IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-1442

CHARLES C. PETERSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT, IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

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REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Peterson lives or dies. This Court has not hesitated to allow argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Peterson.

PRELIMINARY STATEMENT REGARDING REFERENCES

References to the record of the direct appeal of the trial, judgment and sentence in this case are of the form, e.g. (Dir. ROA Vol I, 123). References to the postconviction record on appeal are in the form, e.g. (PC ROA Vol. I, 123). Generally, Charles C. Peterson is referred to as "the defendant" or "the Appellant" throughout this motion. The Office of the Capital Collateral Regional Counsel-Middle Region, representing the Appellant, is shortened to "CCRC."

STATEMENT OF THE CASE AND FACTS

This is an appeal of the circuit court's denial of a 3.851 motion for postconviction relief. Mr. Peterson is alleged to have robbed a Big Lots store and shot a store clerk before taking money from the store and fleeing. During the robbery, the masked assailant shot a store clerk in the upper shoulder blade. A medical examiner informed: "[T]he gunshot was at the left back region, and the bullet was recovered at the right lobe of the liver." (Dir. ROA Vol. XXVI, 1388). The single bullet fired from a .22 caliber handgun struck a clerk in the back shoulder, and travelled through his body before finally lodging in his liver, killing him. Mr. Peterson's convictions and death sentences were upheld by this Court on direct appeal. *Peterson v. State*, 2 So. 3d 146 (Fla. 2009).

CCRC was appointed to represent Mr. Peterson following direct appeal. A 3.851 Motion (*see* Motion at PC ROA Vol. I, 35-109) was filed citing numerous constitutional violations that occurred following the withdrawal of the public defender's office and the appointment of conflict counsel to Mr. Peterson's case. After an extensive evidentiary hearing, the circuit court denied Mr. Peterson's 3.851 Motion. (*See* Order at PC ROA Vol. V, 748-794). This appeal follows.

Five jurors who served in this case are at issue here. The defense never made any motion to remove these five particular jurors from the panel. This will be discussed further in this brief.

The first juror at issue, Audra Johnson, who ultimately served on the jury,

informed that she was a victim at the age of 16. Dir. ROA Vol. XXII, 789. She stated, "I was raped when I was 16." Dir. ROA Vol. XXII, 792. She also stated during *voir dire*, "I don't think that there was a sentence enough for the crime." Dir. ROA Vol. XXII, 795. In a case where the jury would hear evidence at trial that the defendant was involved in at least 4 sexual assaults, and the jury would be choosing between a life sentence and the death penalty, the claim here is that defense should have moved to strike this juror from the panel. This is especially true in a case where the juror's assailant closely resembles Mr. Peterson (as evidenced by photographs of Cedrick Bailey and Charles Peterson, State EH Exhibits 1 and 2, PC ROA Vol. V, 807-08, Defense EH Exhibit 1, PC ROA Vol. V, 810).

Furthermore, Mr. Peterson was on trial for shooting the victim. Juror Johnson informed during *voir dire*, "We're currently going through a case right now with my husband's cousin who was recently shot in St. Petersburg, so we're in the middle of a case." (Dir. ROA Vol. XXII, 789-790)." The claim here is that a rape victim who was "currently going through a case right now" where a family member was shot is not an appropriate juror for a capital murder trial involving a shooting death. This is especially true in a case where the State would be presenting evidence that the defendant has been convicted previously 4 times of rape, and the juror felt that her assailant (one who closely resembles the defendant) had received too light a sentence, perhaps in the very same Pinellas

County courtroom.

This claim brings up another consideration: Juror Johnson stated that "it would be beneficial for us to hear from [the defense], the witnesses, and maybe even to have [the defendant] testify." (Dir. ROA Vol. XXII, 874). This is a case where the defense simply rested after the State presented extensive evidence, much in the way of alleged collateral crimes. Juror Johnson's fitness to serve on this jury is questioned in this case, with allegations that trial counsel was ineffective for failing to move to strike her from the panel.

The second juror at issue, Juror Marilyn Breen, informed that with her sensitivities, she would be better serving on some other type of case. Dir. ROA Vol. XXI, 549. Like with Juror Johnson, the defense never even attempted a strike on Juror Marilyn Breen. She informed that her son was a victim of a crime, he had been knocked off his bike, and sustained a broken arm and required stitches in his head. Dir. ROA Vol. XIX, 254. Juror Breen was upset because she felt the police "could have done more," "they really didn't even question [her] son," and she and her "husband were down there [at the police station] constantly." (Dir. ROA Vol. XIX, 255).

The third juror at issue, Juror Thomas Walbolt, informed that he had been robbed before. Dir. ROA Vol. XX, 406. This is a robbery/murder case. Juror Walbolt informed that his wife had actually escaped and survived two robbery attempts. He also informed that he has worked closely in his job in the parks

department with law enforcement. Dir. ROA Vol. XX, 407. As will be discussed further in this brief, the claim here is that Juror Walbolt should have been stricken from this jury. Instead, he served on this jury and came to taint the jurors against Mr. Peterson. Documented on the record are at least two instances of juror misconduct on the part of Juror Walbolt, actually witnessed by the presiding judge and court clerk. Trial counsel was invited by the presiding judge, but failed to take the opportunity to strike this juror.

This juror was witnessed tainting fellow jurors in the courthouse lunchroom cafeteria, explaining to fellow jurors that the State could actually sustain a first degree murder charge in this case based on the felony-murder principle. Juror Walbolt was asked about his improper cafeteria discussions and he responded: "There were jurors that were talking about the–the people that were here today, not the original group. They were talking about how there was something said in the courtroom about - - that was challenged, and why it was first-degree. And I told them there's two–we were instructed there was two reasons for it to be first degree, you know, and that was–that was what the conversation was mostly about . . . she was wrong. She misinterpreted what it was. It was a nurse . . . It was just her interpretation of what first-degree murder was, so–I didn't feel like it was about this case. I just thought it was about first-degree murder." Dir. ROA Vol. XXIII, 928-929. No motion was ever made by the defense to remove Juror Walbolt.

