IN THE SUPREME COURT OF FLORDA

THEODORE RODGERS,
Appellant,

v.

Appeal No. SC11-2259
L.CT. 01-CR-2386

STATE OF FLORIDA,
Appellee
_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from the denial of the Appellant's Motion to Vacate the Judgment and Sentence pursuant to Florida Rule of Criminal Procedure 3.851. The Appellant, Theodore Rodgers, will be referred to by name. The prosecuting authority, the State of Florida, will be referred to as the State.

The record on appeal consists of nine volumes. Volumes I-V contain the documents from the clerk's office and will be referenced in the briefs of the Appellant by the volume number, "R", and the appropriate page number. Volumes VI-IX contain the transcripts of the proceedings and will be referenced in the briefs of the Appellant by the volume number, "T", and the appropriate page number.

Volume IX [9] of the evidentiary hearing transcripts is not numbered sequentially with the other volumes from the evidentiary hearing. The page numbers for Vol. IX used in the briefs will be the page number contained on the top right corner of each page.

The appellate record received by appellate counsel does not contain the four Defense Exhibits entered into evidence at the evidentiary hearing. Defense Exhibit 4, the report of Dr. Michael Gamache, has been attached to

this brief as Appendix A for the Court's ease and in the event that the exhibits were not transmitted to this Court by the Ninth Judicial Circuit Clerk's Office.

STATEMENT OF THE CASE

On March 21, 2001, the grand jury for the Ninth Judicial Circuit, in and for Orange County, Florida, issued an indictment against the Appellant, Theodore Rodgers, for the offense of first-degree murder. [I,RA] The jury recommended death by a vote of 8-4.[V,R773] Mr. Rodgers was convicted as charged and sentenced to death on June 16, 2004.[I,R166;V,T773]

Mr. Rodgers appealed to the Florida Supreme Court, which affirmed the judgment and sentence in Rodgers v. State, 948 So.2d 655 (Fla. 2006), with the mandate issuing on February 9, 2007. [I,R32] The United States Supreme Court denied certiorari review on October 7, 2007. Rodgers v. Florida, 552 U.S. 833, 128 S.Ct. 59,169 L.Ed.2d 50(2007).

CCRC filed a notice of appearance on March 9, 2007, for representation in collateral proceeding. [I,R7-8] CCRC filed a Motion to Vacate Judgments of Conviction and Sentence on September 18, 2008.[I,R165-200; II,R201-212] On October 31, 2008, CCRC filed a motion to withdraw as

counsel.[II,R222-223] The State filed a response to the CCRC motion on November 4, 2008.[II,R224-294] CCRC's motion to withdraw as counsel was granted on November 17, 2008.[II,R295-296]

An Amended Motion to Vacate Judgment and Sentence was filed on June 16, 2009. [II,R347-400;III,R401-429]. The State's Response to the Amended Motion was filed on July 30, 2009. [III,R495-502]

The evidentiary hearing was bifurcated - three days of hearings were conducted on June 14, 15, and 16, 2010 [V,VI,VII,VIII], and two days of hearings were conducted on December 20-21, 2010.[IX] The postconviction court entered an order denying relief on October 18, 2011.[V,R773-807]

A timely Notice of Appeal was filed on November 16, 2011.[V,R808-843]

STATEMENT OF THE FACTS

A summary of testimony presented at the evidentiary hearing follows:

Gerod Hooper relocated to Florida in 1989 after practicing civil law in New York and New Jersey. [VI,T13] Mr. Hooper worked in several public defender offices in Florida prior to coming to the Ninth Circuit. [VI,T13-15] During that period of time he had experience with six or

seven capital cases.[VI,T15-16] He served as lead counsel in two penalty phases.[VI,T19] Mr. Hooper came to the Ninth Circuit on May 5, 2003, and began representing Mr. Rodgers, whose trial occurred in October 2003, about a month before the trial of the penalty phase.[VI,T25;30] He had to be involved in death cases because he was the only lawyer in the office other than the elected public defender who was death qualified.[VI,T27] Mr. Hooper worked on this case with George Couture and a paralegal, Jeff Lee.[VI,T33]

George Couture testified that he worked at the Public Defender's office and began representing Mr. Rodgers. [VII,T189] This case was the first case that he worked on that went to verdict. [VII,T189] Mr. Couture prepared most of the motions and worked on the penalty phase. [VII,T195] Mr. Couture was also involved in the process of obtaining records, which included identifying records, directing the paralegal and investigator, and ensuring that records were ultimately obtained. [VII,T198-199]

Junior Barrett was hired as an attorney by the Public Defender's office in 1991.[VII,T300] Prior to 2003 he had worked on some capital cases.[VII,T302]

Around the time that the current elected Public Defender took office, around 2002, most of the capital

lawyers left, leaving no one in the office who was death qualified. [VII,T303;307] Mr. Rodgers' case came to the office just about this time.[VII,T303] Mr. Barrett became lead counsel for the guilt phase of Mr. Rodgers' case until Mr. Hooper joined the office.[VII,T306] Mr. Hooper was the one who was death qualified at the time.[VII,T307]

Rowana Williams testified that she had worked for the public defender's office in the 1990's, left, and then returned from 2000-2003.[VII,T337] In the 1990's she handled capital sexual battery cases, but did not handle capital cases.[VII,T338] She did no capital cases while in private practice.[VII,T338] When she returned in 2000, she eventually ended up in the capital division.[VII,T339] According to Ms. Williams, people were switched around so much it was "ridiculous and "crazy."[VII,T340]

Ms. Williams could not recall exactly when she became involved in Mr. Rodgers' case.[VII,T339] Her role was to assist in penalty phase. Couture was the "motions man," Hooper was lead penalty phase counsel assisted by Couture, and Barrett was lead guilt phase counsel.[VII,T339-40]

1. Ownership of the gun

Mr. Hooper testified that he had no role in identifying evidence that would have established that the

gun was owned by the victim's ex-husband, Willie Odum.[VI,T34] Accordingly, he had no role in determining whether to call witnesses to establish that Odum owned the gun.[VI,T34]

Couture believed that establishing that the gun used in the homicide was owned by Willie Odum was important to the case because it was relevant to the question of premeditation. [VII,T199] Ownership of the gun was relevant to penalty phase as well because it went to Mr. Rodger's mental state, demonstrating this was a crime committed under emotional duress, as opposed to premeditation. [VII,T199]

Couture recalled some discussion about calling Willie Odum as a witness not only to establish ownership of the gun but also to support the defense theory that Odum was involved with the victim, had recent sexual relations with her, and had been involved with the victim during her marriage to Mr. Rodgers.[VII,T200] Odum could also be used to humanize Mr. Rodgers for penalty phase.[VII,201] Couture could not remember why Odum was not called but thought there may have been some difficulty locating him. [VII,T200]

Barrett knew that Willie Odum was the ex-husband of

the victim and believed that it was important to prove who actually owned the gun, especially to establish that the victim could have had access to the gun and pulled it on Mr. Rodgers. [VII,T312] Odum admitted in deposition that the gun was his and that the registration for the weapon would establish his ownership.[VII,T313]

Barrett intended to call Odum as a witness and subpoenaed him for trial. [VII,T314] However, at a meeting just a few days before trial, it was learned that Odum could not be located.[VII,T314] The records that the defense had obtained regarding the gun were objected to at trial and not introduced.[VII,T315] Barrett knew the legal procedure required to authenticate a business record, but that was not done in this case.[VII,T316]

Ms. Williams knew that the gun used to kill the victim belonged to Willie Odum.[VII,T345] She recalled that immediately before trial it appeared that he had been served, but that turned out to be incorrect; Odum had not been served. [VII,T346] She did not recall introducing any documents establishing that the gun belonged to Odum.[VII,T346] Ms. Williams believed that establishing the ownership of the gun diminished premeditation because the victim had been calling Mr. Rodgers all day, had told

him to come to the daycare, and had the gun when he got there; Mr. Rodgers did not bring a gun with him.[VII,T347] Defense Exhibit 1, entered into evidence, established that the gun was owned by Willie Odum.[IX,T77-78]

2. Use of a child witness expert

Dr. Sherry Bourg Carter is a psychologist specializing in forensic psychology. [VIII,T356] Her primary area of focus deals with child witnesses, a subspecialty of forensic psychology. Dr. Carter has focused on child witnesses issues for 20 years and has testified in the trial courts of Florida over 100 times on issues related to child witnesses. [VIII,T356, 358] She has worked for both the prosecution and defense. [VIII,T358-9] She often works for the prosecution to make sure that a child witness is competent or capable of testifying and to review interviews of child witnesses to determine if those interviews were done properly. [VIII,T359-60] Dr. Carter's resume was entered into evidence as Defense Exhibit 3.[IX,T78]

A child witness who does not understand the importance of telling the truth may not understand the gravity of the situation, the consequences of making a mistake, or of saying something that someone else said but they did not actually see or hear. [VIII,T448-9] The child witnesses in

the instant case gave different information at different times. [VIII,T449]

Dr. Carter was asked to review the materials related to the child witnesses in this case. [VIII,T360] She reviewed the police reports, the audio statements of the child witnesses and the transcripts, the depositions of the child witnesses, and the direct and cross-examination from the trial. [VIII,T361] She also reviewed the trial testimony of Detective Chiota, who had conducted the pretrial interviews of the children. [VIII,T361]

Dr. Carter testified that there is an accepted set of standards for interviewing child witnesses and that certain types of questions should be asked in order to adequately assess whether the child understands certain concepts. The majority of experts agree that these standards should be used to determine the competency of child witnesses. [VIII,T365;447] Dr. Carter evaluates and testifies about whether those professional standards have been met. [VIII,T447] In analyzing whether a child interview has been conducted properly, it is first determined what the child allegedly saw. An assessment is then conducted to determine what, if anything, might have influenced the child's statement or affected the child's memory.

[VIII,T365] The actual interview is then reviewed to determine if the procedures used were in accord with the protocol.[VIII,T365]

In this case, Dr. Carter noted that three children were involved - Marquis, TiJuan, and Raveen.[VIII,T368-9] Although all three children were asked during the police interview about truth and lies, merely asking this question alone is not sufficient to determine the competency of children because it does establish whether the children knew the meaning of taking an oath, knew that that there are consequences for telling a lie in court, or knew what those consequences might be.[VIII,T368-69] These issues were not addressed with any of the three children.[VIII,T370] The police interviewer did not explore with any of the three children the meaning of the obligation to tell the truth, which is a moral obligation in Florida under case law.[VIII,T370]

For example, after Marquis was asked if he knew the difference between the truth and a lie, he gave no response to most of the questions without significant prompting. [VIII,T372-374] Dr. Carter opined that the exchange with Marquis did not establish that he understood the concept of truth or the concept of a lie.[VIII,T374]

Likewise, Dr. Carter found no evidence in the police interview of TiJuan that he was asked any questions about the consequences of not telling the truth. [VIII,T376] TiJuan was not asked to differentiate between truth and a lie.[VIII,T376] It was not determined that TiJuan understood what a "promise" is.[VIII,T376]

Similarly, although Raveen was asked to "promise" to tell the truth, but there was nothing to indicate that she understood the concept of promise, which with young children is not a given. [VIII,T376] She was asked no questions about the consequences of not telling the truth.[VIII,T377]

Dr. Carter also listened to and reviewed the transcripts of each child's police interview.[VIII,T377] She identified specific problems with the way each child was questioned and problems that occurred with all of the children.[VIII,T377]

According to Dr. Carter, all interviews should be taped, and no conversation with the child should occur outside of the recording. [VIII,T390] However, contrary to that accepted protocol, the interview with Marquis indicates that the officer talked with him prior to the recording. [VIII,T390]

Dr. Carter also said that interviews in the home are discouraged due to the possibility of others being present, which is a "don't," because third parties can communicate with the child through body language, which is not readily apparent on a recording. [VIII,T378-79, 391] This protocol was not followed here. Not only were the children interviewed in the home [VIII,T391], but laughter is audible in the background of the interview of Marquis[VIII,T391], and all of the children were interviewed in the presence of Yolanda Gay, who is presumably the children's mother or close relative.[VIII,T377] Other voices are also audible in the taped interviews.[VIII,T378;415] Since Ms. Gay is an interested party, there is no way to determine what influence she may have had on the children's statements.[VIII,T379]

It is also inappropriate for a parent to participate in an interview of a child and provide answers to the child or direct the child how to answer a question.[VIII,T380]

Also, although it is preferable to have only one police officer conduct the interview since children are more easily influenced by authority figures than adults [VIII,T378-79], and two people asking questions and

interjecting can be intimidating to a child[VIII,T379], the children here were interviewed by two detectives. [VIII, T377] Failure to follow these procedures and protocols creates a large enough chance for error that it should not be done if it can be helped. [VIII,T379]

