five-year minimum mandatory weapons charge would be dropped. I felt like I had no choice." The deputies who made these promises knew that Ozio was lying when he swore he had no deal. As a matter of law, so did the prosecutor.[20]

b. <u>The State sealed Ozio's lips by threatening perjury and opposing a deposition (IB at 14-15.)</u>

The prosecutor grabbed an FDLE agent by the arm and said, forcefully, we are going to the Sheriff's office. Four armed FDLE agents intervened. How would Ozio have fared had he come to Walton County after being threatened by the State with perjury if he said what was in his affidavit? Not even FDLE agents want to go to Walton County without an armed escort. And according to the State now, nothing in the Ozio affidavit even shows a constitutional violation. What did the state have to fear?

The State let Ozio lie about his deal at trial, and then

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[20] *Kyles,* 514 U.S. at 437-38 (1995)(a "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation...the prosecutor's responsibility for failing to disclose known, favorable, evidence...is inescapable.").

successfully opposed a request to depose Ozio so he could tell the truth. Now the State has the temerity to write this Court must guard against "manipulation of the criminal justice system" - by the *defense*. BA at 12. There truly is gamesmanship here, but it is not by Appellant. If a deposition is not allowed under these circumstances, then Florida has no mechanism for ferreting out false testimony in capital cases.

B. Suggesting There Were Two DNA Samples

Agent Ginsberg took a sample of blood from Mr. Whitton's boot using a gauze pad and determined it was consistent with the victim's blood. He sent a sample to the FDLE lab in Jacksonville. Agent Ziegler testified about what she received from Ginsberg--a swabbing with blood on it--and, based upon DNA testing, it in fact did not match the victim or defendant. BA at 19.

The prosecutor argued that what Ziegler tested and what Ginsberg tested were different samples which could have come from different areas of the boot so, in fact, the victim's blood could have been on the boot. He argued Ms. Ziegler's "particular sample," ROA 1953, was a "swab" and "not a gauze pad, as Lonnie said he took that blood off there with." R. 1954. Ziegler testified below that a swab is simply a piece of gauze. The prosecutor had no basis to say the two samples were not the same.

The State does not deny that this argument was made, that it was misleading, and that it was consistent with this prosecutor's

disdain for the truth. The State simply says that this was prosecutorial argument, and "[a]rgument is not evidence." BA at 17. The State takes 5 pages to explain that the jurors could not have been misled by this misleading argument.[21]

C. The Prosecution: "we are not gonna bring it up"

Unhappy with FDLE agent Ziegler's scientific findings, Lt. Mann in the sheriff's office contacted another DNA lab and yucked it up about "we've got problems. (Laughter)." Ex 11, SV1, 47. He said (falsely) that "the girl who did the DNA, this was her first case;" id.; that the Sheriff "has been rattling cages up in Tallahassee;" *id.* at 51 and "hopefully... with what blood we" have left you are "able to do this other test. You know, this is where you come in." *Id.* Mann agreed "what we want to do is try to find someway where they probably screwed it up." *Id.* at 54.

The State responds this is simply "an investigators' exploration of additional testing." BA at 21. It is another illustration of the "remarkably uncritical attitude," or downright hostility about, what is true. *Kyles*, 514 U.S. at 445.

This tape recording was found at the Florida repository. Defense counsel was not told about it, knew nothing about the efforts by the Sheriff's department to undermine FDLE, did not know there was additional blood to be tested, did not know that

[21]The State also argues this claim should have been raised on direct appeal. BA at 17. Appellant cannot find where this defense was raised below; the lower court ruled on the merits.

there was this taped conversation, or that the Sheriff was "rattling cages" concerning Ziegler, not just during trial, but back at a time when "we haven't even had depositions yet." *Id.*

D. Cellmark - Insufficient vs. Inconclusive

So then Clayton Adkinson, the prosecutor, personally took over, contacted another independent lab, paid the lab $1,190.00 for DNA testing (SV1, at 106), and made himself the contact person with the lab. *Id.* at 122. He was told DNA testing at this new lab was "inconclusive," i.e., the results could not be tied to the crime.[22] The report provided to defense was that there was no testing because there was not enough DNA to test. IB, p. 22. Why did the prosecutor not tell the defense the truth?