The fourth juror at issue was Necole Tunsil. Instead of being stricken by the defense after announcing that she would require the defendant to take the stand and deny culpability in a criminal trial, she served as foreperson. She even conveyed that if the defendant did not take the stand, she would presume him guilty. Charles Peterson did not take the stand. Post verdict she told the press: "I think [Charles Peterson] could have gotten up and said something." Dir. ROA Vol. XII, 2158. She outright informed the press post-verdict that the jury's decision might have been different if Charles Peterson would have testified. *See* Dir. ROA Vol. XII, 2144.

The fifth juror at issue is Christine Salgado. She was actually more vehement than Juror Tunsil about requiring the defense to present at least some evidence. She informed the defense that "Even though the burden is on the State, I would still definitely want to hear your side." Dir. ROA Vol. XXII, 873. Trial counsel was ineffective for failing to exercise either a peremptory or cause challenge on these five jurors.

During *voir dire*, the defense failed to object when the State continually informed the jurors that the legislature had essentially determined that the Peterson case was appropriate for the death penalty. The most egregious example of this misconduct was with prospective juror Annie Stevens; when she expressed reservations about the death penalty, the State responded: "You may not agree that that's heinous enough for you, but the legislature has, on your

behalf, said these are the circumstances in Florida that a person could be punished be death. Would you believe that the legislature has the right to do that on your behalf and decide that?" Dir. ROA Vol. XX, 463.

In effect, the State was informing the panel that a vote for life would be a violation of Florida law. Facing no objections, the State continued with prospective juror Daryl Bortel as follows: "You indicated that you would have to look at things and feel whether or not it's appropriate, and we've had discussions about how the legislature has kind of taken that out of your hands a bit." Dir. ROA Vol. XX, 476. Trial counsel should not have permitted the State to continually taint this pool of prospective jurors.

Trial counsel never challenged the questionable eyewitness identifications of the masked perpetrator in this case. They should have consulted and presented an expert in the field of eyewitness identification. Trial counsel allowed *Williams* rule evidence of a prior Hillsborough County sexual assault to prejudicially infect these proceedings. They also failed to challenge the State's fingerprint evidence, and failed to adequately move to exclude all *Williams* rule evidence.

At the penalty phase, trial counsel permitted the State to utilize the *Williams* rule evidence to obtain a death sentence. Counsel did not present additional witnesses in support of the mitigating factor that Mr. Peterson had close relationships with friends and family and did good deeds. Trial counsel did

not investigate and present all available mitigation, presenting a defense expert at trial who branded Mr. Peterson with the stigma of the anti-social personality disorder.

The instant appeal follows the denial of Mr. Peterson's 3.851 Motion.

SUMMARY OF THE ARGUMENTS

ARGUMENT I -- Trial counsel was ineffective during *voir dire* for not exercising either cause or peremptory strikes on five jurors who exhibited bias against the defense. At the very least, there was reasonable doubt as to several jurors' ability to respect Mr. Peterson's presumption of innocence and right to remain silent. The defense should have moved to strike Juror Thomas Walbolt for two instances of juror misconduct after he prejudicially informed his fellow jurors in the courthouse cafeteria before opening statements that there were actually two ways that the State could prove first degree murder.

ARGUMENT II --Trial counsel was ineffective for failing to object to several improper comments made by the State during *voir dire* suggesting to the jurors that the legislature had chosen this case to be appropriate for the death penalty. Various comments by the State which improperly shrouded this case with legislative legitimacy and diminished the jurors' sense of responsibility should have been objected to by trial counsel. Trial counsel was ineffective for failing to file appropriate motions *in limine* to prevent improper, inflammatory, and

prejudicial considerations from reaching the jury. Trial counsel was ineffective for failing to object during the State's improper closing arguments, and for failing to make an opening statement and failing to make available arguments during closing. Trial counsel failed to effectively challenge the State's fingerprint, *Williams* Rule, and eyewitness identification evidence.

ARGUMENT III – Trial counsel was ineffective at the penalty phase for failing to object to the State using the *Williams* Rule cases as evidence of aggravation when the whole premise behind the admission of the *Williams* Rule cases which Mr. Peterson was convicted and those which he was not convicted was limited to proving the similar facts. Trial counsel was also ineffective for failing to object to facts not in evidence, and failing to present additional lay witnesses to support mitigation. The case for life was further prejudiced by the defense expert's branding Mr. Peterson with the stigma of antisocial personality disorder.

ARGUMENT IV—The errors in this case are significantly prejudicial when their cumulative effect is considered.

CLAIM I

MR. PETERSON WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE BIASED JURORS WERE NOT STRICKEN FROM THE PANEL. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO QUESTION

JURORS REGARDING THEIR EXPERIENCES AND BIASES, CHALLENGE THEM FOR CAUSE, OR HAVE THEM EXCUSED BY EXERCISING A PEREMPTORY CHALLENGE. THE LOWER COURT SHOULD HAVE GRANTED RELIEF UNDER *STRICKLAND.*

Under the principles set forth by this Court in *Stephens v. State*, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring *de novo* review with deference only to the factual findings by the lower court.

In *Porter v. McCollum*, 130 S. Ct. 447, 455-456 (2009), the United States Supreme Court stated as follows: "We do not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.' *Strickland*, 466 U.S., at 693-694, 104 S.Ct. 2052." Mr. Peterson's burden of proof in this postconviction action is something less than a preponderance of the evidence.

Problems During Voir Dire

During *voir dire*, information surfaced regarding several jurors that should have alerted competent counsel of the need to exercise a strike.

Ineffective assistance of counsel is comprised of two components: deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prove deficient performance the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the

Sixth Amendment." *Id.* The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. To prove the deficient performance caused prejudice to the defendant, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

The defendant must show both deficient performance and prejudice to prove that a "conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant had the assistance necessary to justify reliance on the outcome of the proceeding." *Id.* at 691.

A defendant, however, "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695.

"In making this determination, a court hearing an ineffectiveness claim

must consider the totality of the evidence before the judge or jury." *Id.* at 695. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696.

Jury selection in any criminal case is one of the most important stages of a criminal trial. In a capital case the importance of jury selection takes on a greater dimension because each individual juror must decide ultimately whether an individual will live or die. Counsel had the added responsibility to ensure that the jurors selected will deliberate and consider mitigation in a manner that is consistent with the constitutional requirement that the death penalty must be reserved for the most aggravated and least mitigated of murders.