Additionally, children must be told what the rules of the interview are prior to questioning, because they are more easily influenced by authority figures. [VIII,T385] They should be given permission to say that they don't understand or don't remember something. When this is done, children is more likely to follow the rules since they are used to having rules both at home and at school. [VIII,T385] If a child is not made aware of these rules, the child will answer questions that the child does not know the answer to just to please the authority figure. [VIII,T385]

It is also inappropriate for the adult interviewer to urge a child to answer a question. [VIII,T386] A question can be rephrased, but if a child is urged to give an answer, the child is more likely to give just any answer because of the urging rather than giving an accurate answer.[VIII,T386] Marquis was often urged to give an answer, to say "yes" or "no."[VIII,T386]

It is also inappropriate for a child to be told to give an answer. [VIII,T387] All three children were told to give an answer during the police interview. [VIII,T387] For instance, during Marquis's interview, he was told to give an answer by both his mother and the police.[VIII,T391-2]

Furthermore, an interviewer should not use leading questions with a child.[VIII,T389] Neither should "tag" questions, which give the child information about the answer, be used.[VIII,T389] Children are more susceptible to giving a desired answer, rather than an accurate answer, than adults are. [VIII,T390] The more frequently a child goes along with the lead, the greater the likelihood that the information provided is inaccurate or is misinformation.[VIII,T394] Leading questions and tag questions were used in the interview of Marquis.[VIII,T392-3;395;396]

Finally, if it becomes apparent during an interview that a child has received information about the incident from a third party, the interviewer should ascertain what the exposure was, what the child's feelings are about the person who provided the information, and what, if anything else was communicated to the child. [VIII,T406] This is

important because a child's memory is more easily influenced by what he or she has been told, resulting in contamination of the memory. [VIII, T407; 485; 487] These protocols and procedures were not followed here. Not only did all the children indicate that they had talked with someone else or someone named Keisha prior to the police interview, there are indications that the police talked to the children prior to the taped interview. [VIII,T406;484-5]

Dr. Carter identified additional issues during the police questioning related to Marquis.[VIII,T371] First, the police officers asked developmentally inappropriate questions.[VIII,T382] When a police officer asks developmentally inappropriate questions of a child, it increases the likelihood that the child will provide unreliable information.[VIII,T382] The developmentally inappropriate questions of Marquis related to questions about how long things happened.[VIII,T382;479] Children Marquis' age cannot understand this concept.[VIII,T383;479]

Another problematic question of Marquis was "why did the defendant kick the victim?" Children that age are egocentric and often cannot understand the perspective of others; they can only consider their own perspective.

[VIII,T383;478] Young children cannot assume the perspective of another to determine what that person was thinking. [VIII,T384;478]

Marquis was also asked improper questions about the passage of time.[VIII,T395] Young children do not grasp the concept of time, so such questions are developmentally inappropriate. [VIII,T395]

Marquis was also asked multiple questions at one time, making it impossible to tell which question he was answering. [VIII,T391;393]

Finally, Marquis was improperly given information about what the other children had said prior to his interview. [VIII,T395] Young children have difficulty identifying the source of information in their memories - a difficulty called source monitoring - which is compounded when they hear something that is not their own memory. [VIII,T396] They have difficulty distinguishing their own memory from the memory of others. [VIII,T406]

Dr. Carter noted that TiJuan’s interview was also fraught with impropriety. Contrary to proper procedures, TiJuan’s mother was present during his interview, TiJuan was asked improper leading questions, and any incorrect information TiJuan gave was corrected. [VIII,T398-99]

Developmentally, children TiJuan's age (age six) do not understand the concepts of lies and truth, so they should be questioned using scenarios. The questioning of TiJuan regarding truth/lie was developmentally inappropriate. [VIII,T400] TiJuan was not asked if he understood the concept of promise [VIII,T400], and he was questioned using inappropriate leading questions and tag questions [VIII,T401-404], in addition to developmentally inappropriate questions about time and relationships. [VIII,T401-2] Also, someone had improperly talked to TiJuan after the event occurred but before the interview. [VIII,T403-4]

Dr. Carter observed that Raveen was age eight at the time of questioning, so some aspects of her interview were better than the interviews of Marquis and TiJuan. [VIII,T405] However, Raveen's interview also contained leading questions, developmentally inappropriate questions about relationships, and exposure to information from others who had been interviewed prior to her interview. [VIII,T405;408]

According to Dr. Carter, evaluation of a child witness also includes an examination of the inconsistency/consistency of the child's testimony when

compared with other statements made by the child and others. [VIII,T398;490] Some inconsistencies may not be significant, but others may be relevant to competency and credibility. [VIII,T398;490] For example, all the children here claimed that they were interviewed together, yet Detective Chiota testified at trial that he interviewed each child individually. [VIII,T409] Indications in the interviews suggest the children were interviewed together. [VIII,T411-412]

It is appropriate to look at the totality of the circumstances in an interview, not each isolated problem, when evaluating whether it is likely that the observed interview errors resulted in misinformation being reported. [VIII,T416] With regard to Marquis, Dr. Carter said that the deficiencies of the interview made it impossible to determine whether he understood the difference between the truth and a lie, whether he had the ability to understand his obligation to tell the truth, and whether or not he understood the consequences of telling the truth. [VIII,T418] Similarly, there were insufficient questions asked of TiJuan to be able to determine whether he had the ability to understand the difference between the truth and a lie, the ability to understand the obligation to tell the

truth, or the consequences for failing to tell the truth. [VIII,T419] Likewise, inadequate questioning made it impossible to tell whether Raveen knew the difference between the truth and lie, although most eight years old children do. [VIII,T420] Dr. Carter could not determine whether Raveen understood the obligation to tell the truth and what the attendant consequences would be for failure to tell the truth due to inadequate questioning. [VIII,T420]

Dr. Carter also reviewed the children's pretrial trial depositions. [VIII,T423] She found that in each child's pretrial deposition there was inadequate inquiry into each child's ability to distinguish truth from a lie, inadequate inquiry into each child's ability to understand the obligation to tell the truth, and inadequate inquiry into each child's ability to understand the consequences of lying. [VIII,T424] In fact, TiJuan and Raveen were asked no questions in deposition with respect to the truth and lies. [VIII,T424, 425]

Dr. Carter also reviewed the trial testimony of each child to determine whether he or she had been adequately questioned on the issues of truth/lie, obligation to tell the truth, and consequences of lying.[VIII,T425]

At the time of trial, Marquis was eight years old.

[VIII,T425] Although he was asked very basic questions about the difference between the truth and a lie, there was not an adequate inquiry into his ability to understand the obligation to tell the truth. He was asked only one question about what would happen to someone, not him specifically, who did not tell the truth. [VIII,T425-6] There was no indication that Marquis was asked any question to ascertain whether he understood the meaning of an oath. [VIII,T426]

The trial inquiry of TiJuan was similar. [VIII,T426] He was asked a total of four questions, which were insufficient to determine competency.[VIII,T426]

Raveen was ten and a half years old at the time of trial. [VIII,T427] She was asked only three questions related to her competency to testify. [VIII,T427] This was insufficient to determine if Raveen understood the duties of an oath. [VIII,T427]

Dr. Carter testified that she has associated with defense lawyers in the past to assist them in the preparation of pretrial motions related to challenging the admissibility of children’s testimony. [VIII,T428] She has given information to attorneys addressing the issues and weaknesses in cases that help them frame their motions.

[VIII,T428] She is consulted by attorneys to ascertain the strengths and weaknesses of child witness statement. [VIII,T428] Dr. Carter sometimes reviews motions to ensure that the phrasing on these issues is correct. [VIII,T428]

In a case such as this, where Dr. Carter has identified problems with each witness, she would be able to make recommendations and assist the trial attorney with questions that could be asked of the child witnesses so that any problems or deficiencies regarding the child's testimony could be brought out at trial. [VIII,T429] Dr. Carter often assists attorneys in developing developmentally appropriate questions to ask at deposition to better determine if a child is competent to testify. [VIII,T429] She also assists lawyers in drafting developmentally appropriate questions related to competency for use at trial. [VIII,T429]

Dr. Carter could have assisted with and brought to the attorney's attention the problems she identified with the three child witnesses in this case. [VIII,T429] Dr. Carter could have pointed out the deficiencies in the police questioning and assisted the attorneys in preparing questions for cross-examination to be asked of the police officers that would have illuminated the identified

deficiencies. [VIII,T430;468-471] Had Dr. Carter been associated with this case prior to trial, she would have urged the attorneys to hold a competency hearing before the children testified. [VIII,T473] She also would have assisted the defense attorneys in identifying and addressing on cross-examination the inconsistencies in the children's testimony and the inconsistencies between the children's statements and testimony. [VIII,T473] While the defense attorney did address one or two instances of inconsistency, many, many more inconsistencies between the child's statements and within each child's statements should have been explored. [VIII,T473-4;491] The defense filed a proffered list of inconsistencies identified by Dr. Carter that were not addressed by defense counsel on cross-examination. [VIII,T495-96] Dr. Carter could have assisted the lawyers in phrasing questions that were developmentally appropriate.[VIII,T475] Dr. Carter would have been available as an expert in 2003.[VIII,T430]

Mr. Hooper testified that any issue about the children's testimony was a guilt phase concern.[VI,T32] He would not have been involved in any decision regarding an expert. [VI,T32] Hooper did not recall any discussion about the child witnesses or any expert during the probable

weekly meetings that occurred in this case after he became involved.[VI,T33]

Mr. Couture testified that he was not involved in the decision-making process involving the child witnesses or in preparing cross-examination or rebuttal evidence. [VII,T201,204] He probably didn't participate in the planning for cross-examination of the law enforcement officers who interviewed the children.[VII,T202] At the time of trial, Mr. Couture was aware that there are experts in the area of child testimony whose testimony and assistance is valuable.[VII,T207] However, he did not suggest using any experts in child testimony.[VII,T209] Nor did he recall any other member of the defense team suggesting that an expert in child testimony be consulted or used.[VII,T210]

Mr. Couture believed that the testimony of the child witnesses was given great attention by the jury based on his in-court observations. [VII,T209] He thought the children's testimony became an aggravating circumstance. [VII,T210]

Mr. Barrett testified that at one point in time he handled only capital sexual battery cases. [VII,T304] As such, he was familiar with experts who evaluate the

veracity of child witnesses and the interview techniques applicable to child witnesses, and who provide assistance and advice to attorneys regarding child witnesses.[VII,T306]

Mr. Barrett testified that he never considered bringing a child witness expert on board because he was comfortable handling child witnesses.[VII,T308] The lack of a hearing on the competency of the child witnesses led Mr. Barrett to conclude that he must not have had any concerns about their competency to testify.[VII,T330]

Ms. Williams recalled nothing about the question of whether to consult or use a child witness expert.[VII,T342]

3. Mr. Rodgers' Appearance before the penalty phase jury in jail garb.

Mr. Hooper stated that it was his decision to have Mr. Rodgers wear jail clothes at penalty phase. [VI,T36] He believes jail clothes are preferable.[VI,T36] He even had one defendant in Tampa appear in jail clothes and wrist shackles. [VI,T37] Mr. Hooper testified that sometimes he gets lucky, and the guards forget to take the shackles off his client so when the client is asked to raise his arms to the jury the jurors can see the chains "just like the ghost of Christmas past."[VI,T96-97] Mr. Hooper believed that

this put the penalty he was asking for, life in prison, closer to a death sentence, which made it more likely that the jury would vote in favor of life. [VI,T96-98]

Mr. Hooper wasn't sure when he told Mr. Rodgers about wearing jail clothes.[VI,T38] It wasn't a lengthy discussion, and Mr. Rodgers didn't ask any questions.[VI,T38-40] Hooper would have just told Mr. Rodgers that it would be better for him if he wore jail clothes for closing argument, without any additional explanation.[VI,T38-40] Mr. Hooper didn't explain why or how jail clothes were better, because Mr. Rodgers didn't ask.[VI,T39-40]

Mr. Hooper wouldn't have explained the constitutional right aspect of the decision about clothes to Mr. Rodgers because he believed he had low functioning skills, so he would have omitted the "legalese". [VI, T41-42]

Mr. Hooper was not sure if Mr. Rodgers, due to his mental deficiencies, would have understood what the phrase "dressed out" meant when used by the trial court. [VI,T49] He didn't know if Mr. Rodgers would understand the word "attire"; it was not a word that he would use in speaking with Mr. Rodgers. [VI,T49] Mr. Hooper did not explain to

Mr. Rodgers what these phrases and words meant.[VI,T50] Mr. Hooper was comfortable that Mr. Rodgers understood the decision, issue, and concept of wearing jail clothes.[VI,T50]

Mr. Couture recalled that Mr. Rodgers wore a suit during the guilt phase. [VII,T219] During penalty phase Mr. Rodgers was dressed in jail garb.[VII,T219] Mr. Couture did not recall any specific conversations with Mr. Rodgers about what he would wear during penalty phase.[VII,T220] He did not recall telling Mr. Rodgers that he had a right to wear street clothes and would have to waive that right.[VII,T227-228] Mr. Couture testified that the jail clothing was Mr. Hooper's idea; he and Mr. Hooper discussed it.[VII,T220]

After listening to the colloquy between the court and Mr. Rodgers, Mr. Couture wasn't sure if Mr. Rodgers would have understood the word "attire". Mr. Couture believed that Mr. Rodgers had a limited education and vocabulary; he often had to explain things in several different ways for Mr. Rodgers to understand. [VII,T224-227] However, his job as a lawyer was to make sure that his client understood what was said in court, no matter how long that took. [VII,T224]

4. Failure to investigate and present evidence of organic brain damage

Dr. Harry Krop, a licensed forensic psychologist, testified that he was retained by postconviction counsel to evaluate Mr. Rodgers in August 2009.[VI,T102-107] Dr. Krop oversees three offices with 20 mental health professionals and staff.[VI,T102] He trains lawyers thorough workshops and continuing education seminars and is an associate professor in the Department of Psychiatry at the University of Florida.[VI,T103-5] Dr. Krop has performed evaluations in roughly 1600 murder cases, testifying in about ten percent of those.[VI,T103;106] In roughly sixty percent of the cases he is asked to evaluate, he finds no helpful information. [VI,T106] Dr. Krop does not generally use the term "brain damage" because that is medical terminology.[VI,T152] He is more comfortable with using the term neurocognitive disorder, which is determined to exist through the use of neuropsychological testing.[VI,T152

Dr. Krop reviewed the raw data from the testing of Dr. Dee, who had begun work on the case prior to his death. [VI,T108] Dr. Krop reviewed prior evaluations and materials, including those of Dr. Michael Gamache, Dr.