E. *Whitton v. State*, 649 So 2d at 863, "a receipt indicating that Whitton obtained a car wash on October 10 at 2:37 a.m was found in his car;" *Not True*

The State wrote in its brief to this Court at page 24:

> This car wash issue is a red herring. The relevance of the car wash ticket was always to establish Whitton was in the vicinity of the gas station/car wash at a certain time following the crime. The State never proceeded on a theory Whitton purchased a car wash ticket with the specific intent to cover up his crime.

This is untrue. In the state's brief on direct appeal, (another) attorney wrote: "The state's case consisted of ... (5) testimony

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[22]The state complains that no evidence shows that there was testing that was inconclusive. BA at 23. The records from this lab were admitted below without objection (V17, at 3274-75), and show high molecular DNA was extracted from blood on the boot and the testing results were "inconclusive." SV1 at 127.

that Whitton *had his car washed* after leaving the motel. R. 1517, et seq." (emphasis added). This was about washing a car, not being in the vicinity.

The Assistant Attorney General on direct appeal was correct. In his examination of an employee of the car wash, the prosecutor asked "When you use the car wash, now, do you have to actually use that ticket to use the car wash?" and the answer was "Yes, sir. You would have to punch in this code right here." And to the question: "So could they get a car wash and just punch in the numbers and then put the ticket in the floorboard or wherever they wanted to?" the answer was " Yes, sir." R. 1520.

During cross examination the State confronted Mr. Whitton about the imaginary car wash: "Q. You get in your vehicle, you drive back to Pensacola and you casually stop and get gas and get a car wash." Mr. Whitton answered "I never got a car wash." R. 1874. And the state argued to the jury "wouldn't it be reasonable that the defendant would have washed his car out after he had been in that motel room and having beaten James Maulden to death and having gotten blood all over him." R. 1987-1988.[23]

The problem is, the state knew that the car wash ticket was not used. A Walton County Sheriff's Report reveals: "**Whitton did**

[23]This Court understood the State's theory: Whitton got a car wash, not just a ticket. *Whitton*, 649 So 2d at 863 ("a receipt indicating that Whitton **obtained a car wash** on October 10 at 2:37 a.m was found in his car.")(emphasis added). The state conceded below the prosecutor made this argument. V. 23, at 4456 n. 12.

not use the car wash at the Conoco Station with the receipt found." Ex.6, SV1, 31(emphasis added).

When the prosecutor, the direct appeal attorney for the State,[24] and this Court think its pertinent Whitton washed his car, how is the fact he did not do so suddenly a "red herring?"

F. Lying to Maureen Fitzgerald; *Not True*

The prosecutor argued to the jury that Whitton told the victim's girlfriend that the victim was at a different hotel than he actually was. A contemporaneous police report says Whitton told her the correct hotel. IB, p. 24. The state responds that because Whitton supposedly lied about three other things, it was alright for the prosecution to lie about this one. BA at 28-29.

G. The Corrupt Prosecution

The State's misconduct in this case was pervasive. Agent Ziegler knew "[t]hey had an entire office of deputies and that I could disappear very easily if they wanted." (V.17, 3201). If she could "disappear very easily," what chance did an inmate have?

There can be no dispute - the state's action in this case were uncondonable. Nowhere in the Brief of Appellee, however, is there even a whiff of disapproval. Singularly, each wrong act by the state requires relief. Cumulatively, they conclusively remove confidence that the right result was reached in this case.

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[24] "The likely damage [of suppressed impeachment evidence] is best understood by taking the word of the prosecutor...." Kyles, 514 U.S. at 444.

Knowing what we know, if this case was in a trial court today there would be an acquittal, or conviction of a non-capital offense, or a plea - like the plea offer that was made before Satan and Ozio were conjured up.

ARGUMENT II: INEFFECTIVE ASSISTANCE AT GUILT/INNOCENCE

A. Car Wash Ticket

Trial counsel should have known police reported the car wash ticket had not been used. If they knew, they were ineffective. If they did not, they were hoodwinked.

B. Fingerprint Evidence Inside Sandwich Wrapper

Defense counsel wanted to show that the fingerprints and palm print inside the sandwich wrapper - which did not match Appellant or the victim - must have come from the actual killer. The State, however, introduced evidence that the prints could "just as easily" have been made during the manufacturing process. R. 1811. Had defense counsel asked the manufacturer he could have shown the jurors it was impossible for a person at the plant to have left the prints. It was unreasonable of counsel not to ask.