Trial counsel seriously failed during this crucial phase of Mr. Peterson's representation. Trial counsel was ineffective throughout jury selection. During this critical stage, important areas of juror bias and prejudice were not adequately addressed or were simply ignored. Counsel failed to use the jury selection process to ensure that Mr. Peterson was tried by a fair jury.

As a result of counsel's failures during jury selection, Mr. Peterson was prejudicially denied the most fundamental of rights - - a fair and impartial jury.

Juror Audra Johnson

There were several troubling issues surrounding Juror Johnson, and therefore she should not have served on this jury. The Florida Supreme Court

stated the following over 50 years ago:

> [I]f there is basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial he should be excused for cause on motion of a party.

Singer v. State, 109 So.2d 7, 23-24 (Fla.1959). When asked about her contact with the criminal justice system, Juror Johnson shared the following information: "I was also a victim when I was 16." Dir. ROA Vol. XXII, 789. When asked if she felt "comfortable talking" about the incident, she answered, "No." Dir. ROA Vol. XXII, 792. She approached the bench discreetly, and informed, "I was raped when I was 16." Dir. ROA Vol. XXII, 792. She said that the assault took place in Pinellas County, and informed the Court, "I don't think that there was enough time sentence for the crime." Dir. ROA Vol. XXII, 795. This defense inquired:

> MR. MCDERMOTT: The person was convicted?
> PROSPECTIVE JUROR AUDRA JOHNSON: Yes.
> MR. MCDERMOTT: And do you recall his name?
> PROSPECTIVE JUROR AUDRA JOHNSON: Cedrick Bailey.
> MR. MCDERMOTT: Hm?
> PROSPECTIVE JUROR AUDRA JOHNSON: Cedrick Bailey.
> MR. MCDERMOTT: And you felt that his sentence wasn't severe enough?
> PROSPECTIVE JUROR AUDRA JOHNSON: Correct.
> MR. MCDERMOTT: What did he get? What sentence?
> PROSPECTIVE JUROR AUDRA JOHNSON: I think it was like two years.
> . . . .
> MR. MCDERMOTT: Do you feel that experience–well, let me ask you this: Did the defense lawyers take your deposition or statement?
> PROSPECTIVE JUROR AUDRA JOHNSON: Yes.
> MR. MCDERMOTT: Was that uncomfortable for you?
> PROSPECTIVE JUROR AUDRA JOHNSON: Yeah, at times.

Dir. ROA Vol. XXII, 795-796. Although Juror Johnson may not have expressed any feelings which would have conclusively warranted a cause challenge, some jurors are just not suitable for service based on their unique life history and circumstances. At the very least, the defense should have exercised a peremptory challenge on Juror Johnson. *See McKenzie v. State*, 29 So. 3d 272, 280 (Fla. 2010)(finding a juror's history "place[d] her beyond service on this jury.").

In the case at bar, the State would present *Williams* rule evidence that circumstantially implicated Mr. Peterson in a Hillsborough County rape. An FDLE DNA analyst involved in that case testified in the feature Pinellas trial that "the question sample from [the victim] matched the DNA profile of Charles Peterson." Dir. ROA Vol. XXIII, 1068. Trial counsel asked to approach the bench at that point in the testimony and pointed out: "[T]he witness said 'sample from Palmisano.' I'd like–I think that hints pretty strongly it was bodily fluid obtained from her." Dir. ROA Vol. XXIII, 1068. Trial counsel knew this might become an issue, and therefore should have ensured that Juror Johnson not serve as a juror because she herself was a victim of a rape. Even before the testimony revealing that there might have been a rape, Mr. McDermott warned and foreshadowed the following: "the DNA, while it is coming into evidence, without the sexual battery material, I think that the jury's going to try to pretty well guess where that came from, and that's the real problem from a prejudice standpoint." Dir. ROA Vol.

XXIII, 939-940. As such, trial counsel failed in a duty to strike Juror Johnson from the panel. To add further prejudice, the juror's attacker, Cedrick Bailey, very closely resembles Mr. Peterson, such that this traumatic event may have been relived in her mind by Ms. Johnson as she looked over at Mr. Peterson and heard how his DNA was recovered from the person who was described as the "victim" in the case, "Mary Palmisano." Dir. ROA Vol. XXIII, 1064. Cedrick Bailey's booking photo from 2006 reveals high, fleshy cheeks that witnesses described when speaking of Mr. Peterson. (*See* PC ROA Vol. V, 807-08, 810).

As far as penalty phase prejudice, this is a juror who thought that the man who raped her at age 16 received a light sentence. This is also a juror who would hear evidence at the penalty phase that Mr. Peterson had been convicted four years ago of four separate sexual batteries during the course of a robbery/false imprisonment situation with a firearm. Dir. ROA Vol. XVI, 32. Juror Johnson could do nothing to ensure a harsh sentence for her own assailant, Cedrick Bailey, but as a sitting juror on this capital case, she could ensure a harsh sentence for Charles Peterson. Juror Johnson was not the right juror for this case.

As in the *McKenzie, Id.* case, Juror Johnson informed that she has family in law enforcement. She candidly revealed: "my brother-in-law is a corrections officer at the jail next door." Dir. ROA Vol. XXII, 789. She informed that this relative has worked in the jail, in the prison system, and has also worked as a

probation officer. Dir. ROA Vol. XXII, 790. Furthermore, she discussed how another family member was recently *shot*! She informed as follows: "We're currently going through a case right now with my husband's cousin who was recently shot in St. Petersburg, so we're in the middle of a case." Dir. ROA Vol. XXII, 789-790. Someone who is "currently going through a case right now" where a family member was *shot* is *not* an appropriate juror for a capital murder trial involving a shooting death.

If all of the above information was not enough for the defense to prudently excuse Juror Johnson, this is a juror who stated that "it would be beneficial for us to hear from [the defense], the witnesses, and maybe even to have [the defendant] testify." Dir. ROA Vol. XXII, 874. A strike was necessary, especially in this case where the defense simply rested after the State presented extensive evidence, primarily in the form of alleged collateral crimes. There *certainly* was some doubt concerning Juror Johnson's fitness to serve on this jury. Trial counsel was grossly ineffective for failing to move to strike her from the panel.