Jacquelyn Olander, Dr. Teresa Parnell, Dr. Eric Ming, some notes and a deposition from Dr. Gregory Pritchard, and the sentencing order.[VI,T108] He then conducted a clinical interview and performed neuropsychological testing on Mr. Rodgers.[VI,T108-9]

Dr. Krop did not retest the WAIS-III or other intellectual functioning tests, as those had been done previously and he had the raw data.[VI, T110] He did not repeat the Wechsler Memory Scale because he had the raw data from Dr. Dee.[VI,T111]

Dr. Krop administered the WTAR, a neuropsychological assessment, the Test of Memory Malingering [used to asses whether an individual is putting forth maximum effort], the Wisconsin Card Sorting Test, the Trail Making Test A and B, and the Booklet Category Test. [VI,T111-112, 116] Dr. Krop focused on tests that would supplement prior testing and would tap the different parts of a person's cognitive functioning.[VI,T112] Three tests focused on frontal lobe or executive functioning that are most relevant in assessing cognitive functioning.{VI,T116] Additional memory and IQ tests were also given.[VI,T117] All of the tests that Dr. Krop gave were available for use in 2003.[VI,T113]

Dr. Krop also reviewed the testing done by Dr. Eric

Mings in 2002.[VI,T112-3] Dr. Mings administered only three tests: The WAIS III, a test of intellectual functioning; the Wechsler Memory Scale III, an assessment of overall memory capability; and the Woodcock Johnson, a measure of achievement in terms of reading, writing, and other basic academic skills.[VI,T113] These tests are useful in making a determination of mental retardation.[VI,T114] The testing that Dr. Mings did would not be sufficient or adequate for the purpose of identifying brain damage.[VI,T112-3]

The testing that is used to detect brain damage is available in several batteries; there are 250 or more individual tests.[VI,T114] Typically, a psychologist will give a memory test, a visual cognition test, a special perception test, and an abstract reasoning test, in addition to attention, concentration, reasoning, and problem-solving tests.[VI,T115] In Dr. Krop’s opinion, a reasonably competent neuropsychologist would not use only the three tests used by Dr. Mings to determine whether brain damage is present.[VI,T115-116]

The results of Dr. Krop’s testing showed that Mr. Rodgers had neurocognitive deficits consistent with some type of impairment.[VI,T117] Dr. Krop was very comfortable concluding that Mr. Rodgers had neurocognitive disorders

associated with impairment in the frontal lobe.[VI,T152] The testing showed that Mr. Rodgers was not malingering and was putting forth maximum effort.[VI,T118-20] The memory scores indicated that the area of the brain related to memory was intact, but his scores were borderline to low average. [VI,T118]

The tests in which Mr. Rodgers scored poorly measure a certain type of executive functioning.{VI,T121] His low scores are consistent with the presence of frontal lobe impairment. [VI,T121] Dr. Krop would have diagnosed Mr. Rodgers with a cognitive disorder, NOS, under the DSM-IV.[VI,T122] In his opinion, Mr. Rodgers was not mentally retarded.[VI,T168]

It would be expected that Mr. Rodgers' cognitive disorder would manifest itself in impaired executive functioning. [VI,T123] Executive functioning is the higher level functioning of the brain. The frontal lobe's executive functioning role includes problem-solving, planning, reasoning, impulse control, and the ability to inhibit behavior once it starts. [VI,T123] Mr. Rodgers' behavior patterns would reflect problems in these areas. He would be more likely to become frustrated, to impulsively use poor judgment, and to fail to reason things

through than a person of his age without brain damage. [VI,T124] He would be more likely to have difficulty in problem solving, reasoning, judgment, impulse control, and so forth.[VI,T125] A person with impaired executive functioning finds it hard to control emotions, while a person with mental retardation generally does not have that difficulty.[VI,T172] Dr. Krop classified Mr. Rodgers' impairment with regard to controlling his emotions in the moderate range.[VI,T173]

Dr. Krop also reviewed the sentencing order and the factual scenario contained in the order on pages three and four related to a prior manslaughter conviction. [VI,T125-27] Dr. Krop presumed that the court's summary was correct. [VI,T129]

Dr. Krop also reviewed the facts related to this offense as outlined in the sentencing order. [VI,T130] He was further aware of the trial testimony related to Mr. Rodgers' intellectual functioning.[VI,T131] Dr. Krop was aware that Dr. Mings had identified Mr. Rodgers as mildly mentally retarded, but Dr. Mings did not refer to Mr. Rodger's neurological functioning.[VI,T159] Dr. Krop believed there is a difference between an expert merely talking about a defendant's judgment or impulsivity and

relating those behaviors to a neurological etiology.[VI,T160]

While mental retardation can be a classification that is simply based on an IQ test[VI,T155], most often, mental retardation also includes evidence of deficient adaptive functioning.[VI,T155] A cognitive disorder is not tied to IQ; a person can have a high IQ and have a cognitive disorder.[VI,T156] Conversely, a person can have a low IQ with no cognitive disorder.[VI,T156] Significantly, a finding of mental retardation does not preclude a finding of brain damage as well. The two diagnoses can coexist. A person can be mentally retarded with brain damage or be mentally retarded without brain damage.[VI,T131] An IQ score reflects a persons limitations as opposed to a description of a person's brain behavior based on test results.[VI,T161]

The terms "brain damage" and "cognitive dysfunction" or "cognitive disorder" can be used interchangeably; however brain damage is a medical term, and cognitive disorder is a psychological term.[VI,T132] Mr. Rodgers could be both mildly mentally retarded/borderline intellectual functioning and have cognitive disorder, NOS, as well.[VI,T132] Neither diagnosis precludes the

other.[VI,T133] Dr. Krop stated that based upon his psychological and neurological testing, Mr. Rodgers had a cognitive disorder, NOS, beyond a reasonable psychological certainty. The testing results strongly indicated neurocognitive impairment consistent with a cognitive disorder, NOS.[VI,T133] Mr. Rodgers' scores on the tests specific to executive functioning identified him as organically impaired.[VI,T166]

Based on the consistency of the tests conducted by all the various doctors from 2001 to the present, Dr. Krop believed that Mr. Rodgers' cognitive disorder, NOS, existed in 2001. [VI,T133] No significant interventions after 2001 would have lead to the current testing results.[VI,T133] Dr. Gamache's 2001 findings that Mr. Rodgers had significant neuropsychological deficits and very inferior cognitive functioning support this diagnosis. [VI,T134] Dr. Krop also believed that Dr. Mings' testing created a "red flag" indicating the need for further testing of Mr. Rodgers for neuropsychological issues, including a full neuropsychological battery. [VI,T143] Dr. Gamache's report further strengthened the need for additional testing to determine that Mr. Rodgers has a cognitive disorder, NOS. [VI,T143]

However, Dr. Krop testified that a doctor cannot move forward without the direction of and approval of the lawyer. [VI,T142] In his experience in over 1500 capital cases, after doing his evaluation, he meets with the lawyer or defense team and advises them of his results. [VI,T142] The attorney then typically asks or suggests what the next step is - further testing or a referral to a neurologist or medical doctor.[VI,T142] Dr. Krop cannot conduct testing beyond what is requested by the attorney.[VI,T142]

Dr. Joseph Wu, a medical doctor, is the clinical director of the University of California Irving Brain Imaging Center and the clinical director of the UCI Neurocognitive Clinic. [IX,T4] He is responsible for the acquisition and interpretation of brain imaging involving PET scans and diffusion imaging scans for patients with various types of neuropsychiatric or neuro-cognitive disorders. [IX,T4] He has been responsible for the acquisition and interpretation of over 5,000 PET scans and has published over 50 peer-reviewed articles on brain PET scan studies on neurologic and psychiatric disorders.[IX,T5] In the last five years, Dr. Wu has done forensic consulting with attorneys in fifty cases, and has testified in all of those cases.[IX,T5]

The PET scan is a corroborative tool for neuropsychological tests.[IX,T43] One peer-reviewed published study in 1996 found a ninety percent correlation between patients with brain imaging abnormalities and neuropsychological testing deficits.[IX,T46] The type of PET scan used in this case is not used in a clinical setting, as it would be of no value.[IX,T50-1]

Dr. Wu became involved in this case as an observer to the PET scan testing that was conducted at the Rockledge MRI/PET Scan Center. [IX,T8] He served as a consultant to the technicians while a computerized visual vigilance task during the FDG uptake was conducted on Mr. Rodgers. [IX,T8] Dr. Wu then reviewed and interpreted the digital data of the resulting imaging. [IX,T8] The testing was conducted to his satisfaction. [IX,T8] Dr. Wu was given no information or results from prior testing before interpreting the results of the PET scan on Mr. Rodgers. [IX,T35-6]

According to Dr. Wu, PET scans, which use functional imagery, are used to detect traumatic brain injury because they are more accurate and sensitive than other testing. [IX,T9] CT scans and MRI testing constitute structural brain scanning tests, which are not sensitive enough to

detect most cases of mild or traumatic brain injury. [IX,T10;13] A PET scan can corroborate positive neurological findings and neuropsychological findings.[IX,T11]

After being injected with fludeoxyglucose, Mr. Rodgers was administered a visual vigilance task, or continuous performance test.[IX,T15] This is an activation test which has lower variability than resting and has a higher test/retest reliability, according to peer-reviewed literature.[IX,T15] The visual vigilance method is more reliable than the resting method PET scan, especially for detecting head trauma.[IX,T15-16] The areas of the brain that consume more sugar are more active and have more energy rays emanating from them.[IX,T18] This causes the crystals in the PET scanner to produce more lines or rays.[IX,T18]

Traumatic brain injury, or TBI, is more detectable on PET scans than on structural imaging scans.[IX,T19] PET scans are generally accepted in the neurological community for the use of chronic closed-head injuries with cognitive neurological deficits.[IX,T19-20]

The transaxial slices taken from the PET scan images of Mr. Rodgers showed major abnormalities in the second

row, the third and fourth column, and at the front of the brain from the ten o'clock to the two o'clock position.[IX,T22] This area of the brain was less active than the back, which is a typical pattern for a patient with traumatic brain injury. [IX,T23] When compared with the control scan of a normal individual, the frontal lobe of Mr. Rodgers's brain was less activated, which is consistent with some type of frontal lobe abnormality. [IX,T24-25] This damage could be caused by head trauma or a neuropsychological disorder.[IX,T25-26] The frontal lobe is an important area of the brain for the proper regulation of impulse control, such as aggression.[IX,T27] It acts like the brakes on a car.[IX<T27]

The region of Mr. Rodgers' brain called the frontal pole and inner anterior cingulate was half the value of a normal control. [IX,T26] This is a very significant decrease that is consistent with some type of injury or significant psychiatric illness.[IX,T26] The right parietal lobe of Mr. Rodgers' brain showed significant asymmetrical decrease relative to the left side of his brain.[IX,T27] This was likely caused by some type of head trauma.[IX,T27] The right side parietal decrease is associated with an increased likelihood or risk of

neurological and psychiatric conditions.[IX,T29]