C. Obstruction of Justice

The state does not contest that defense counsel did not learn or reveal to the jurors exactly what the prosecution and FDLE agents did. The State simply writes that the evidence would not have been admissible unless Agent Ziegler had changed her testimony about the DNA. BA at 36-37. It was unreasonable of

defense counsel not to ask Agent Ziegler a few questions and learn she was present with armed guards because the prosecutor and the Sheriff had put her in fear for her life for having the nerve to honor court process (a subpoena) and tell the truth under oath. What the prosecution team did was admissible at trial and could have cast the state's case in an entirely different - and exculpatory - light.

D. Cellmark-Desperation

Defense counsel knew the State was desperate to discredit Agent Zigler but could not do so. It was unreasonable not to have shown this desperation.[25]

E. Fight Lasted Five Minutes at Most (not "thirty minutes," *Whitton v. State*, 649 So.2d 861, 867 (Fla. 1994)) and It Is Not Possible to Determine if the Victim "was aware of what was happening to him." *Id.*

Defense counsel, not the prosecutor, elicited testimony from the medical examiner at trial that the fight resulting in the victim's death went on for thirty minutes. The prosecutor rubbed this in during closing argument: defense counsel "got the answer he wasn't expecting...'roughly thirty minutes.'" ROA 2235.

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[25]The State writes several times that because Appellant admitted being in the hotel room after the victim was killed and that he walked in blood then any other evidence that the blood on his shoes was not the victim's is not harmful. *See, e.g.*, BA at 39. What is harmful is failing to show that the State was furious with, and sought to go around, its own FDLE in its zeal to prosecute. This overzealousness with FDLE suggest overzealouness with .....the prosecutor's soon-to-be step-father, Satan, and the 18 year old from Washington.

Both the trial court and this Court concluded that the "attack" lasted thirty minutes[26] and Maulden "was aware of what was happening to him" and "felt pain." *Whitton,* 649 So.2d at 867. The State does not address the unreasonableness of defense counsel eliciting such testimony. Neither did the lower court.

The State writes that it is *not* fact that this Court was wrong because the trial medical examiner said "there is no way I can measure" how long it took. BA at 43. But in its brief on direct appeal, the State wrote the trial court's finding that "'although he could not precisely measure the duration of the beating, he would estimate it at thirty minutes'" was "supported by the record." BA No. 80,536, pp. 32-33. What's changed?

The medical examiner was wrong. Dr. LeRoy Reddick testified below and the State did not dispute his expertise. He usually testifies for the State **against** persons charged with murder. He testified it was *not plausible*, even possible, that this episode lasted thirty minutes. V.19, 3692. It lasted "[n]o more than five minutes" and it could have been shorter than that. *Id.* 3692-94.[27] He also testified that it is not possible to conclude

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[26]Defense counsel unreasonably and prejudicially asked the state's medical examiner, on cross-examination, how long the fight went on, and the medical examiner stated thirty (30) minutes. **The state argued defense counsel "got the answer he wasn't expecting...**'Roughly thirty minutes'" R. 2235 (emphasis added). The lower court did not address this grievous error.

[27]The State incorrectly writes this was not Dr. Riddick's medical opinion. BA at 42. Counsel for the State said below

to a reasonable degree of medical certainty that the victim experienced fear, pain, or suffering. *Id.* 3693-95. BI at 29-31.

Trial counsel unreasonably did not consider consulting an independent medical examiner. V.20, 3970. After consulting with someone like Dr. Reddick, defense counsel could have conducted a proper cross-examination, and/or presented real rebuttal.[28]

F. Mr. Whitton Was Not Present at the Time of Death

Dr. Riddick testified in his opinion the crime occurred at the earliest at 11:00 p.m. the night before the victim's body was found. IB, at 31-32.[29] The State says that "Whitton does not point to any proof that if the time of death was" at 11:00 p.m.

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that this was Dr. Riddick's opinion: "So where you primarily disagree with Dr. Kielman is...the notion that he could offer an opinion...that from the time the struggle ensued to the time of death could have been as long as thirty minutes? A. That's correct." V.19 at 3706; *see also* 3707. His opinion could not be based solely on the blood involved (BA at 42; V19 3709) but was based upon "his experience." V19 at 3707.