Evidentiary Hearing Testimony Concerning Juror Johnson

Attorney Richard Watts testified that he represented Mr. Peterson at trial along with attorney Joseph McDermott, who since passed away after the trial. PC ROA Vol. XI, 1600. In preparation for the evidentiary hearing Mr. Watts read the 3.851 motion and reviewed the transcript of the *voir dire* involving Juror Johnson.

PC ROA Vol. XI, 1601. He recalled this juror revealed that she was a victim at age 16, she was not comfortable speaking about the incident, and she did not feel that the attacker received a long enough sentence for the assault (a two year prison sentence). PC ROA Vol. XI, 1601. With regard to any discussions he might have had with Mr. McDermott with about Juror Johnson, Mr. Watts stated, "I can't recall in any detail the events of that trial as far as which individuals we discussed or didn't." PC ROA Vol. XI, 1604. Mr. Watts acknowledged that if there was a conviction in the guilt phase, the State would definitely be introducing evidence of a sexual assault in the penalty phase. PC ROA Vol. XI, 1607. Richard Watts counsel informed that he and co-counsel did not have any conversations about possibly pulling Mr. Bailey's booking photo to make sure it did not look like Mr. Peterson. PC ROA Vol. XI, 1614. There simply was no strategy involved here.

Juror Marilyn Breen

Juror Marilyn Breen was not a suitable juror to decide Mr. Peterson's guilt and subsequently his punishment fate. At the conclusion of *voir dire* the defense asked the following ultimate question of Ms. Breen in light of her life experiences:

> MR. WATTS: So you're thinking that maybe with your sensitivity, you would be better on some other kind of case?
> PROSPECTIVE JUROR MARILYN BREEN: Yes.

Dir. ROA Vol. XIX, 549. The defense should have a least *attempted* a cause strike on Ms. Breen. Inexplicably, they failed to make any challenge, cause or

peremptory. The precursor to Ms. Breen's admission above involved a discussion by Mr. Watts that the jury would be hearing "evidence [] that a life has been taken in a violent fashion." Dir. ROA Vol. XXI, 548. Mr. Watts asked if "anybody has a reservation about their emotions and being able to handle that." Dir. ROA Vol. XXI, 548. Ms. Breen was the first person to raise her hand in response to this inquiry, and she informed, "I get very emotional, you know. The slightest thing can set me off. TV commercials that remind me of my children." Speaking of her children, Ms. Breen revealed much earlier in *voir dire* that her child was a victim of a crime. She informed, "My son, eight or years old, was knocked off his bike during broad daylight in the city of Milwaukee and broke his arm and his collar bone and had 12 stitches in his head." Dir. ROA Vol. XIX, 254. She was upset because she felt the police "could have done more," "they really didn't even question [her] son," and she and her "husband were down there [at the police station] constantly." Dir. ROA Vol. XIX, 255.

Juror Breen divulged certain information during *voir dire* that would have led an effective defense attorney to exercise strikes. At the time she served on the Peterson jury, Juror Breen was still upset and emotional about her son being attacked and the crime going unsolved. She admitted that the "slightest thing" can "set her off" emotionally. This is a case where store employees were terrorized and robbed at gunpoint on Christmas Eve, tragically leaving one store employee

dead. Because of her volatile emotional state and life experiences, Ms. Breen even acknowledged that she was not suitable for service on this capital murder trial. As no attempts were made to strike her from the panel, trial counsel provided ineffective assistance of counsel and allowed biased jurors to decide Mr. Peterson's guilt and fate. *See McKenzie v. State*, 29 So. 3d 272, 280 (Fla. 2010).

Evidentiary Hearing Testimony Concerning Juror Breen

Mr. Watts agreed that Juror Breen was "on the emotional scale sensitive," and he said that she was "basically a faint heart." PC ROA Vol. XI, 1618. This juror clearly indicated that she was not suited to serve on this jury due to her sensitivities and past experiences with her son being a crime victim. When asked if had a "specific recollection of speaking with Mr. McDermott about [Juror Breen], about whether [he] should exercise a peremptory strike" on Juror Breen, he answered, "I don't have a specific recollection about her." PC ROA Vol. XI, 1621. Because there obviously was a "reasonable doubt as to [Juror Breen] possessing that state of mind [] enabl[ing her] to render an impartial verdict based solely on the evidence," *see Singer, Id.* at 23-24, the defense should have moved to strike her. Because Mr. Watts had no independent recollection of any strategy involved in keeping her on the jury, he was ineffective. As a consequence, we cannot have confidence in this verdict because unsuitable jurors served.

Juror Thomas Walbolt

This was a robbery/murder case. Juror Walbolt informed during *voir dire*, "I've been robbed. I'm surprised there's people in here who haven't." Dir. ROA Vol. XX, 406. Juror Walbolt, whose wife escaped and survived *two* robbery attempts, should not have served on this jury. *See McKenzie, Id.* In addition to having been robbed before, this juror also informed:

> I work for Clearwater Parks and Rec in special events, so I've had pretty close dealings with a lot of CPD[1] for events that we created over time for them, so they love us. And some of those people over the years–I started in '90–have become friends. A good friend of mine is a crime scene investigator for the SO.[2] My class reunion, the spokesperson for SO [] should be there this weekend if I'm there. My brother and his son run Best Evidence, which is a jury consult company. They do jury–mock trials and things like that. My wife's been grabbed a couple of times and got away both times.

Dir. ROA Vol. XX, 406. The State asked: "You mentioned that you work with the law enforcement officers. You said Clearwater Police Department," he answered, "Right." Dir. ROAVol. XX, 407.

Juror Walbolt's "sister-in-law is on the Florida Bar Association for jury instructions. She's a lawyer," he informed. Dir. ROAVol. XX, 408. Juror Walbolt has regular discussions with his jury consultant brother and nephew, finding their chosen occupational field "pretty interesting work." Dir. ROA Vol. XX, 409. When Juror Walbolt speaks of law enforcement, the words "love, good friend[s], and close dealings" are mentioned. Dir. ROA Vol. XX, 407. Juror

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1 Clearwater Police Department. Juror Walbolt used the acronym "CPD."