The type of frontal lobe damage that Mr. Rodgers exhibits not only leads to a higher risk for substance abuse and depressive disorders, but it increases the probability or risk of impulse control disorders. [IX,T29] It is also associated with an impaired ability to control anger or aggression, which is more likely to manifest as disproportionate reactions to stimulus. [IX,T29-31] Such individuals have difficulty calibrating their responses to slights or insults and are more likely to be characterized as “going postal” than a normal person, who would be able to respond appropriately.[IX,T30]

Frontal lobe injuries such as Mr. Rodgers’ often result in impaired judgment called disinhibition. Disinhibition means a failure to be able to properly inhibit impulses and resulting aggressive outbursts, and results in immaturity, loss of self-control, and the inability to modify and inhibit behavior appropriately. [IX,T31]

Dr. Wu found beyond a reasonable degree of medical certainty or probability that Mr. Rodgers has an abnormality in the frontal lobe metabolism of his brain relative to the other areas of the brain, as well as an

abnormality in the metabolism of the right parietal lobe relative to the left parietal lobe. [IX,T32]

When Mr. Hooper was questioned about Mr. Rodgers' psychological testing, Mr. Hooper testified that he knew that Mr. Rodgers had been evaluated by Dr. Mings, that the focus of Dr. Mings' evaluation had been mitigation, and that Dr. Mings reported back "retardation." [VI,T59-60] Mr. Hooper testified that he would not ask a doctor if he found specific things, such as brain damage. Instead, he would ask open-ended questions such as, "What did you find in your evaluation?"[VI,T60]

Mr. Hooper could not recall if Dr. Mings did a full neuropsychological battery. [VI,T60] Sometimes Dr. Mings asked for one and sometimes he did not. {VI,T60] This case focused on retardation.[VI,T61] Mr. Hooper did not ask Dr. Mings to do a full neuropsychological battery of tests because the process goes the other way - the doctor, not the attorney, asks for the tests.[VI,T61] Mr. Hooper did not ask Dr. Mings if he did a full neuropsychological battery or if he thought one was necessary.[VI,T69] He believed it would be a crucial mistake for the lawyer to have the "arrogance of thinking we know better than all the experts because we happen to be a lawyer." [VI,T62]

Mr. Hooper acknowledged that he had attended training seminars that taught lawyers about the testing necessary to identify brain damage. [VI,T65] However, because Mr. Hooper believes most lawyers are arrogant in thinking that they know more than experts, he is very cautious in relying on that training.[VI,T67] Other than a PET scan or that type of related testing, Mr. Hooper did not personally know of any other way to determine the existence of brain damage.{VI,T66]

Mr. Hooper was told that Mr. Rodgers had mild mental retardation.[VI,T70] He believed that any cognitive deficits were attributable to that, so the focus was on adaptive functioning and IQ.[VI,T70] He did not ask if the cognitive deficits could be the result of brain damage.[VI,T70]

Mr. Hooper knew that head injuries could be important, and he would defer to any expert as to how they could be important. [VI,T71] Mr. Hooper knew that Mr. Rodgers had a bullet to his head that reportedly would not have affected his brain, but he was unaware of any other insults or injuries to the head.[VI,T71-2]

Mr. Hooper reviewed a letter that he Dr. Michael Gamache wrote to him.[VI,T72] After reading the letter,

Mr. Hooper recalled that Dr. Gamache had evaluated Mr. Rodgers in the time between the guilt and penalty phases.[VI,T73] He acknowledged that the letter contained information about a head injury that Mr. Rodgers suffered at age 11, but he "missed that one."[VI,T73-4] Since Mr. Hooper did not believe that Dr. Gamache had recommended testing, Mr. Hooper did not seek any; he was not going to use his limited knowledge from Florida Bar-approved CLE seminar "Life Over Death" to contradict the opinions of two respected neuropsychologists.[VI,T80]

No evidence was presented at the penalty phase or at the Spencer hearing about organic brain damage. [VI,T80-1] No PET scan or other testing of that nature was done. [VI,T84]

Mr. Couture testified that he believes that mental health experts are an indispensable part of the preparation in a capital case.[VII,T235] He also believes that all aspects of a client's mental health should be looked at, not just mental retardation, for example.[VII,T235]

In this case, the focus of pretrial preparation was on mental retardation. [VII,T235] Mr. Couture associated Dr. Mings, a neuropsychologist.[VII,T237] Mr. Couture was generally familiar with what tests might be included in a

full neuropsychological battery.[VII,T238] At the time of trial, Mr. Couture "like[d] to think" that he would have been able to tell whether a full neuropsychological battery had been given.[VII,T240] Mr. Couture did not recall talking with Dr. Mings about whether a full battery was done.[VII,T242-243]

Mr. Couture prepared an outline to assist in the questioning of Dr. Mings at trial.[VII,T241] Dr. Mings was questioned on the type of tests he had performed.[VII,T242] Based upon his review of the testimony, it seemed to Mr. Couture that more tests should have been done for a full battery.[VII,T243]

If a full battery had not been done, Mr. Couture would have asked for one sufficient to identify a cognitive disorder such as brain damage.[VII,T245] Mr. Couture would have wanted Dr. Mings to do a full battery.[VII,T245] Mr. Couture could not recall ever asking Dr. Mings to do a full battery during any pretrial conferences or during trial preparation.[VII,T257] Mr. Couture knew of no way to rule out the existence of organic brain damage other than a full battery of neuropsychological testing.[VII,T262]

Mr. Couture recalled talking to Dr. Mings about possible brain damage from the self-inflicted gunshot wound

just after the homicide.[VII,T258] He had a vague recollection that he and Dr. Mings reviewed some radiographs of that injury and that Dr. Mings had concluded that there was no brain damage resulting from the trajectory of the bullet.[VII,T258] Mr. Couture did not recall having any conversation with Dr. Mings about doing a PET scan. [VII,T265] No PET scan was done. [VII,T266]

Mr. Couture left his job just after this trial. Mr. Hooper did the Spencer hearing.[VII,T267] He could not recall if they ever talked about the Spencer hearing.[VII,T267] Mr. Couture did not know if he was given a copy of Dr. Gamache's report in this case, since it came in after he left the office.[VII,T267]

The State called one witness, Dr. Lawrence Holder. [IX,T56] Dr. Holder is employed by the University of Florida at Shands Hospital.[IX,T57] He is a radiologist with a subspecialty in nuclear medicine.[IX,T57] He is semi-retired or "slowed down". [IX,T57] Dr. Holder has used PET scans for approximately eight or nine years as part of his radiology and nuclear medicine practice.[IX,T58] Only about thirty-five percent of his "slowed down" practice involves PET scans.[IX,T66] Dr. Holder has done about 1,000 PET scans in the course of his

clinical practice, of which maybe ten percent, or 100, involved the brain. [IX,T63;67] These 100 or so scans were done for clinical oncological purposes and not for neurological purposes. [XI,T63] He was looking for brain tumors and evidence of dementia or Alzheimer's. [IX,T63;68] He has done very few brain scans with traumatic brain injury, maybe three or four. [IX,T69] In his practice, he uses a SPECT scan in injury cases, because a SPECT scan is cheaper, and he is only looking for gross abnormalities. [IX,T70]

Dr. Holder has not published any works related to PET scans, has done no research in the area of PET scans, has no psychiatric background, is not a neuropsychologist, and has no basis to dispute the findings that result from testing performed by a neuropsychologist. [IX,T67, 75, 77] He has testified in eight or ten cases, two of which were civil. [IX,T58] In the last six or seven years, he has looked at four or five visual vigilance PET scans conducted by Dr. Wu. [IX,T71]

Dr. Holder testified he is familiar with the type of PET scan test that was administered to Mr. Rodgers, but it is not the type used in a clinical practice. [IX,T59] Dr. Holder has never performed a visual vigilance PET

scan.[IX,T71;74] It is used by a half dozen investigators as a research tool. [IX,T59] Dr. Holder testified there is a lot of research going on in brain research and imaging. [IX,T60] However, it is not used in a clinical practice. [IX,T61]

Dr. Holder disagreed with Dr. Wu as to an abnormality between the left and right brain, opining that there is always some difference.[IX,T61] Dr. Holder further testified that older people often have more brain activity in the back of the head as opposed to the right.[IX,T69] He saw nothing abnormal in the scans for Mr. Rodgers.[IX,T64]

The postconviction court entered an Order Denying the Amended Motion to Vacate Judgment of Conviction and Sentence on October 18, 2011.[V,R773-807] The order states the following as to each claim:

Failure to Consult/Call Child Witness Expert: Defense counsel was not ineffective because he deposed the children, observed their behavior, and concluded that they were competent to testify. [V,R781] Further, the Court observed the children during the trial and listened to their testimony and found no reason to question their competency.[V,R781] The failure to use a child witness

expert was not outside the broad range of reasonable assistance under the prevailing professional standards.[V,T781]

Failure to Call Witness to Establish Ownership of the Murder Weapon: Evidence of the ownership of the gun would not have altered the outcome at trial.[V,R781]

Failure to Have the Defendant "Dress Out" for Penalty Phase: Since the court asked defense counsel if "that's the way you want him dressed" in front of the defendant, the defendant understood the issue about appearing in jail clothes in front of the jury, regardless of whether he understood the word "attire." [V,R783] The defendant's waiver was knowing and voluntary. [V,R784]

Failure to Obtain a Complete Neuropsychological Evaluation: Defense counsel was not ineffective in failing to obtain a complete neurological exam and in relying on an expert who did not conduct a full neurological exam. [V,R786] The outcome at trial would not have been different, because the defendant did not immediately kill his wife but did so only later in the day after he had time to think about the incident of catching her and Willie Odum in compromising circumstances. [V,R787]

Lethal Injection Claim: This claim was denied based upon the prior holdings of the Florida Supreme Court. [V,R788]

SUMMARY OF THE ARGUMENT

ISSUE I: Trial counsel was ineffective in failing to investigate and present evidence that Mr. Rodgers' cognitive deficiencies were the result of organic brain damage. Testimony at the evidentiary hearing from Dr. Krop and Mr. Couture established that a full neuropsychological battery of testing was not done by the defense pretrial. Dr. Krop testified that the report prepared by Dr. Gamache and sent to Mr. Hooper contained some additional neuropsychological testing, but not a full battery, and indicated that the cause of Mr. Rodgers' cognitive deficiencies was neuropsychological. Mr. Hooper testified that he did not discuss the need for a complete battery of neuropsychological battery of testing with his other expert, Dr. Mings, and Dr. Mings did not ask for additional testing. Thus, Mr. Hooper did not pursue any additional investigation that would have led to a diagnosis of brain damage.

Testimony from Dr. Krop at the evidentiary hearing established that a full neuropsychological battery of

testing indicated that Mr. Rodgers has what is medically termed “brain damage”, but which psychologists classify as “neurocognitive impairment, NOS,” that was likely organic in nature. This diagnosis was consistent with the information that Dr. Gamache conveyed to Mr. Hooper.

Dr. Josiph Wu’s testimony at the evidentiary hearing confirmed the presence of frontal lobe brain damage after the administration of a visual vigilance PET scan. Dr. Wu testified that this type of brain damage would lead to behaviors consistent with those affecting Mr. Rodgers’ judgment and thought process at the time of the murder.

Trial counsel was ineffective in failing to present evidence to the jury and trial court that Mr. Rodgers has organic brain damage and the effects of that condition on his abilities and conduct.

ISSUE II: Trial counsel was ineffective in failing to associate with an expert in child witnesses. Such an expert would have educated trial counsel about the standards for interviewing children and would have helped trial counsel to develop rigorous-cross examination of the police officer who interviewed the children, which would have exposed the numerous deficiencies in the interviews of the three children. A child witness expert would have

assisted defense counsel pretrial and at trial in ensuring that the appropriate inquiry was made to ensure that each child was competent to testify, particularly regarding their moral obligation to tell the truth. Trial counsel failed to object to the competency of the children, even though the trial record does not establish that the children were competent to testify. A child witness expert could have assisted defense counsel structure age-appropriate cross-examination questions that would have demonstrated the inconsistencies within each child's testimony, among the children's statements, and between the children's prior statements and testimony, resulting in a full adversarial testing of the state's evidence as provided by these three critical eye witnesses.

ISSUE III: Trial counsel was ineffective in failing to present evidence to the jury that the gun used in this offense belonged to Willie Odum, the victim's ex-husband. Mr. Rodgers was prejudiced by this failure, as the ownership of the gun by someone other than Mr. Rodgers supported the defense theory of self-defense and undercut the prosecution theory that Mr. Rodgers returned to the day care with the predetermined intent to shoot the victim.

ISSUE IV: Trial counsel was ineffective in failing to

adequately advise Mr. Rodgers of his constitutional right to appear in front of the jury in street clothes. Counsel's failure to advise Mr. Rodgers of this right, coupled with an inadequate colloquy between the trial court and Mr. Rodgers on whether he wished to appear in front of the jury in jail garb, resulted in a waiver of his constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution that was neither knowing nor voluntary.