[28]The lower court did not address whether this attorney conduct was unreasonable; it found that even if counsel was unreasonable, there was no prejudice. The manner of death was the most important issue in this case - how could expert evidence that a fight lasted less than five minutes and there was no way to tell if the victim felt any pain **not** create a reasonable probability of a different result?

[29]The state writes this was based upon "the opinion of a non-medically trained police officer, Lt. Mann, that when he found Mr. Mauldin dead, Mr. Mauldin's body was in full rigor." BA at 46. Dr. Riddick testified homicide detectives are relied upon for whether a body is in full rigor. V19 at 3725. The State also writes the lower court found Dr. Riddick's opinion on this issue "carries little weight." BA 46. This holding runs afoul of *Porter v. McCollum*, 130 S.Ct 447 (2009). *See* n. 44 and text, *infra*.

or earlier "he could not have committed the crime," and then writes that the motel clerk testified he saw Mr. Whitton's car arrive a little bit after 10:30 p.m. (*id.* at 45, note 7). It is this very motel clerk who makes it impossible for Mr. Whitton to have committed the crime. When this motel clerk first spoke to police he stated that he saw the car at 12:20 a.m. or later. See note 60, IB. The State's argument that we cannot trust (**two**) police reports (BA at 61) is unusual.

G. Evidence Rebutting Motive; Whitton Was Not Desperate

The supposed motive for the crime was money. As the state concedes, defense counsel did not introduce evidence that Whitton had received $1800.00 in student loans and salary in the two to three months before this crime. BA at 50. He was not a person who was strapped for cash - he worked, and he had independent loans. He had lost his job but testified he had decided beforehand to take a job offshore, a decision he had told others about.[30] Counsel failed to prove Whitton had his own cash,

[30]The State writes that these prior statements would not be admissible under Section 90.801(3) of the Florida Evidence Code because they would not have been offered to explain subsequent conduct since Whitton did not take the off-shore job -- he was arrested. BA at 51. But explaining subsequent conduct is only one exception to hearsay under 90.801(3)(a). The other one is when the prior statement is offered to prove the declarant's then existing state of mind, including a statement of intent, plan, motive, or design, when such state of mind at that time or any other time is an issue in the action. "If an out-of-court statement of a person is offered as circumstantial evidence of his or her state of mind, the statements are not hearsay and are admissible, if relevant." Charles W. Ehrhardt, Florida Evidence,

access to more cash, and planned to continue working.

H. Blood - You Can't Clean It Off in the Bathroom

Dr. Riddick testified that if the state's theory was correct - the assailant attempted to wash blood off his or her body in the hotel bathroom - "a large amount of blood would be transferred" to the car because "you can't clean it off in the bathroom...You use a brillo pad to clean it off." V. 19, p. 3692. The state argues the assailant might have had a change of clothes (but not shoes?), but he or she did not have a change of arms and hands.[31] It was not reasonable of trial counsel to prove that an assailant's car would have been blood-filed.

I. Incompetent Police Investigation

See IB at 36.

J. Victim was Drunk, Flashing Cash, Getting Rolled

The State concedes that "trial counsel could have put on Mr.

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886 (2012 Edition). Mr. Whitton's statements to others would also be admissible to rebut the suggestion that his testimony that he had already decided to work offshore before losing his job was a recent fabrication. *Id.* at 831.

[31]The State also argues that Dr. Riddick conceded on cross-examination that it was beyond his ability to answer a question. The question was:

> Could you conclude, within a reasonable degree of medical certainty, that the assailant was unable to wash away such an amount of blood in the sink that he - he would not have gotten a significant amount of blood in his car.

Anyone would answer this nonsensical question with "I - That's beyond my ability to testify." V. 19, p. 3701.

Lee to bolster a reasonable doubt defense." BA at 58. Boy howdy! Of course they could have and should have. It was prejudicially unreasonable for counsel not to have shown just how much of a target this victim was[32] and how he had already been "rolled by a transvestite."[33]

K. Malleable Maleszewski

This motel clerk was readily impeachable with prior inconsistent statements and omissions to law enforcement. There are two different police officer reports regarding this witness, neither of which contain any mention by the witness that he saw anyone do anything before midnight. Defense counsel did not use these reports. The state says that "[i]t could be that Mr.