2 Pinellas County Sheriff's Office. Juror Walbolt used the acronym "SO."

Walbolt was not an appropriate juror for this capital murder case, especially having been a victim of a *robbery.*

He assured the State that in light of his discussions with close personal family and friends about the criminal justice system and the various cases being worked, he still did not feel he had any special "expertise that [he] would bring to the jury pool as far as deciding guilt or innocence of Mr. Peterson." Dir. ROA Vol. XX, 409. But early on in this case Juror Walbolt came to taint the jurors' perceptions against Mr. Peterson's cause for innocence before opening statements. Juror Walbolt became the subject of misconduct and controversy as early as the first lunch break after *voir dire* commenced. Shockingly, Judge Allan informed immediately after the lunch break that Juror Walbolt had actually approached her and Judge Peters at lunch and commented on the prospective jurors' alleged feelings about the death penalty. Dir. ROA Vol. XVIII, 118-120.

Juror Walbolt should have been excused by the defense at this point. Instead, further inquiry regarding his discussions with Judge Peters and Juror Sheryl Calderone about this were affirmatively "waiv[ed]"by the defense (*see* Dir. ROA Vol. XVIII, 125-126), and the defense inexplicably never moved to have him removed from the panel. This juror *was* ***so*** pro death penalty that he could not believe that there were so many people on the jury panel who would genuinely oppose the death penalty. He confirmed that he thought that people were voicing

opposition to the death penalty on the panel only because they "wanted to get out of jury duty." Dir. ROA Vol. XVIII, 124. For his apparent strong opinions in favor of the death penalty and misconduct, the defense should have accepted the trial court's invitation to excuse him for his first improper lunchroom discussion.

When Juror Walbolt was chosen to serve on the jury, he was again told not to talk about the case (*See* Dir. ROA Vol. XXIII, 922-24). Just after he was selected, at the lunch recess prior to opening statements, he engaged in discussions with fellow jurors about the case. After the lunch recess, the trial court informed counsel as follows:

> THE COURT: Mr. Walbolt, the same person who I had to drag out here before to plop himself down next to me, I'm told that our fine clerk overheard him down in the cafeteria talking to several other jurors. One of the things that he said was, "I've lived here since–I've lived here in 1997 and I didn't hear anything–read anything about the case in the paper.

Dir. ROA Vol. XXIII, 924-925. Juror Walbolt confirmed that he indeed had those discussions. Dir. ROA Vol. XXIII, 927. Additionally, and much more significantly, he informed the Court:

> There were jurors that were talking about the–the people that were here today, not the original group. They were talking about how there was something said in the courtroom about - - that was challenged, and why it was first-degree. And I told them there's two–we were instructed there was two reasons for it to be first degree, you know, and that was–that was what the conversation was mostly about . . .she was wrong. She misinterpreted what it was. It was a nurse . . . It was just her interpretation of what first-degree murder was, so–I didn't feel like it was about this case. I just thought it was about first-degree

murder.

Dir. ROA Vol. XXIII, 928-929. The nurse was never identified by name.

A second incident now occurring at the cafeteria here, the prospective juror nurse apparently was questioning why first degree murder was charged in this particular case, and she expressed some doubts as to the degree charged by the State. Juror Walbolt, in effect, instructed her and the other prospective jurors within earshot of the discussion that first degree murder was the appropriate charge because of the felony-murder rule. In effect, Juror Walbolt was preemptively precluding group consideration of a 2nd degree murder verdict in this case. Significantly, the trial court had not provided any jury instructions on felony murder at this point! Such lunchroom jury instructions from this controversial juror would have had the effect of infecting and tainting the entire jury pool.

Apparently the nurse juror questioned whether the facts of the case would meet first-degree murder, and Juror Walbolt enlightened the group that there need not be actual intent to kill in order for there to be first-degree murder. After this information came to light, attorney McDermott ineffectively only addressed Juror Walbolt, and merely inquired from him who the nurse was who had questions about the law on first degree murder. Dir. ROA Vol. XXIII, 929. The trial court then asked trial counsel if they were making any motions to have jurors removed, and attorney McDermott answered, "No." Dir. ROA Vol. XXIII, 931. The nurse

apparently had been stricken. But, the prejudice still remained: some of the other jurors privy to the discussions would have been tainted. Trial counsel should have immediately moved for a mistrial for Juror Walbolt's lunchroom seminar on the Florida felony-murder instruction in front of his fellow jurors. This was the second time he was caught talking about the case. He should not have served on this jury due to egregious juror misconduct. Because his lunchroom lecture would have tainted all jurors within earshot of those discussions, a motion for mistrial should have been made and a new jury panel seated.

He was not an appropriate juror for this case: a case involving a robbery, a shooting, and a murder; he should have been stricken. *See McKenzie, Id.* Because of the prejudicial lunchroom lecture he conducted before opening statements, the entire panel should have been stricken.

If a jury panel has been prejudicially exposed to a "lunchtime cafeteria lawyer-juror's" pre-trial explanation of how his understanding of felony-murder converts this case into a death-warranted, first-degree murder case, a motion needed to be made and a mistrial granted. Just as a jury should not travel to the crime scene and reenact the murder, a jury should not congregate in the courthouse cafeteria and discuss the nuances of felony-murder theories. This went way beyond utilizing a smart phone or a dictionary to look up legal definitions during deliberations. *See Tapenes v. State*, 43 So. 3d 159 (Fla. 4th DCA 2010), reversing

a conviction where a juror looked up the definition of "prudent" on an iPhone and shared the definition with other jurors in a first-degree murder case.

It is to the trial court's instructions and the trial court's instructions alone that jurors are supposed to look in considering the law, not to some maverick juror bent on convicting and sentencing a man to death in a one-bullet murder case. If a definition received from an iPhone is prejudicial in a case where the jury actually came back with a manslaughter conviction from a first-degree murder conviction, certainly Juror Walbolt prejudiced Mr. Peterson for his courthouse café speech about first-degree felony murder in a case where Mr. Peterson was found guilty as charged and sentenced to death. Mr. Walbolt had many friends in law enforcement, his sister-in-law apparently is a lawyer who sits on an American Bar Association committee who frames jury instructions, and he was caught informing a group of fellow jurors who doubted the severity of the crime that the law indeed sustains a conviction for first degree murder on these facts.