ARGUMENT

THE LEGAL STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL AND THE STANDARD OF APPELLATE REVIEW

The standard for establishing relief on a claim of ineffective assistance of counsel is governed by Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), which requires the application of a two-prong test. The first prong, deficient performance, must identify acts or omissions by the lawyers that are shown to be outside the broad range of reasonably competent performance under prevailing professional norms. The second prong requires a showing that the deficient performance of counsel resulted in prejudice to the defendant. Prejudice requires a showing that but for the deficient performance, there is a

reasonable probability that the outcome of the proceedings would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. In order to prove that the deficient performance prejudiced the defense, there must be a showing that "'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988) (quoting Strickland, 466 U.S. at 687, 104 S.Ct. at 2064). Put another way, "[t]he defendant must show that there is a reasonable probability that the result of the proceeding would have been different if not for counsel's unprofessional errors. Gorham, 521 So. 2d at 1069 (quoting Strickland, 104 S.Ct. at 2068).

Strickland does not require the defendant to establish that he would have been acquitted in order to establish prejudice; Strickland requires a reasonable probability that the outcome would be different, not an absolute certainty. Subsequent decisions by the United States Supreme Court have underscored this distinction between reasonable probability/unfair trial and an acquittal. See Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S.Ct. 2574 (1986)("The essence of an ineffective-assistance claim is

that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect".). The reasonable probability standard has been defined by Florida courts as a question of whether a "reasonable jury" could have believed the omitted evidence and whether the omitted evidence would cast doubt. Tyson v. State, 905 So.2d 1048, 1049 (Fla. 2d DCA 2005). Florida has unquestionably adopted the Strickland standard. See Spencer v. State, 842 So.2d 52, 61 (Fla. 2003).

As to the first prong, there is a strong presumption that trial counsel's performance is not deficient. A "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Walker v. State, 37 Fla. L. Weekly S291, S292 (Fla. April 19, 2012) (quoting Strickland, 466 U.S. at 689).

Both prongs of the Strickland test carry mixed question of law and fact; thus, the appellate court employs a mixed standard of review. The appellate court defers to

the circuit court's factual findings, but reviews the circuit court's legal conclusions de novo. Walker, 37 Fla. L. Weekly at S292 (citing Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004)).

ISSUE I

TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE AND PRESENT EVIDENCE THAT MR. RODGERS HAS ORGANIC BRAIN DAMAGE. THE POSTCONVICTION COURT'S DETERMINATION THAT THIS OMISSION DID NOT RESULT IN PREJUDICE IS ERROR SUBJECT TO REVERSAL.

In Claim VI of his postconviction motion, Mr. Rodgers argued that trial counsel was ineffective for failing to investigate and present evidence of organic brain damage to the jury. The postconviction court found that trial counsel was not ineffective in failing to seek additional mental health evaluations and concluded that the result of this evidence would not have changed the outcome at sentencing. Both determinations are erroneous and should be reversed.

At the original penalty phase proceedings and Spencer hearing, the defense focused on establishing mental retardation to the exclusion of any other mental health diagnosis. The defense had only the testimony of Dr. Mings to support this position, while the State presented the

testimony of Dr. Teresa Parnell, Dr. Jacquelyn Olander, and Dr. Gregory Pritchard to rebut Dr. Mings' findings. The trial court determined that Mr. Rodgers was not mentally retarded; therefore, execution was not barred. However, none of these individuals evaluated Mr. Rodgers for brain damage, and none offered testimony on whether Mr. Rodgers had brain damage. This Court affirmed the trial court's determination that Mr. Rodgers was not mentally retarded.

The record from the trial establishes that no evidence of organic brain damage was submitted for the jury's consideration. After the penalty phase, but prior to the Spencer and mental retardation hearing, Mr. Hooper contacted Dr. Michael Gamache. The defense subsequently received a letter from Dr. Michael Gamache directed to Mr. Hooper indicating that Dr. Gamache had been retained by the defense for "consultation." Dr. Gamache did not testify before the trial court, but a copy of Dr. Gamache's letter to Mr. Hooper was admitted as an exhibit. [Trial Transcripts, T1245-1252]

At the evidentiary hearing, two lawyers testified that they were responsible for penalty phase: Gerod Hooper and George Couture. Each was questioned about the training they had received, the prevailing professional norms

regarding the identification of brain damage, and the importance of a complete evaluation for brain damage. Each testified about the use of Dr. Mings at trial.

Mr. Couture testified that he had attended death penalty training seminars such as Life Over Death and Death Is Different. Based on his training and experience, Mr. Couture related that mental health experts are indispensable to the defense team and that all aspects of a client's mental health should be investigated, rather than focusing on any one particular aspect such as retardation.[VII,T235]

Mr. Hooper testified that he had also attended death penalty training seminars such as Life Over Death and Death is Different. [VI,T65] However, Mr. Hooper disagreed with the training he received at those seminars on how to investigate mental health issues. Although the training recommended that the lawyer should suggest or confer with the medical professional, Mr. Hooper believed that was "arrogant," so he was very cautious about relying on any training he received. [VI,T67] Contrary to the recommendations of the training, he would not ask or direct a doctor to do specific things; he would just go with whatever the doctor said. Mr. Hooper would not ask a

doctor to perform any testing or conduct any additional testing because that would be a crucial mistake illustrative of the "arrogance of thinking we know better than all the experts because we happen to be a lawyer." [VI,T62]

Both defense lawyers were questioned about their understanding of how organic brain damage is diagnosed. Mr. Hooper did not know of any method of diagnosing brain damage, except by a PET scan or that type of related testing.[VI,T66] Mr. Couture identified the administration of a full neuropsychological battery of testing as the threshold manner of identifying organic brain damage. [VII,T245;262]

Mr. Couture testified that he associated Dr. Mings, a neuropsychologist.[VII,T237] Mr. Couture recalled talking with Dr. Mings, but he did not think they discussed whether Mings did a full neuropsychological battery.[VII,T242-43] After reviewing the trial testimony of Dr. Mings, Mr. Couture testified that more tests should have been done on Mr. Rodgers for a full neuropsychological battery.[VII,T243] Mr. Couture testified he would have wanted Dr. Mings to perform a full neuropsychological battery, but he did not recall ever asking him to do

so.[VII,T257] The only conversation that Mr. Couture had with Dr. Mings about brain damage was to ascertain if the self-inflicted gun shot wound after the murder had caused any brain damage, to which Dr. Mings responded that the trajectory of the bullet would not be indicative of any brain damage.[VII,T258] Mr. Couture did not talk to Dr. Mings about a PET scan.[VII,TT265]

Mr. Hooper did not ask Dr. Mings to do a full neuropsychological battery; in order for that to be done Dr. Mings would have had to ask for the tests. Mr. Hooper would never suggest this be done.[VI,T62] According to Mr. Hooper, Dr. Mings was working on retardation, so he would not ask him about brain damage.[VI,T60] Mr. Hooper never considered that Mr. Rodgers' cognitive deficits could be attributable to anything other than retardation.

Mr. Hooper did not remember Dr. Gamache until he was shown a letter he wrote to him asking him to consult on the case.[VI,T72] However, Mr. Hooper had met with Dr. Gamache at the jail and introduced him to Mr. Rodgers.[Defense Exhibit 4, Letter from Dr. Gamache] Mr. Couture testified that he left the office before Dr. Gamache submitted his findings, so he did not recall anything related to Dr. Gamache.[VII,T267]

Mr. Hooper testified that he was aware that head injuries are important to consider, but he did not believe Mr. Rodgers had any other than the self-inflicted gun shot that did not affect his brain.[VI,T71-72] Dr. Gamache's letter to Mr. Hooper clearly stated that Mr. Rodgers reported at least two head injuries that resulted in some type of loss of consciousness, to which Mr. Hooper responded that he had "missed that one."[VI,T73-74][Defense Exhibit 4, page 2]

Mr. Hooper stated that he did not get any additional testing, because he believed the cognitive deficiencies were related to mental retardation and Dr. Gamache did not indicate otherwise or recommend any additional testing.[VI,T80]

However, Mr. Hooper's testimony is belied by Defense Exhibit 4, a letter from Dr. Gamache to Mr. Hooper in which Dr. Gamache advised Mr. Hooper of several critical factors related to brain damage and the need for further evaluation:

> Mr. Roger's neuropsychological history is also significant for learning and attentional problems including predominantly right hemisphere learning disability symptoms;[Defense Exhibit 4, page 1]
>
> * * *

I have attached two illustrations that I hope will be helpful in informing you, and perhaps ultimately the court, regarding Mr. Rodgers neuropsychological status. In Figure 1 I have plotted Mr. Rodgers' scores on the various neuropsychological measures that were administered in relation to age corrected means. That is, the scores that have been assigned to his performance in this illustration reflect his performance relative only to men in their late 50's to early 60's across a variety of educational levels. As can be seen by this illustration, Mr. Rodgers' overall performance in relation to men his age is inferior. In individual cognitive domains his performance ranges from a high of the 70th percentile on simple measures of reaction time, to a low of the 3rd percentile, on measures of memory, and the 4th percentile on measures of reasoning and calculation; [Defense Exhibit 4, p.2]

* * *

His overall performance is best reflected by his General Cognitive Functioning and General Cognitive Proficiency scores. When compared with both men and women across all ages and educational ranges his Global Cognitive Functioning (GCF) scores is 67.28 and his Global Cognitive Processing (GCP) score is 69.28. These scores have a mean of 100 and a standard deviation of 15 and in this sense are comparable with the scale used for intelligence quotients. Consequently, the score of 60.28 places Mr. Rodgers at the 2nd percentile relative to the population as a whole and a score of 67.28 places him slightly lower, at the 1st percentile with the population as a whole. Another way of characterizing this performance would be that 98 or 99 out of every 100 people randomly selected would perform better on these tests than Mr.

> Rodgers on these cognitive measures.[Defense Exhibit 4, p.3]

Dr. Gamache opined that the neuropsychological evaluation revealed that Mr. Rodgers' overall functioning was poor and inferior to the general population. Further, Dr. Gamache opined that:

> The pattern of performance suggests that these are likely to be long standing cognitive deficiencies. Considered in light of the report of probable early developmental delays it is likely that these deficiencies are hereditary and genetic in nature or perhaps related to a prenatal or perinatal insults, about which Mr. Rodgers is not informed. [Defense Exhibit 4, p.3]

According to Dr. Krop, although Dr. Gamache's testing was not a full neuropsychological battery, it nevertheless identified a cognitive disorder with a neurological base, the medical term for which would be "brain damage". Despite these indications from Dr. Gamache, Mr. Hooper did not pursue a full battery of neuropsychological testing, nor did he seek a PET scan to confirm brain damage. Instead, Mr. Hooper submitted Dr. Gamache's letter to the court and did nothing further.

Dr. Gamache did not use the words "mental retardation" or anything resembling a diagnosis of mental retardation anywhere in his report. Neither did he discuss the DSM-IV

requirements for a diagnosis of mental retardation. He did not discuss the three requirements for establishing mental retardation and did not opine that Mr. Rodgers was mentally retarded or that the source of his cognitive deficiencies was the result of retardation. Rather, Dr. Gamache attributed the source of the cognitive deficiencies to **neuropsychological** issues.

Despite having evidence that Mr. Rodgers' cognitive deficiencies were the result of neuropsychological deficiencies and not mental retardation, Mr. Hooper failed to investigate the issue of brain damage by forgoing further neuropsychological testing such as that performed by Dr. Krop and failing to obtain a PET scan or other "such test," as Mr. Hooper testified he was aware of that could have conclusively established brain damage, such as the testing conducted by Dr. Wu. These failures by Mr. Hooper constitute deficient performance under the first prong of Strickland.

Trial counsel's failure to thoroughly consider Dr. Gamache's report and investigate whether Mr. Rodgers had brain damage was unreasonable under the facts of this case. When confronting the question of whether or not an attorney's actions are reasonable, this Court has held that

a reasonable investigation into mental health mitigation is defense counsel's obligation when there is any indication that the defendant may have mental deficits. See Hurst v. State, 18 So.3d 975, 1010 (Fla. 2009)(stating that such an evaluation is "fundamental"). When addressing whether the inaction of counsel is reasonable, the postconviction court "'must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.'" Hurst, at 1010 (quoting Wiggins v. Smith, 539 U.S. 510, 527, 123 S.Ct. 2527, 156 L.Ed. 2d 471 (2003)).

The attorney in Hurst knew from the family that the client probably had borderline intellectual functioning and was emotionally immature. Trial counsel did not obtain any school records or conduct any other investigation and did not seek a mental health exam from a "shrink" because Hurst indicated he did not want an evaluation. Postconviction proceedings established that Hurst had possible organic brain damage and significant mental health mitigation.