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[32]The State argues that the victim was not flashing his wad of money around, even writing that Mr. Lee did not say he was flashing money. BA at 58. But the state cross-examined him:

> Q. ...Would you characterize Mr. Maulden as flashing his money around?
>
> A. He wasn't hesitating a bit about it.

V. 18, at 3591. He was not waving his hand around and saying "Hey everybody; look at all the money." *Id.* But it was "such a huge wad of money. You know, average people wouldn't carry money around like that." *Id.*

[33]Police documented the victim had earlier been ripped off for $500.00 and "had pick[ed] up a black female prostitute who turned out to be a male." IB at 38. And he told Cynthia Shelton "he had **just been rolled** by a prostitute" that he thought was a woman but turned out to be a male." *Id.* The State writes this is inadmissible (BA, p. 570), but it is a spontaneous statement describing an event immediately thereafter and it surely is trustworthy - who would lie about that? Ehrhardt, at 862. Even if hearsay, it would be admissible at capital sentencing.

Maleszewski did not report it. It could be that the officer who actually interviewed Mr. Maleszewski did not write it down." BA at 61. Both those reasons are very good for the defense. Why wouldn't a defense attorney want the jury to hear them? Or, "[i]t could be some other reason." *Id.* There is no possible "bad for the defendant" reason.

L. Inadequate Investigation Regarding Snitches-"He Wasn't Truthful About Nothing Ever"

As set forth in the Initial Brief at 42, Shelia Lowe testified expressly about Satan's "reputation" which "lots of others in Defuniak" including "law enforcement" knew - Satan was known to be "not truthful." The lower court erred by not considering this testimony. *See* note 62, IB.

Argument III: SECRET NOTES BETWEEN JURORS, BAILIFF, AND COURT

A. A New Trial was Required by Florida Statute, Rule, and Case Law

"[T]he statutes of the State of Florida prescribe certain safeguards pertaining to the conduct of the trial which *must be followed exactly.*" *Holzapfel v. State*, 120 So.2d 195, 196 (Fla. 4th DCA 1960)(emphasis added). One "of these safeguards is section 918.07, Fla Stat.," *id.* at 197, which provides:

> When the jury is committed to the charge of the officer, the officer shall be admonished by the court to keep the jurors together in the place specified and not to permit any person to communicate with them on any subject except with the permission of the court given in open court in the presence of the defendant or the defendant's counsel. The officer shall not communicate with the jurors on any subject connected

> with the trial and shall return the jurors to court as directed by the court.

Under this statute, "[n]o one is permitted to communicate with the jurors without permission from the Court given in open court in the presence of the defendant or his counsel." *Caldwell v. State*, 340 So.2d 490, 491 (Fla 2d DCA 1977).[34] Similarly, F.R.Crim.P 3.410 provides:

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them the additional instructions or may order the testimony read to them. The instructions shall be given and the testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

Thus, by Florida statute and rule, any questions from the jurors must be submitted to the Court and answered in open court after consultation with counsel for both parties. *Wright v. CTL Distribution, Inc.*, 650 So.2d 641, 643 (Fla. 2d DCA 1995); *Caldwell v. State*, 340 So.2d 490 (Fla. 2d DCA 1976). If a Court takes action on a jury request or question without the defendant being present, and/or without opening court, and/or without advising counsel for the parties, it is error requiring reversal. *Slinsky v. State*, 232 So.2d 451 (Fla 4th DCA 1970). If the bailiff answers the question - even correctly - outside the presence of the defendant, reversal is required. *Holzapfel,*

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[34] *See also State v. Merricks*, 831 So.2d 156 (Fla. 2002); *Ivory v. State*, 351 So.2d 26 (Fla. 1977).

supra.[35] These strictures were not followed exactly in Appellant's case, and a new trial is required.[36]

During Appellant's capital trial at least four notes were written to the judge by the jurors and at least one note was written by the judge to the jurors. The State concedes that "[t]he record is silent as to three of the juror notes. The way the trial judge handled these three notes is not in the trial record." BA at 71. *Ipso facto*, Florida Statute and rule were violated and a new trial is required.[37]

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[35]"[T]he potential for prejudice and the danger of an incomplete record of the trial court's communication with the jury are so great as to warrant the imposition of a prophylactic per se reversible rule." *State v. Franklin*, 618 So.2d 171 (Fla. 1993).