As this Court confirmed regarding juror misconduct, "potentially harmful misconduct is presumptively prejudicial, but the defendant has the initial burden of establishing a prima facie case that the conduct is potentially prejudicial." *Amazon v. State*, 487 So. 2d 8, 11 (Fla. 1986). Trial counsel failed in their duty here to point out the potential prejudice of this lunchtime discussion. A Peterson jury who might otherwise have been open to the possibility of a lesser-included-offense in

this case was improperly influenced by Juror Walbolt's comments regarding first degree felony-murder. As stated in *Grissinger v. State*, 186 So. 2d 58, 59 (Fla. 4th DCA 1966), the "trial court is the only source from which the jurors may properly obtain the law or definition of legal terms applicable to the issue being resolved by them." In the case at bar, the jurors received felony-murder instructions from Juror Walbolt in the cafeteria prior to opening statements. At the very least, trial counsel should have moved for a curative instruction telling the jurors that they should disregard anything that Juror Walbolt may have told them about first-degree murder, and the court would instruct them on the law at the appropriate time. See also *Howard v. State*, 943 So. 2d 884 (Fla. 2d DCA 2006). At the very least, trial counsel should have moved to discharge Juror Walbolt and substitute the alternate juror. He was obviously biased in favor of the State going into this case.

Evidentiary Hearing Testimony Concerning Juror Walbolt

Mr. Watts was asked: "Do you remember - - do you have a specific recollection of having discussions with Mr. McDermott talking about whether or not you should strike Juror Walbolt?" He first answered as follows: "I don't have a specific recollection." PC ROA Vol. XI, 1624. After vacillating about discussions that he might have had, or *thinks* that he did in fact have with the defense team about this juror, he was asked to review that portion of transcript wherein Juror Walbolt explained his courthouse cafeteria discussions with the

other jurors. At that point, Mr. Watts became more unsure about whether he conferred with co-counsel about Juror Walbolt. He said he was actually quite "surprised" in reviewing Juror Walbolt's responses, and could not remember why he did not at least request a curative instruction. PC ROA Vol. XI, 1623-26.

As evidenced by the cited transcript, any alleged strategy in keeping Juror Walbolt on the panel is purely speculative. Trial counsel was ineffective for failing to remove this juror and ask for a curative instruction and/or mistrial. Juror Walbolt should have been stricken from this panel preliminarily. Instead, the defense ineffectively allowed him to remain and taint all of the other jurors.

Juror Necole Tunsil

Trial counsel should have stricken Juror Tunsil. This is the juror who told the press post-verdict that the jury's decision might have been different if Mr. Peterson would have testified. *See* Dir. ROA Vol. XII, 2144. She was quoted in the press as follows: "I think [Charles Peterson] could have gotten up and said something." Dir. ROA Vol. XII, 2158. Juror Tunsil served as foreperson.

Juror Tunsil stated in *voir dire* that she "works very closely with St. Pete Beach Police, as well as the sheriff's department and St. Pete PD also, because I work with juvenile justice." Dir. ROA Vol. XX, 391. She described how at her school, "We've had a lot of fights at the program, and the police–we were also a hands-on program, so we actually took down kids, which I kind of enjoyed a little

bit - - so when the police came, they were already on the ground and the police would arrest them." Dir. ROA Vol. XX, 391-392. She indicated an extreme bias towards law enforcement, adding, "I would hope that [my family is] never [] arrested [] because it would give me a bad name. . . .none of my family members were never let off the hook or anything like that." Dir. ROA Vol. XX, 392. Juror Tunsil was apparently completely closed to the possibility that someone could actually be falsely accused of a crime. An accused is entitled to a presumption of innocence. Juror Tunsil apparently believes in the presumption of guilt due to the fact that a simple arrest of her family member would automatically give her a "bad name." She actually revealed during *voir dire* that if an accused exercised their right to remain silent at trial, she would "feel like the [prospective juror] in front of [her] " who would harbor a "suspicion guilt" in that circumstance. *See* Dir. ROA Vol XXI, 555, 558-559. The defense should have moved to strike her.

Juror Tunsil's post-trial comments to the media regarding Mr. Peterson's silence come as no surprise. She informed during *voir dire*, "I'd like to see him testify." Dir. ROA Vol. XXI, 555. Immediately after this response, the defense asked, "If he did not testify, what would you do?" Juror Eugene Stanley, presumably seated in front of Juror Tunsil, joined in the discussion and volunteered that he would "probably" harbor a "suspicion of guilt." Dir. ROA Vol. XXI, 555. The court then read the instruction regarding the burden of proof and the accused's

right to remain silent. Juror Tunsil responded to the instruction as follows:

> I'm totally clear on what the Judge read. I think I've watched enough Judge Judy and things like that to understand it's the State's responsibility to provide us with the burden of proof. But just as a human being, I would like to hear what Mr. Peterson has to say. . . .But I just think at some point I would like to hear. And if he chooses not to, then so be it. But I feel like the gentleman in front of me. If your life was on the line, wouldn't you want to get up–if he doesn't say anything but, 'Look Necole [sic] I'm not guilty,' I think I'd be at peace with it.

Dir. ROA Vol. XXI, 558-559. So Juror Tunsil *would still* personally require the defendant to at least testify and verbally deny the offense, despite the court's instruction. Her comments following the court's instruction rise to the level that a cause strike was warranted. *See Singer, Id.* (the standard for juror competency is reasonable doubt). The defense should have moved to strike Juror Tunsil.

Evidentiary Hearing Testimony Concerning Juror Tunsil

When asked about this juror and her responses during *voir dire*, Mr. Watts initially offered that "She agreed to follow the rules." PC ROA Vol. XI, 1633. When asked if he could have been mistaken about that, he answered, "I could." PC ROA Vol. XI, 1633. Mr. Watts ***was*** mistaken. The transcript clearly reflects that Ms. Tunsil respected neither the right to remain silent nor the presumption of innocence. Mr. Watts reviewed the relevant portions of the transcript and stated that he had no specific recollection of why the defense did not move to strike Juror Tunsil. PC ROA Vol. XI, 1637-42. Mr. Watts could not offer a reason why he

failed to strike her from the jury after she informed that she would harbor a suspicion of guilt if a defendant did not testify. PC ROA Vol. XI, 1642. Because trial counsel's deficiencies during jury selection led to the seating of actually biased jurors, Mr. Peterson should receive a new and fair trial under *Strickland* as one cannot have confidence in the result.

Juror Christine Salgado

Trial counsel should have moved to strike Juror Salgado, a juror who was actually more vehement than Juror Tunsil regarding her need to hear the defense present at least some evidence.