While trial counsel in this case did attempt to procure information about Mr. Rodgers in order to support mental retardation, counsel's performance was not reasonable and therefore, deficient, because he failed to

investigate brain damage as well. Based upon the quantum of evidence known to counsel, the evidence of brain damage contained in Dr. Gamache's report would have led a reasonable attorney to investigate further.

During the pretrial time period, the following evidence was known to Mr. Hooper: He came to the case about a month before trial; he knew that Dr. Mings would say that Mr. Rodgers was retarded and that Dr. Pritchard, a state witness, would testify that Mr. Rodgers was not mentally retarded. After the penalty phase, the trial court appointed two additional mental health experts to examine Mr. Rodgers for the sole purpose of determining mental retardation. Both experts, Dr. Parnell and Dr. Olander, determined that Mr. Rodgers was not mentally retarded. Thus, three of the four experts in this case did not support the primary mitigation upon which the defense relied. Against this backdrop, Dr. Gamache then advised Mr. Hooper that, based on his minimal neuropsychological testing, Mr. Rodgers had cognitive deficiencies that were neurological in nature - the psychological equivalent of brain damage. Despite the overwhelming evidence against the defense theory of mental retardation and in an inexplicable apparent rejection of Dr. Gamache's suggestion

that neurological reasons explained Mr. Rodgers' mental deficiencies, Mr. Hooper did not investigate brain damage as the cause of Mr. Rodgers' cognitive deficiencies.

The evidence and information available to counsel was clearly sufficient to place Mr. Hooper on notice that the cause of Mr. Rodgers' obvious mental deficiencies was not mental retardation, but brain damage. Together, the evidence from the four doctors who assessed mental retardation and Dr. Gamache's report put Mr. Hooper on notice that he should have investigated further.

Moreover, although Mr. Hooper claimed not to have been aware of the possibility of brain damage, Mr. Hooper clearly recognized at the time of sentencing that Dr. Gamache's diagnosis differed dramatically from the four other doctors. On April 14, 2004, Mr. Hooper signed and filed the Defendant's Memorandum In Favor of A Life Sentence with the trial court. [Trial Transcripts, Vol.VII,R1256-1268] On the second page, in footnote 2, Mr. Hooper wrote:

> Apart from supporting Defendant's mental retardation claim generally, Dr. Gamache's report corroborates the fact that Defendant is substantially impaired neurologically, independent of Dr. Mings' findings, yet consistent with those findings. This is separate and distinct mitigation, different

> in character and kind, that must be considered in evaluating Defendant's culpability and the proportionality of the death penalty in this case. [Trial Transcript,Vol.VII,R1257]

Even while acknowledging Dr. Gamache's findings indicating brain damage, Mr. Hooper did nothing to develop or present evidence of brain damage. Rather, he relegated what this Court has recognized to be significant and powerful mitigation to a footnote. This was unreasonable.

Mr. Hooper's reason for not pursuing a full neuropsychological battery of testing to conclusively establish brain damage is equally unreasonable. Mr. Hooper defended his failure to question Dr. Mings about the need for a full neuropsychological exam by stating that he would never suggest to any doctor that certain testing be done because that would be an example of the arrogance of attorneys believing that they know better than doctors.[VI,T62] Mr. Hooper admitted that this view was not the prevailing professional norm, as promulgated by the training provided to capital defense attorneys through the CLE seminars Life Over Death and Death Is Different. Mr. Hooper disagreed with the position advanced by those training capital defense attorneys in Florida Bar-approved CLE training seminars, stating that he is "very cautious

because a lot of them being attorneys have a certain level of arrogance and they think they know more than the experts."[VI,T67] Yet, when presented with Dr. Gamache's report that did indicate what Mr. Hooper knew to be mental health mitigation that was different than mental retardation, he could have acted further without being in danger of being "arrogant" by simply investigating what Dr. Gamache had already brought to his attention. Mr. Hooper's justification for why he did not pursue a full neuropsychological battery of testing and a PET scan is unreasonable.

Mr. Hooper testified that he would not limit a doctor or tell a doctor to "look for this or that", but Mr. Hooper was not the lawyer who first associated with Dr. Mings. Mr. Hooper did not come into the case until a month before trial in 2003 and Dr. Mings had evaluated Mr. Rodgers in July 2002.[Supplemental Trial Transcripts, Vol.1,T85, Testimony of Dr. Mings at Penalty Phase] Mr. Couture, who represented Mr. Rodgers at the outset of the case, but who left before Dr. Gamache submitted his report, was the lawyer who first associated Dr. Mings to evaluate Mr. Rodgers. [VII,T237] Mr. Couture testified that he would have wanted Dr. Mings to administer a full battery of

neuropsychological testing.[VII,243] After reviewing Dr. Mings' testimony, Mr. Couture admitted that it did not appear that a full battery was done, and he had no recollection of talking to Dr. Mings about doing a full battery; they spoke only about retardation.[VII,T242-243]

In Parker v. State, 3 So.3d 974, 984-5 (Fla. 2009), this Court quoted extensively from the ABA guidelines regarding defense counsel's duty to investigate. The ABA Guidelines provide that investigation into mitigation evidence "'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" Id. (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), at 93 (1989)). This directive, coupled with the training provided by Life Over Death and Death Is Different, would support an investigation into brain damage in this case under the prevailing professional norms.

Mr. Hooper stated that the focus of this case was retardation. [VI,T60] Mr. Hooper testified that Dr. Mings reported that retardation was the diagnosis; he didn't ask him about brain damage. [VI,T60] Even after receiving Dr. Gamache's report, Mr. Hooper did not ask Dr. Mings about

brain damage. The failure of Mr. Hooper, after receiving Dr. Gamache's report, to investigate brain damage was unreasonable under the prevailing professional norms. See Blackwood v. State, 946 So.2d 960, 971-975 (Fla. 2006)

Furthermore, Mr. Hooper offered no strategic reason that he chose to keep evidence of brain damage from the jury or the trial court. Thus, this case is distinguishable from those cases where the attorney deliberately chose to forgo the presentation of mental health mitigation because it contained harmful information or would have been inconsistent with other mitigation. See Douglas v. State, 37 Fla. L. Weekly S13 (Fla. Jan. 15, 2012); Sexton v. State, 997 So.2d 1073 (Fla. 2008); Sliney v. State, 944 So.2d 270 (Fla. 2006).

Although defense counsel did not rely on Mr. Rodgers' claim of innocence through self-defense as a basis for forgoing the investigation or presentation of evidence of brain damage, the postconviction court seems to have relied on this rationale as a basis for finding a lack of prejudice. [V,R786-787] This Court rejected this type of reasoning in Hurst v. State, 18 So.3d at 1012-1013, finding that mental health mitigation, including brain damage, does not conflict with a claim of innocence in guilt phase. As

in Hurst, evidence that Mr. Rodgers has brain damage that has likely been present since birth (1) carried no harmful factors, (2) would not have opened the door to damaging evidence, (3) did not constitute an admission to the crime, and (4) presented no reason to exclude it.

This is not a situation where the evidence in the post-conviction proceeding was cumulative to the evidence presented at the penalty phase, mental retardation hearing, or Spencer hearing. The evidence of brain damage in this case was not incidental or just more explanatory than the evidence of retardation as was the case in Johnston v State, 63 So.3d 730 (Fla. 2011). This Court held in Johnston that trial counsel was not ineffective in failing to present evidence that the defendant had ADHD and additional evidence of neurological impairment when defense counsel had called four medical experts to testify at penalty phase that the defendant had frontal lobe brain damage and mental health problems.

Nor does this case fall into the category of cases where trial counsel relies upon his experts who either fail to find or reject brain damage during the trial proceedings, but then different experts in postconviction identify brain damage as the trial court found. [V,R786]

See Buzia v. State, 82 So.3d 784, 791-792 (Fla. 2012); Reese v. State, 14 So.3d 913, 918 (Fla. 2009); Darling v. State, 966 So.2d 366, 377 (Fla. 2007). In each of those cases, the defense attorney associated with mental health experts who affirmatively told defense counsel that the defendant showed no signs of brain damage. In each of those cases, defense counsel relied upon the opinion of the expert and failed to seek additional opinions. In this case, Mr. Hooper had the information that Mr. Rodgers had brain damage from Dr. Gamache before the Spencer hearing and recognized that it provided significant and different mitigation than Dr. Mings had identified, but he inexplicably chose to ignore Dr. Gamache's findings and failed to investigate and present evidence of brain damage.

To show prejudice under Strickland for claims relating to penalty phase, the defendant must show that "but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence. To assess that probability, we consider 'the totality of the available mitigation evidence- both that adduced at trial, and the evidence adduced in the (postconviction) proceeding'- and 'reweig[h] it against the evidence in aggravation." Porter v. McCollum, ___U.S.___, 130 S.Ct. 447, 453-54, 175 L.Ed.

2d 398 (2009), (quoting, Williams v. Taylor, 529 U.S. 362, 397-398 (2000)); Coleman v. State, 64 So.3d 1210 (Fla. 2011).

Mr. Rodgers was prejudiced by the failure of trial counsel to present evidence of organic brain damage to the jury. At a minimum, this evidence was relevant to assessing Mr. Roger's moral culpability. If it had been presented at trial, it is likely to have constituted strong and important mitigation that could have influenced at least one, if not more jurors. See Walker v. State, 37 Fla. Law Weekly S291 (Fla. April 19, 2012); Hurst, 18 So.3d at 1014; Blackwood, 946 So.2d at 976.

At the penalty phase, the jurors heard, through improper hearsay testimony, evidence of the details of the prior homicide and victim impact testimony. The jury also heard evidence from the family and friends of Mr. Rodgers. The primary focus of the defense penalty phase was that Mr. Rodgers was mentally retarded, thus leading to the establishment of the statutory mental health mitigators. However, the evidence of mental retardation was strongly rebutted by the State through the testimony of Dr. Pritchard. Thus, the jury was asked to consider relatively weak non-statutory mitigation and to rely on disputed

evidence for the existence of the two statutory mental health mitigators. In a somewhat bizarre vote, the jury rejected the statutory mitigators by a larger margin than the overall 8-4 recommendation for death.

Yet, unlike the evidence of mental retardation, the evidence of brain damage was essentially unrebutted. See Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992). The postconviction court's statement that both Dr. Krop's and Dr. Wu's opinions that Mr. Rodgers had brain damage were disputed is in error. [V,R785] At the post-conviction evidentiary hearing, Dr. Krop testified that his testing coupled with his review of all the prior testing conducted in the penalty phase, the mental retardation hearing, the Spencer hearing, and Dr. Gamache's report, led him to conclude within a reasonable degree of psychological certainty that Mr. Rodgers had a cognitive disorder, NOS- the psychological term for brain damage.

The State presented no evidence to rebut Dr. Krop's testimony. During the postconviction proceedings, the State sought the services of Dr. Pritchard. Dr. Pritchard had testified for the State in the penalty phase in this case. Dr. Pritchard met with Mr. Rodgers for testing purposes and was provided with all of Dr. Krop's raw data.

Dr. Pritchard was not called by the State as a witness in the evidentiary hearing to rebut Dr. Krop. The State did not present any testimony to rebut Dr. Gamache's conclusions. The testimony and reports of Dr. Parnell and Dr. Olander from the Spencer and mental retardation hearing did not address brain damage at all. The postconviction court's statement that Dr. Mings performed neuropsychological testing is also incorrect. [V,T705] The unrebutted testimony from Dr. Krop was that Dr. Mings did not perform neuropsychological testing, and Mr. Couture testified likewise that Dr. Mings did not perform neuropsychological testing. The State did not call Dr. Mings to testify that he did perform neuropsychological testing and did not present any evidence from any other doctor that Dr. Mings did neuropsychological testing. Thus, the conclusions of Dr. Krop and Dr. Gamache are not contradicted or disputed by the evidence at the evidentiary hearing.

The State's expert, Dr. Holder, who did testify at the evidentiary hearing, stated that he had no basis to dispute the findings as a result of the testing performed by the neuropsychologists. [VIII,T77] Dr. Holder did not dispute the results of the testing performed by Dr. Krop or Dr.

Gamache. Accordingly, the trial court's finding that the neuropsychological testing was in dispute is in error. There was no dispute as to the findings resulting from the neurological testing.

Likewise, the postconviction court's conclusion about Dr. Wu's testimony is not supported by competent substantial evidence. This Court defers to the factual findings of the trial court only where such findings are supported by competent, substantial evidence. Walker v. State, 957 So.2d 560 (Fla. 2007) While the postconviction court here did not specifically find that Dr. Holder was more credible than Dr. Wu, the court suggested that Dr. Holder's testimony should carry the day. Yet, Dr. Holder testified that he has not used, researched, or published in the area of forensic PET scans that Dr. Wu utilizes. DHe had examined fewer than 100 PET scans of the brain using a different method and only for the purpose of identifying tumors or physiological changes consistent with dementia or Alzheimer's disease. While Dr. Holder is admittedly a medical doctor, his practice is oncological in nature; he has no background or experience in the forensic use of PET scans or in the administration and interpretation of a visual vigilance PET scan, the crucial testing at issue

here.