[36]The lower court did not address the Florida statute, rule, or this case law. Neither did the State in the BA.

[37]The State argues that one of the four juror notes - the one in which the jurors expressed concern and uneasiness with a person recording the proceedings in the courtroom - was addressed by the judge in open court when the judge stated she "had dealt with the situation that you brought to my attention" and that she would "file this note with the clerk." There is no evidence that the note the judge was talking about was the one in which the jurors expressed their concerns. The complete record evidence is the following:

> Let me make a general announcement before you call your first witness, and that would simply be to advise the jury that I have dealt with the situation that you brought to my attention. And I will, for the record, just file this note with the Clerk.

Tr. Vol. 11, at 2152. This incident supports Appellant's arguments. How/when did the jurors write whatever note to which the judge referred? How did the judge get the note? When had the judge "dealt with the situation." How did she deal with it?

B. The Evidentiary Hearing Conducted Below Illustrates the Need for a Per Se Rule

Instead of granting a new trial, the lower court had a hearing on what happened at trial, but excluded any input from the actual jurors on the matter.[38] The resulting hearing illustrates why there is a *per se* rule of reversal under these circumstances. The actual trial judge testified that she had no memory of what had happened and then testified to what her habits were under similar circumstances. One defense attorney testified that he remembered a note about a juror's feet not touching the ground and a note about how much time a model prisoner would have to serve on a life sentence. V20, at 3959. He did not recall how he found out about these two notes. *Id.* at 3960. The other defense attorney only remembered one note, did not remember what it said, and did not remember when it occurred. The prosecutor had no memory.

Thus, there are four notes which the record does not explain. Defendant agrees that the content of the fifth note - about a juror's feet not reaching the ground - was discussed in open court on the record. *See* BA, pp. 70-71.

[38]Appellee's suggestion that Appellant failed to present any argument on why juror interviews should have been allowed below is specious. BA 77. At least three unexplained notes, a judge with no memory, and attorneys with little, leaves only one other source of probative information - the jurors themselves, who wrote the notes and got the answers. *See* IB at 46, lines 14-20 (including note 67) and at 47, lines 1-15 (including note 68)("These circumstances provided additional support for the motion to conduct juror interviews, Defendant renewed his motion to conduct such interviews, V. 22, 4302, but the lower court would not allow it"), and at 49.

This was the evidence upon which the lower court concluded that everything was done at trial the way it should have been done, despite the fact that "[t]he way the trial judge handled these three notes is not in the trial record." BA at 71. But such a conclusion flies in the face of the rationale for the rules discussed above, *i.e.*, without a contemporaneous record, court's are necessarily "uncertain," *Caldwell*, 340 So.2d at 491, "[n]ot certain as to what actually happened," *Holzapfel*, 120 So.2d at 196, and "can not determine the effect," *Slinsky*, 2332 So.2d at 452, of actions taken but judges and bailiffs. "In the criminal law the procedural aspects affecting the substantial rights of the defendant must be strictly observed," *Holzapfel*, 120 So.2d at 196, and that did not occur.

C. The Claim is Not Procedurally Barred, and, if it is, It Can Only Be Because Trial and/Or Appellate Counsel Were Prejudicially Ineffective

The notes were sealed in the lower court and were not included in the direct appeal record. How was Appellate counsel supposed to raise the claim? If Appellate counsel was required to raise the claim, she was ineffective for failing to raise an issue that would have required automatic reversal. *See* Appellant's Petition for Writ of Habeas Corpus. Similarly, trial counsel were ineffective to allow juror questions and requests to

be addressed, if at all, off the record.[39]

ARGUMENT IV: COUNSEL WERE PREJUDICIALLY INEFFECTIVE AT SENTENCING

A. The Duty to Investigate and the Right to a Meaningful Capital Sentencing Proceeding

"It is unquestioned that under the prevailing professional norms at the time of [Defendant's] trial, counsel had 'an obligation to conduct a thorough investigation of the defendant's background.'" *Porter v. McCollum*, 130 S.Ct 447, 453 (2009)(citations omitted); *see also Simmons v. State*, 105 So.3d 475 (Fla. 2012).