> MR. MCDERMOTT: Do you have any feeling that the defendant or the Defense ought to put on witnesses or that he ought to testify?
> PROSPECTIVE JUROR SALGADO: Yes.
> MR. MCDERMOTT: What? Tell me what it is.
> PROSPECTIVE JUROR SALGADO: You would have to–I would think you would have to prove your case.
> MR. MCDERMOTT: Prove my case?
> PROSPECTIVE JUROR SALGADO: Yes.
> MR. MCDERMOTT: Even though the burden is on the State, that I would still have to prove my case too?
> PROSPECTIVE JUROR SALGADO: Yes.
> MR. MCDERMOTT: We're talking about the penalty phase now–I mean the guilt phase, not the penalty phase.
> PROSPECTIVE JUROR SALGADO: Oh, yes.
> MR. MCDERMOTT: You still have that feeling, like you want to hear from both sides too?
> PROSPECTIVE JUROR SALGADO: Yes, sir.

Dir. ROA Vol. XXII, 870-871. After equivocating on whether she could follow the law, she stated that she was "very confused." Dir. ROA Vol. XXII, 873. Then,

she very clearly and unequivocally stated as follows contrary to law:

> PROSPECTIVE JUROR SALGADO: Even though the burden is on the State, I would still definitely want to hear your side because you might have different–
> MR. MCDERMOTT: And that would include the defendant testifying?
> PROSPECTIVE JUROR SALGADO: No, absolutely not, just your witnesses.
> MR. MCDERMOTT: My witnesses?
> PROSPECTIVE JUROR SALGADO: Uh-huh.

Dir.Vol. XXII, 873-874. Inexplicably, no challenges were made against this juror. If these statements do not rise to the level of a cause challenge under the law, this juror should at least have been challenged by the defense peremptorily. There certainly is some reasonable doubt as to this Juror Salgado's ability to return a fair verdict based solely on the evidence, and not on what was presented or not presented by the defense. *See Singer, Id.* Despite the burden of proof being fully on the State, this juror stated in no uncertain terms that she would require the defense to present some type of evidence at trial. This is especially prejudicial in a case where the defense presented absolutely no evidence at trial.

Evidentiary Hearing Testimony Concerning Juror Salgado

Mr. Watts in his testimony could not recall any strategic reason why the defense failed to strike Juror Salgado after, he had to agree, "she put a burden on the Defense." PC ROA Vol. XI, 1643-44.

Jurors Johnson, Breen, Walbolt, Tunsil, and Salgado all should have been

stricken by the defense. Mr. Peterson was prejudiced in that several biased individuals were seated on his jury. The lower court's finding that these jurors were not biased at PC ROA Vol. V, 759 is in error. This Court should reverse.

CLAIM II

MR. PETERSON WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE TRIAL COUNSEL FAILED TO OBJECT TO SEVERAL IMPROPER COMMENTS AND ARGUMENTS MADE BY THE STATE, FAILED TO OBJECT TO OTHER IMPROPER STATE CONDUCT AT TRIAL. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO MAKE PROPER OBJECTIONS AND REQUEST CURATIVE INSTRUCTIONS AND A MISTRIAL DURING THE COURSE OF THE TRIAL PROCEEDINGS, AND FOR FAILING TO INVESTIGATE THE CASE AND PRESENT AFFIRMATIVE EVIDENCE OF INNOCENCE. THE LOWER COURT ERRED WHEN IT DENIED RELIEF.

Under the principles set forth by this Court in *Stephens v. State*, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring *de novo* review with deference only to the factual findings by the lower court.

Failure to Object During Voir Dire

During *voir dire,* trial counsel failed to object to comments made by the State which gave the prospective jurors the impression that the legislature, and not

the prosecutor's office, had predetermined that death was the appropriate punishment for Mr. Peterson's case in violation of *Brooks v. State*, 762 So. 2d 879, 902 (Fla. 2000) (reversing a death sentence where the State's comments "tend[ed] to cloak the State's case with legitimacy as a bona-fide death penalty case").

Although highly prejudicial and improper, no objections were made as the State repeatedly informed the jury during *voir dire* that the legislature had already determined that death was the appropriate punishment for Mr. Peterson. When one particular juror expressed hesitation and reservation in returning with a death sentence, the State engaged the juror in the following discussion without objection:

> PROSPECTIVE JUROR ANNIE STEVENS: I hesitate at the thought of a death sentence. I hesitate greatly. But there are circumstances, if they're presented here, that are so heinous–I call it eternal rest–would be the solution. And if the Court recommends it, I would follow–you know, I would follow the law.
> MR. MARTIN: Well, let me stop you there a little bit because the Court's not going to recommend anything to you. The Court's going to give you the law, and you're going to recommend to the Court.
> . . . .
> MR. MARTIN: I wanted to make sure you were clear on that. The other thing I'd like to discuss with you is you mentioned if there are circumstances so heinous–and of course, we have 60 people in the room, and as soon as you heard "heinous," everyone had a different version of what that was.
> PROSPECTIVE JUROR ANNIE STEVENS: True.
> MR. MARTIN: And so the legislature, because we all have a different version, has set forth specific facts under these circumstances. You may not agree that that's heinous enough for you, but the legislature has, on your behalf, said these are the circumstances in Florida that a person could be punished be death. Would you believe that the legislature has the right to do that on your behalf and decide that?
> PROSPECTIVE JUROR ANNIE STEVENS: Absolutely.

> Absolutely, they do.
> MR. MARTIN: Even though you may not believe they're heinous enough, but the legislature on your behalf has decided that is the circumstances in which a person could be punished by death...
> . . . .
> PROSPECTIVE JUROR ANNIE STEVENS: ...[Y]ou have more experience with this than I do, what is heinous. You have more–I have no experience whatsoever with the legal system, and especially the criminal justice system. I'm a novice. I don't even have a good vocabulary for it here. So my idea of heinous may be something different from yours, but, nevertheless, I would be able to say if the law is–if this is heinous enough, I would definitely look at that and say, okay, you know more than I do.
> MR. MARTIN: ...[T]he legislature has formulated–we're not calling it heinous. We're not calling it bad. We're calling it, under these circumstances that the legislature has deemed to be appropriate for someone to be death eligible as punishment?
> PROSPECTIVE JUROR ANNIE STEVENS: Of course, of course.
> . . . .
> MR. MARTIN: ...The bottom line is, could you sign that verdict form?
> PROSPECTIVE JUROR ANNIE STEVENS: Yes, yes. Based on the law, I would.
> MR. MARTIN: All right. And would you follow the Court's instructions. . . .and determine whether or not any of the evidence presented by the Defense outweighs that before you make a decision for life or death? Would you follow that instruction?
> PROSPECTIVE JUROR ANNIE STEVENS: Absolutely, absolutely, I'm a very law-abiding citizen.