It is also likely that evidence that Mr. Rodgers has brain damage would have affected the proportionality analysis that this Court conducted in the direct appeal. Coleman v. State, 64 So.3d 1210 (Fla. 2011). Although the sentence of death was upheld, three members of this Court dissented, focusing heavily on Mr. Rodgers' mental health issues, the relative weight that the trial court had assigned to the other mitigation, and the fact that this was a single aggravator case. Evidence that a defendant, like Mr. Rodgers, has brain damage that is consistent with prenatal origins, coupled with a low IQ, has been termed by this Court in other cases to be significant mitigation. See Hurst, 18 So.3d at 1013.

Thus, the second prong of Strickland, prejudice is established. The trial court's denial of relief is erroneous and should be reversed.

ISSUE II

TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO CONSULT AND CALL AN EXPERT WITNESS IN THE AREA OF CHILD WITNESSES WHO WOULD HAVE ASSISTED IN THE PREPARATION OF CROSS-EXAMINATION OF DETECTIVE CHIOTA AND THE CHILD WITNESSES, ENSURING THAT THE CHILD WITNESSES WERE COMPETENT TO TESTIFY, AND IN

CROSS-EXAMINING THE CHILD WITNESSES ABOUT THE INCONSISTENCIES IN THEIR TESTIMONY WITH PREVIOUS STATEMENTS WITH QUESTIONS APPROPRIATE FOR CHILD WITNESSES.

At trial, the State presented the testimony of three children who were present in the day care center at the time of the offense. The children were all under the age of 8 at the time of the offense. The children's first recorded interview with law enforcement was conducted by Detective Chiota two days after the offense. During pretrial proceedings, the children and Detective Chiota were deposed by defense counsel. Marquis Turner was age eight at the time of trial, TiJuan Turner was age nine at the time of trial, and Raveen Turner was age ten and a half at the time of trial.

Defense counsel did not challenge the competency of any of the children to testify at trial. The trial court conducted a rudimentary inquiry.

Dr. Sherry Bourg-Carter testified at the post-conviction evidentiary hearing that numerous issues surrounded the interviews of the children, including their competency and deficiencies in the cross-examination of both Detective Chiota and the children at trial. Dr. Carter is a forensic psychologist with a subspeciality in

the area of child witnesses. She assists both prosecutors and defense attorneys in determining whether a child is competent to testify, evaluating the interviews of child victims against the accepted protocols governing child witness interviews, and assisting in preparation of questioning for trial.

A. Deficiencies in the Police Interview/Cross-examination of Detective Chiota

Dr. Carter testified that Detective Chiota's interview of the three children was done in a manner that conflicted with or did not meet the set of standards that a majority of the experts in the field agree should be followed when children are interviewed.[VIII,T365] Dr. Carter outlined the problems, including indications that the police spoke with the children before the interviews were recorded; that the children's mother and others were present during the interviews; that the interviews employed developmentally inappropriate questions, leading questions, and tag questions that could influence the accuracy and reliability of the children's statements; that the children were not told that they were permitted to say that they did not remember or understand in response to questions; and that inadequate questioning was conducted to ensure that the

children understood (1) the difference between the truth and a lie, (2) the meaning of an oath, (3) the obligation to tell the truth, and (4) the consequences for not telling the truth. [VIII,T367-417] The totality of the errors or mistakes, coupled with the surroundings of the interview, are evaluated using the totality of the circumstances to determine the competency of the children and the probability that interview errors caused the children to misunderstand questions or misreport when answering. [VIII,T416]

In Dr. Carter's opinion, there was insufficient questioning of Marquis and TiJuan to determine whether they had the ability to tell the truth, understand an oath, and understand the obligation to tell the truth. [VIII,T517-419] Similarly, there was insufficient questioning of Raveen to determine whether she could distinguish between the truth and a lie, although most eight-year-olds can. [VIII,T419-20] The questioning regarding the obligation to tell the truth and consequences for failing to do so was not sufficiently addressed to be able to determine whether Raveen understood those concepts in the interview. [VIII,T420]

The failure to investigate and present expert

testimony constitutes ineffective assistance of counsel, which is compounded when that failure leads to a breakdown of the adversarial testing of the State's case. The duty of defense counsel is to subject the State's evidence to adversarial testing. Honors v. State, 752 So.2d 1234 (Fla. 2d DCA 2000). The primary means by which the State's evidence is subjected to adversarial testing is through full and effective cross-examination and impeachment of the State's witnesses. Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974); Steinhorst v. State, 412 So.2d 332, 337 (Fla. 1982). The need for effective cross-examination is more pressing where the witness is a key state witness or an eyewitness. Perez v. State, 949 So.2d 363 (Fla. 2d DCA 2007). The defense in this case failed to subject the State's evidence and a key witness, Detective Chiota, to the rigorous adversarial testing that is contemplated under the Sixth Amendment to the United States Constitution.

At trial, the testimony of Detective Chiota consisted of twelve total pages - five pages of direct by the State and seven pages of cross. [Trial Transcripts, Vol. VII, T940-952] During all that time, however, defense counsel did not cross-examine Detective Chiota on the preferred

protocols that apply to child witness interviews or the deficiencies identified by Dr. Carter in the interviews done by Detective Chiota. This failure on the part of defense counsel to cross-examine Detective Chiota constitutes deficient performance under the first prong of Strickland. There was no tactical or strategic reason to forgo the type of cross-examination outlined by Dr. Carter. The defense attorneys agreed that the three child witnesses were critical, key state witnesses. An adversarial testing of the State's case would necessarily include the development of any evidence that would cast doubt on the reliability and credibility of the children's testimony. That was not done in this case.

As an expert, Dr. Carter could have alerted defense counsel to the deficiencies and could have assisted defense counsel in drafting motions and questions for the cross-examination of Detective Chiota which would have alerted the jury to Detective Chiota's deviations from the preferred protocol.[VIII,T428-430] Accordingly, Mr. Rodgers was prejudiced as a result of the deficient performance of trial counsel in failing to subject Detective Chiota to rigorous cross-examination regarding the children's interviews. The jury was deprived of

information that was critical to its determination regarding the credibility of the children and the reliability of their testimony.

Had the jury been presented with and considered the testimony of Dr. Carter about the importance of utilizing proper techniques in the interview process and questions that arise regarding reliability of information when children are not properly interviewed, the jury would have been far better equipped to evaluate the credibility of the children, their opportunity to observe, and their ability to accurately relate their observations to the jury. The jurors were thus deprived of the essential tools required to permit them to properly evaluate the state's key witnesses. In the face of this obvious deficiency, it cannot be presumed that the jurors would have rejected this critical knowledge, had it been presented to them. To the contrary, it is likely that the jurors would have relied upon that knowledge in evaluating the children's credibility. As such, the jurors could well have reached a different verdict as a result.

B. Competency of the Child Witnesses At Trial

Dr. Carter's opinion regarding the same issues regarding truth/lie, obligation to tell the truth, and

consequences of failing to tell the truth were not adequately developed in the depositions. [VIII,T424-425]

Dr. Carter noted that during trial, Marquis was not asked any questions regarding his obligation to tell the truth or his understanding of the oath. [VIII,T425-6] TiJuan was not asked any questions at trial sufficient to determine his competency based on the four questions he was asked.[VIII,T426] Raveen was not asked sufficient questions at trial to determine whether she understood the obligation to tell the truth and the duties of an oath.[VIII,T427] In order for a child witness to be found competent to testify, this Court has set forth three criteria: "Accordingly, when evaluating the competency of a child, the trial court should consider the following:

> (1) whether the child is capable of observing and recollecting facts; (2) whether the child is capable of narrating those facts to the court or to a jury, and (3) whether the child has a moral sense of the obligation to tell the truth."

Floyd v. State, 18 So. 3d 432, 443-333 (Fla. 2009).

Since witnesses are presumed competent, the burden is on the objecting party to establish a lack of competency. Zabrani v. Riveron, 495 So.2d 1195 (Fla. 3d DCA 1986). Under Floyd, it is the obligation of the trial court to

determine competency. That determination is reviewed on appeal under an abuse of discretion standard.

The record reflects that none of the children here were questioned before the trial court about their understanding of their moral obligation to tell the truth. For example, Raveen was asked if it was good to tell the truth and what would happen if you didn't tell the truth [Trial Transcript, Vol.V,T670] However, she was not asked about her moral obligation to tell the truth. TiJuan was asked the same questions as Raveen, again with no specific questions about his moral obligation to tell the truth. [Trial Transcript, Vol. V,T698]

The postconviction court's order denying relief overlooks the fact that none of the children were asked any questions to demonstrate their understanding of their moral obligation to tell the truth. Although the court noted that the defense attorney and the court had the opportunity to observe the demeanor of the children, a child's demeanor quite obviously sheds no light on the child's understanding of the moral obligation to tell the truth. Accordingly, Mr. Rodgers was prejudiced by the court's failure to ascertain whether the children were competent to testify.

C. Cross-examination of the child witnesses

Dr. Carter testified at the evidentiary hearing that she reviewed each of the statements that each of the children made and found many instances of inconsistencies between each child's multiple statements and with the other children's statements. [VIII,T473] A few of these inconsistencies were brought out on cross-examination of the children, but many, many others were not.[VIII,T473] The State's position below was that the trial court and the lawyers were capable of identifying any inconsistent statements.[VIII,T493-498] The postconviction court recognized in the order denying relief that defense counsel had questioned the children on "some" of their inconsistent statements without identifying those inconsistencies and without identifying potential cross-examination that was omitted.[V,R780-1] An analysis of the children's statements and testimony reflects these examples of inconsistencies that were not brought out at trial:

(1) Marquis Turner: Marquis told the police that he observed Mr. Rodgers punching the victim in the stomach. However, at trial he testified that the victim was kicked. He was not impeached on this inconsistency. Also at trial, Marquis testified that when Mr. Rodgers came out of the bedroom he had a jacket with the gun. Marquis did not tell

the police or the State in deposition anything about a jacket. Marquis was not impeached on this inconsistency at trial either.

(2) TiJuan Turner: TiJuan stated in his deposition that Mr. Rodgers opened the door to the daycare, said nothing, and went straight to get his gun. Marquis testified at trial that the victim let Mr. Rodgers in. TiJuan was not impeached with this inconsistency at trial. In addition, TiJuan testified at trial that he saw Mr. Rodgers hit the victim in the face with the front of the gun. TiJuan did not make this claim during the police interview or during his deposition. He was not impeached with this inconsistency. At trial TiJuan claimed that Mr. Rodgers sat on the couch while he shot the victim, a claim he had not made in his police interview or in deposition. TiJuan was not impeached with this inconsistency. During his deposition TiJuan claimed that he heard Mr. Rodgers muttering to himself in the living room, “Where’s my gun,” but not very loud. At trial TiJuan testified that he did not hear Mr. Rodgers make any statements about a gun. TiJuan was not impeached with this inconsistency.

(3) Raveen Turner: Raveen testified at trial that she did not ever see Mr. Rodgers hit the victim with his hands

and recounted that he when kicked the victim, she fell to the ground, and then Mr. Rodgers kicked her again. Raveen told the police, however, that Mr. Rodgers slapped the victim in the face with his hands. She stated to the police and in her deposition that Mr. Rodgers kicked the victim only one time, not twice. She was not impeached with this inconsistency. Raveen testified at trial that she heard Mr. Rodgers ask the victim after the phone rang if she was on the phone with the police, yet in her interview and at deposition she claimed she did not hear anything but only believed that Mr. Rodgers suspected the police had been called because her older sister told her this. Raveen was not impeached with this inconsistency.

Defense counsel's failure to bring out all the inconsistencies within the children's statements and between the children's statements constituted clearly deficient performance under the first prong of Strickland. The areas of impeachment that were omitted from cross were equally critical to the defense as those upon which defense counsel did impeach the children. There is no tactical or strategic reason for defense counsel to have chosen to forgo impeachment on the inconsistencies that were outlined above. Defense counsel's failure can only be characterized

as a lapse that amounted to deficient performance. It cannot be seriously argued that this lapse was merely a failure to produce cumulative evidence. In the case of witness credibility, each inconsistency makes the witness progressively less credible. The failure to present multiple inconsistencies in the testimony of key state witnesses is outside the bounds of prevailing professional norms.

Mr. Rodgers was prejudiced by defense counsel's deficient performance. The importance of a full adversarial testing of the State's case through cross-examination that was set forth in section A of this issue applies with equal force to the failure of defense counsel to rigorously cross-examine the children on the inconsistencies of their own statements and the inconsistencies among the three statements. Mr. Rodgers was prejudiced by the failure of defense counsel to demonstrate to the jury the conflicts and unreliability in the children's memories through rigorous cross-examination of all the areas of inconsistency and impeachment of the witnesses where warranted.