B. The Sentencing Evidence Introduced About Gary Whitton's Upbringing - Around 10 pages From a Brother and an Aunt

The defense presented two witnesses who knew Gary Whitton as he was growing up, his brother Royal Whitton, the only close family member to testify,[40] and an aunt, Ruth McGuiness.[41] Their comprised around 10 pages of transcript. Dr Larson also testified Gary Whitton told him about his upbringing - 16 lines

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[39]The State's argument (BA at 68) that Appellant has not alleged that trial counsel were ineffective is incorrect. *See* IB at 46; *see also* lower court order at V.24 4695. It is equally without merit for the State to suggest because Mr. Whitton did not testify below he cannot prevail. Mr. Whitton verified, in court, the content of the motion containing this claim.

[40]He testified that Gary was "lucky" because he, Royal, got most of the abuse growing up, which was false.

[41]She testified she never saw her brother, Gary's father, abuse him. He did - mercilessly. She did not see Gary at all between his ages of 7 or 8 to 15.

of testimony. ROA XI, p. 2164, ln. 9-25.

C. Unreasonableness: Defense Did Not Go to NY Where Mr. Whitton Was Born/Raised, Seek Available Medical and Social Services Records, or Speak to Teachers and Social Workers, Thereby Depriving their Expert and the Jury of Important Background Material

To prepare for sentencing, the defense spoke with three family members who lived in Florida. *Id.* 3907. They learned Gary's brother, Michael, had been "beat to death" as an infant by his mother and that state police had investigated. Ex. 74, SV 9, 1760-61. They learned the names and ages of Gary's siblings, there were health department and foster care records in New York State, and the family grew up in New York "near Watertown." *Id.*

The defense sent no one to New York for any purpose. V.20, 3838. Tongue testified that it was not necessary because "we had interviewed the ones that we had closer by." *Id.* 3896. They spoke to no school teachers, no foster care workers or record-keepers, and no acquaintances of the family. They did not obtain autopsy records for the death of one of Gary's siblings they had been told about. *Id.* 3908-11. They did not decide to limit the amount of testimony at sentencing. *Id.* at 3897. They simply introduced what they had locally. It is not evident that any person left the office to investigate for mitigation.

This was unreasonable attorney conduct. Counsel did not "'fulfill their obligation to conduct a thorough investigation of the defendant's background.'" *Simmons*, 105 So.3d at 507

(citations omitted). In this case, there was a

> large amount of mitigating evidence that could have been unearthed and presented in the penalty phase. The decision made by trial counsel to limit mitigation without knowing the full extent of available mitigation was not a reasonable strategic decision based on full information. *Id.* at 510.

Since the attorneys conducted an unreasonable investigation, their sole expert could not properly diagnose.[42]

D. Prejudice is Palpable: *What "[t]he jury heard nothing about." Johnson v. Sec'y, DOC, 643 F.3d 907, 937(11th Cir. 2011)*

The detailed post-conviction evidence from non-family members, teachers, administrators, foster care witnesses and others included the following which "[t]he jury heard nothing about." *Johnson, supra.*

> Gary Whitton grew up knowing that his mother could just kill him at any time, like she did his brother, with impunity (known but not presented by counsel);
>
> Gary has brain damage that affects the way he thinks and responds in stressful situations (not known by counsel and actually disavowed at trial);
>
> Gary has post-traumatic stress disorder (not known by counsel and not presented at trial);
>
> Gary has fetal alcohol affects/syndrome (trial expert Larson could not so find);
>
> Gary and four of his siblings have congenital mid-line defects (not known by counsel or presented at trial);

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[42]Dr. Larson did not have interviews of family members, school teachers, or foster parents, neuropsychological testing or department of social services records from New York state, and did not know the midline defects that Gary and his siblings have.

Given Mr. Whitton's mental infirmities, two statutory mitigators apply (not known by counsel and actually disavowed at trial);

Throughout his life when Gary was given opportunities to thrive his father would pull him back(not known by counsel and not presented at trial);

State workers from DSS whose job it was to document and correct the problems in Gary's homes documented but did not correct the problems and did not protect Gary (not known by counsel and not presented at trial);

Gary had foster parents who could have helped him had his parents allowed it (not known by counsel and not presented at trial);

Gary's mother tied the children up with rope all day so she could drink alcohol (not known by counsel and not presented at trial);

School principals and teachers swear this was the worst case of abuse and neglect they had seen in years of teaching (not known by counsel or presented at trial);

School principals and teachers believed there was something wrong with the way Gary's brain worked (not known by counsel and not presented at trial) and that he had brain damage.

The lower court's "finding that the mitigation evidence presented at the evidentiary hearing was cumulative to the evidence submitted at sentencing was an unreasonable determination of the facts" and a "great exaggeration." *Cooper v. DOC*, 646 F.3d 1328, 1353 (11th Cir. 2011).

E. Unrebutted Expert Mental Health Testimony Given No Weight Below

Dr. George Woods testified below on Appellant's behalf. Nothing he testified to was disputed in any manner by the State, and the lower court accepted it all as true. Based upon the

records he reviewed, neuropsychology testing from another expert, and his examination and evaluation of Mr. Whitton, he concluded that Mr. Whitton suffered from significant impairments in brain functioning and suffers from mental diseases and defects that provide mitigating, including statutory, circumstances.

Dr. Woods diagnosed Gary Whitton with (1) brain impairment; (2) fetal alcohol spectrum disorders(FASD). V17, 3380; and (3) Post-traumatic stress disorder(PTSD). *Id.* 3479. He explained how these conditions affected Mr. Whitton, and that they established statutory mitigation factors. He also concluded that trial expert Larsen was provided insufficient information by defense counsel to diagnose Mr. Whitton. <u>None of this was rebutted.</u>

The State argues, and the lower court found, that if the trial expert does not testify in post-conviction proceedings that his opinion has changed, then Dr. Woods' testimony, while accepted as completely true, is legally irrelevant: "Whitton offered no testimony that Dr. Larson would have opined any differently if he would have had the information used by Dr. Woods in reaching his opinion." BA at 99. This is not the law.

First, this Court's cases contain no such requirement. For example, in *Simmons* trial counsel had a mental heath expert who testified at a *Spencer* hearing that Simmons was immature with a moderate to severe learning disability. *Simmons*, 105 So.3d at 504. In post-conviction counsel presented an expert

neuropsychologist, a psychologist, and a psychotherapist who testified about brain damage, borderline personality disorder, borderline intelligence, and statutory mitigation. This Court found trial counsel ineffective without requiring the trial mental health professional to change her opinion.[43]

Furthermore, such a requirement is contrary to *Strickland*. In *Porter* the state court entirely discounted the testimony of the defense expert because he had been cross-examined about his opinion and state experts disagreed with him. The Supreme Court held this was an unreasonable application of the *Strickland* test:

> [N]either the postconviction court nor the Florida Supreme Court gave any consideration for the purposes of non-statutory mitigation to Dr. Dee's testimony regarding the existence of brain abnormality and cognitive deficits. While the State's experts identified perceived problems with the tests Dr. Dee used and the conclusions that he drew from them, *it was not reasonable to discount entirely* the effect that his testimony might have had on the jury or the sentencing judge.

130 S.Ct at 455 (emphasis added).[44]

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[43]*Rompilla v. Beard*, 545 U.S.374, 392 (2005): "While [trial experts] found 'nothing helpful to [Whitton's] case,' their postconviction counterparts, alerted by information from school, medical, and prison records that trial counsel never saw, found plenty of 'red flags' pointing up a need to test further. ***When they tested***, they found [Defendant] suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions." (Citations omitted)

[44]If a Court may not entirely discount such testimony when the state impeaches it, and offers contrary expert testimony, as in *Porter* and this Court's decision in *Simmons*, then *per force* when the evidence is credited and not rebutted it is *Strickland* error to refuse to consider it.

IV. CONCLUSION

Appellant requests that this Court reverse the judgment below and order a new trial.

CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that a copy hereof has been furnished to Carol Dittmar at Carol.Dittmar@myfloridalegal.com and that Carol.Dittmar@myfloridalegal.com is the e-mail address on record with The Florida Bar as of this date for Ms. Dittmar, pursuant to Rule 2.516(b)(1)(A).

I also certify that this Brief of Appellant was computer generated using Courier New 12 font.

Respectfully submitted and certified:

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