ISSUE III

TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO

ESTALBISH THAT THE GUN USED IN THIS HOMICIDE BELONGED TO THE VICTIM'S EX-HUSBAND, WILLIE ODUM, AND DID NOT BELONG TO MR. RODGERS.

The defense at trial was that Mr. Rodgers shot the victim in self-defense after the victim obtained a gun from the day care center that she operated. The State's theory at trial was that Mr. Rodgers, angry about his wife's infidelity after catching her and her ex-husband Willie Odum that morning in compromising circumstances, returned to the day care center in the evening intending to kill his wife. The State argued that Mr. Rodgers became increasingly angry as the day progressed and did not return to speak with his wife but to harm her.

During pretrial discovery, the defense was provided with documents from Orange County law enforcement that identified the gun used in the homicide as belonging to Willie Bee Odum. Mr. Odum was the victim's ex-husband and the man Mr. Rodgers found leaving his wife's daycare center in a state of undress on February 14. The defense made some efforts prior to trial to secure Willie Odum as a witness, as each guilt phase attorney [Barrett and Williams] and one penalty phase attorney [Couture] agreed that establishing that the gun belonged to Odum was important to the defense case and to the penalty phase

because it diminished premeditation and the emotional nature of the offense.

Just before trial, the defense attorneys learned that Odum had not been served. Despite knowing the evidentiary predicate that would be required to introduce the documentary evidence establishing gun ownership, no efforts were made to secure those witnesses. As a result, it was not established at trial that the gun was owned by Willie Odum. The failure of the defense team to take the necessary steps to present testimony to establish ownership of the gun without Odum's presence amounted to deficient performance.

Mr. Rodgers testified at trial that in the early evening he began to receive calls to his cell phone from the victim asking him to come to the daycare center. After arriving at the daycare, Mr. Rodgers and the victim began to argue. Mr. Rodgers testified that the victim had a gun, contrary to the testimony of the three children who claimed that Mr. Rodgers went to a back room and came out with a gun. Mr. Rodgers testified that he did not come to the daycare armed, nor did he enter any room to obtain a gun.

The failure to call a witness to present testimony that supports the defense or calls into doubt any portion

of the State's evidence can constitute ineffective assistance of counsel. Newland v. State, 958 So.2d 563 (Fla. 2d DCA 2007); Nelson v. State, 875 So.2d 579 (Fla. 2004).

In this case all of the defense attorneys agreed that it was important to both the guilt and penalty phases to establish that the gun did not belong to Mr. Rodgers, but that the gun belonged to Willie Bee Odum. The defense took steps to secure the presence of Odum but learned just before trial that he could not be located for purposes of service. At this point, however, no further efforts were made to admit the records establishing gun ownership as a business record under Section 90.803(6), Florida Statutes (2003). The failure to utilize the business record exception by calling the custodian of records from the ATF and the Orange County Sheriff's office to establish that the gun was registered to Willie Bee Odum establishes deficient performance under the first prong of Strickland.

Mr. Rodgers was prejudiced by the failure of his attorneys to establish that the gun belonged to Willie Odum. All of the attorneys agreed that it was important to present evidence corroborating the defendant's testimony. Establishing the gun's ownership in Willie Odum would have

corroborated Mr. Rodgers' testimony that he did not bring the gun into the daycare. Further, the fact that the gun belonged to Odum places not only Odum in the daycare center, but places his possessions in the daycare as well. The fact that Odum had personal property in the daycare supports Mr. Rodgers' testimony that the victim had knowledge of the gun's location in the daycare and retrieved it herself. The reverse is also true. The fact that Odum owned the gun makes it less likely that Mr. Rodgers knew that his wife's paramour had left his personal property at the daycare, knew where it was located, and retrieved it in order to shoot the victim with a premeditated intent.

The ownership of the gun was also important to penalty phase considerations. The fact that the victim's paramour kept personal property at the day care center would be evidence sympathetic to Mr. Rodgers that would help to explain his level of distress over his wife's infidelity and the level of the relationship between the victim and Odum. The jury could have considered these factors in determining whether to recommend death as mitigation in favor of a life sentence.

ISSUE IV

THE TRIAL COURT ERRED IN DETERMINING THAT MR. RODGERS KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT TO "DRESS OUT" BEFORE THE JURY AND INSTEAD APPEARED IN JAIL CLOTHING DURING PENALTY PHASE.

At the onset of the penalty phase, Mr. Rodgers entered the courtroom in jail clothes.[II,R373] The court asked defense counsel Gerod Hooper if "that's the way you want him dressed?", to which Hooper responded that since the jury had found Mr. Rodgers guilty, no reason existed for him to dress differently.[II,R373] After making sure that Mr. Hooper knew that there would be time for a change of clothes, the trial court then asked Mr. Rodgers if he had any problem with his current attire.[II,R373] Mr. Rodgers said, "No," and the proceedings commenced.[II,R373]

Mr. Hooper testified that he did not know if Mr. Rodgers knew what the term "dressed out" meant when used during the colloquy with the trial judge.[VI,T49] Mr. Hooper did not know if Mr. Rodgers would understand the word "attire".[VI,R49] Mr. Hooper didn't follow up or explain "dressed out" and "attire" to Mr. Rodgers because he had told him to wear jail clothes.[VI,T49]

Mr. Hooper testified that it was his decision to have Mr. Rodgers wear jail clothes.[VI,T36] Mr. Hooper could

not say when or where he discussed the issue of dressing out versus jail clothes with Mr. Rodgers.[VI,T38] At some time Mr. Hooper explained to Mr. Rodgers that it would be better for Mr. Hooper during closing argument if Mr. Rodgers was wearing jail clothes.[VI,T38] Mr. Hooper testified that this was not a lengthy conversation and that all he said was just that is was better; Mr. Hooper did not tell Mr. Rodgers why it was better.[VI,T39] Mr. Hooper did not explain his reasoning or rationale to Mr. Rodgers.[VI,T39] Nor did Mr. Hooper tell Mr. Rodgers that he had a constitutional right to wear non-jail clothes before the jury.[VI,T40-41] Mr. Hooper believed that Mr. Rodgers was mentally retarded, so he would not have used any "legalese" to explain things to him.[VI,T42]

Mr. Hooper has had all his capital clients in Tampa appear in jail clothes and once, in shackles.[VI,T37] He always had his capital defendants wear jail clothes.[VI,T43-44] Mr. Hooper did not believe that the same considerations, namely the presumption of innocence, applied at penalty phase.[VI,T95]

Mr. Hooper's prior experience in death penalty litigation came from the time he spent in the Hillsborough County Public Defender's Office.[VI,T16;24] He worked on

about six cases, half of which had an "integrated defense."[VI,T19] Mr. Hooper gave the closing argument for the penalty phase in two cases, where he "guessed" he was lead counsel.[VI,T16;19] Mr. Hooper came to work in the Ninth Circuit after a two-year hiatus in private practice in May 2003.[VI,T30]

Mr. Hooper got involved in Mr. Rodgers' case about a month before trial.[VI,T31]

A criminal defendant has constitutional rights under the due process clause of the Fifth Amendment and the equal protection clause of the Fourteenth Amendment to the United States Constitution to appear before the jury dressed in clothing that is not prison garb. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). This right to appear before the jury without visual impairments to the presumption of innocence was extended by the Supreme Court in 2005 to include the sentencing phase of a capital trial. Deck v. Missouri, 544 U.S. 622, 632, 125 S.Ct. 2007, 161 L.Ed. 2d 953 (2005). While no longer deciding guilt or innocence, the jury is still deciding between life and death. The United States Supreme Court recognized that the decision between life and death is of no less importance than the decision between guilt and innocence, thus the

same considerations that apply to the use of jail garb at the guilt stage apply at the sentencing stage. The Court stated: "[I]t appears to the jury that the justice system itself sees a need to separate the defendant from the community at large." Id. at 630. The United States Supreme Court has thus rejected Mr. Hooper's belief that since the presumption of innocence was no longer applicable, the damaging effects of jail garb no longer applied.[VI,T95]

The United States Supreme Court further stated that the use of jail garb "inevitably undermines the jury's ability to weight accurately all relevant considerations . . . when it determines whether a defendant deserves death. In these ways, [the use of a visual impairment] 'can be a 'thumb' on death's side of the scale." Id. (citing Sochor v. Florida, 504 U.S. 537, 532, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992). In fact, the Court found the use of visual impediments to be so inherently prejudicial that the defendant is not required to show actual prejudice; rather, the burden is placed on the State to show beyond a reasonable doubt that the shackling did not affect the verdict. Clearly, in reaching these conclusions, the Court rejected Mr. Hooper's stated rationale for using jail garb as a means of separating Mr. Rodgers from the community:

> I what to make it sound to the jury as horrible as possible. I'm gong tell them he's gong spend the rest of his life in a small, little cage and have not contact with the outside world, and for the rest of his life, whenever he gets up in the morning, he won't be able to make one damn decision for himself, including what to wear. [VI,T96]

Given the Court's views, as expressed above, it is unlikely that the Court would agree with Mr. Hooper's desire to have the jury see his clients in shackles "like the ghost of Christmas past". [VI,T97]

Permitting a defendant to appear before a jury in jail garb gives rise to a legitimate claim of ineffective assistance of counsel. Waters v. State, 779 So.2d 625 (Fla. 1st DCA 2001) Mr. Hooper's belief that the attorney who forgoes jail garb is ineffective has not carried the day with the United States Supreme Court. [VI,T43] In fact, the reverse is true. Mr. Hooper's strategy to insist that his clients appear before the jury in jail garb constitutes deficient performance.

The right to appear before the jury without visual impediment was a fundamental right belonging to Mr. Rodgers. It was not Mr. Hooper's right. Thus, Mr. Rodgers had to understand the right and make a knowing and intelligent waiver. As such, the appropriate inquiry is,

first, whether Mr. Rodgers was adequately informed of his constitutional right to appear before the jury without visual impairment and, second, whether he knowingly and voluntarily waived that right. See Lewis v. State, 864 So.2d 1211 (Fla. 4th DCA 2004); Palmer v. State, 831 So.2d 725 (Fla. 4th DCA 2002).

According to Mr. Hooper's testimony, the conversation with Mr. Rodgers consisted of Mr. Hooper telling him to wear jail clothes because it would be better for closing argument. Nothing more. Mr. Hooper did not tell Mr. Rodgers he had a constitutional right to appear before the jury otherwise. Mr. Hooper did not engage in any cost/benefit analysis with Mr. Rodgers.

In Palmer, 831 So.2d 725, the defendant appeared in front of the jury wearing green jail pants. Defense counsel told the defendant he could pick between green jail pants or blue jail pants, but the record was unclear whether the defendant knew that he had a choice other than jail garb. The attorney assured the defendant the jail pants "weren't a problem". The district court reversed, ordering an evidentiary hearing. The record in this case reflects that Mr. Rodgers had no more information than did the defendant in Palmer. Simply telling a defendant to

wear something they have a fundamental right to forgo is not sufficient information upon which a waiver can be based.

The colloquy in court did not cure Mr. Hooper's deficient conduct. The trial court did not tell Mr. Rodgers that he had a constitutional right to dress differently or explain to him the pros and cons of the clothing he chose. In Ashley v. State, 614 So.2d 486 (Fla. 1993), this Court held that defendant cannot waive a fundamental right without an affirmative showing that the waiver was "intelligent and voluntary," because: "[W]hat is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." Id. at 988 (citing Boykin v. Alabama, 395 U.S. 238, 243-44, 89 S.Ct. 1709, 1712, 23 L.Ed. 2d 274 (1969)).

The record before this Court establishes that Mr. Rodgers was never told that he had a constitutional right to appear before his jury in street clothes. Neither was he advised of the pros or cons of each alternative, thus depriving him of the information necessary in order for his

decision to be considered knowing and voluntary. The burden rests with the State to show that this error was not harmless.

The United States Supreme Court made clear the negative impact that being dressed in jail garb can have on a jury - a “thumb on death’s side of the scale”. The jury recommendation in this case was 8-4. There was but a single aggravator. The determination of prejudice militates in favor of Mr. Rodgers.

CONLCUSION

Based upon the forgoing facts, arguments, and citation of authority, Mr. Rodgers respectfully requests that the judgment and sentence be reversed, and that as to Issues I and IV a new sentencing proceeding be granted, and as to Issues II and III a new trial be granted.

Respectfully submitted,

_____
ANDREA M. NORGARD
Counsel for Appellant

_____
ROBERT A. NORGARD
Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing has been furnished by U.S. Mail to the Office of the Attorney General, Assistant Attorney General Kenneth Nunnerly, 444 Seabreeze Blvd. 5th Floor, Daytona Beach, FL 32118, this ___ day of May, 2012.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style font used in the preparation of this Initial Brief is Courier New 12 point in compliance with Fla. R. App. P. 9.210(a)(2).

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APPENDIX A