Dir. ROA Vol. XX, 461-466. The State's comments here in front of a group of 60 prospective jurors tended to "cloak the State's case with legitimacy as a bona-fide death penalty case." *Brooks, Id.* at 902. Contrary to the State's improper comments and suggestions, the legislature made no decisions to seek the death penalty in this case. The State's comments during *voir dire* had the effect of

informing these jurors that a vote for anything but death would be contrary to law.

Because no objections were made, the State continued to make comments tending to cloak the State's decision to seek the death penalty with legislative legitimacy. The prosecutor addressed another prospective juror as follows: "I guess where we need to go, Miss Dickerson, is in the State of Florida the legislature has indicated that under certain circumstances, death is the appropriate punishment..." Dir. ROA Vol. XX, 471. Relief is warranted here under *Ferrell v. State*, 29 So. 3rd 959, 988 (Fla. 2010)("the failure of trial counsel to object to even one of these clearly improper remarks left the State's case virtually untested.").

In effect, the State was informing the panel that a vote for life would be a violation of Florida law. Facing no objections, the State continued with Juror Bortel as follows: "You indicated that you would have to look at things and feel whether or not it's appropriate, and we've had discussions about how the legislature has kind of taken that out of your hands a bit." Dir. ROA Vol. XX, 476. Mr. Martin continued, "That would be the law in the State of Florida," and he sought and received assurances from prospective Juror Bortel, "Would you follow that law?" The juror dutifully answered, "Yes, sir." Dir. ROA Vol. XX, 477.

The State addressed Juror Calderone as follows, "the legislature has mandated for us whether or not death is appropriate, and if you found it was appropriate, could you make a death recommendation?" Dir. ROA Vol. XX, 498.

Juror Calderone, wanting to be a law-abiding juror, responded as follows: "I could follow the law, sure. I guess I could make a [death] recommendation." Dir. ROA Vol. XX, 498. The defense should have objected when the State suggested that the legislature had mandated the death penalty for Mr. Peterson. At the very least, an objection should have been made and a curative instruction requested.

Trial counsel's performance was deficient throughout *voir dire* because no objections were made to the State's repeated improper suggestions concerning the appropriateness of the death penalty and "about how the legislature has kind of taken that out of your hands a bit." Dir. ROA Vol. XX, 476. In *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985), the United States Supreme Court reversed a death sentence because of the following situation:

> The State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated.

In the case at bar, the State actually repeatedly said that the decision was out of the jurors' hands because the legislature had already made the decision for them. *See also* Justice Lewis' concurrence following the release of *Ring v. Arizona*, 536 U.S. 584 (2002) in *Bottoson v. Moore*, 833 So. 2d 693, 733 (Fla. 2002), cautioning that "Florida's standard penalty phase jury instructions must certainly be reevaluated under the Supreme Court's *Caldwell v. Mississippi* decision."

Trial counsel's failure to object to the State's repeated comments minimizing the jury's role at the penalty phase prejudiced Mr. Peterson because they felt compelled to vote for death in light of the State's comments. This Court should vacate Mr. Peterson's judgment of conviction and sentence of death.

Evidentiary Hearing Testimony from Attorney Richard Watts on this Issue

Mr. Watts stated that as the penalty phase attorney, he should have been ready to object should the State commit a *Brooks, Id.* violation.

> Q And as the phase two attorney, would you be aware and sensitive to statements that the State might say that could possibly violate Brooks v. State?
> A I should be.
> Q Okay. And what should you do if you hear anything that is said by the State that seems to violate the law of Brooks v. State?
> A I should object and move for a mistrial.
> Q Okay. Or at least a curative instruction?
> A Or, well, failing the mistrial.

PC ROA Vol. XI, 1645-46. In light of the absence of objections following several statements that improperly cloaked this case with death penalty legitimacy, trial counsel was ineffective in this regard. Though the assistant state attorney assigned to this case repeatedly violated *Brooks* during *voir dire*, no objections were made, and no motions for mistrial were made. This was due to negligence rather than strategy. Left uncured, such statements had the effect of tainting the entire panel who heard them, leaving the jurors with the prejudicial misimpression that the legislature had chosen the Peterson case as appropriate for the penalty of death.

Mr. Watts testified that he failed to consider an objection under *Brooks* during the relevant portions of *voir dire*. PC ROA Vol. XI, 1647-54. Mr. Watts went on to candidly admit: "I would have [objected] had I thought to." PC ROA Vol. XI, 1658. Mr. Watts stated he simply failed to object to Mr. Martin's improper comments.

> Q Question about Juror Calderone at ROA volume 20, page 498, Mr. Martin said, quote, The legislature has mandated for us whether or not death is appropriate, and if you found it was appropriate, could you bring a death recommendation? Did you consider an objection?
> A No, sir.

PC ROA Vol. XI, 1661-62. A big problem here is that the legislature has ***never*** mandated that death is appropriate. The reason that the jury instructions were changed in 2009 was to clear up the confusion in this area of capital sentencing law. Even if the aggravation far outweighs the mitigation, life is still an option for the jury. And this is not a change in the law, this has always been the law (*see Henyard v. State*, 689 So.2d 239, 249-50 (Fla.1996) "a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors."). Trial counsel should have objected to Mr. Martin's comments based on *Brooks* and *Caldwell*. *Caldwell* at page 341says that the state is prohibited from seeking to minimize the jury's sense of responsibility for determining the appropriateness of the death penalty. That is exactly what the State did repeatedly throughout the trial. Mr. Watts was asked about his failure to object:

> Q Okay. And we've talked about the law in Brooks and we've just reviewed the law in Caldwell. So I want to ask you at ROA Volume 20, page 476 --we discussed this. Mr. Martin said, quote, about how the legislature has kind of taken that out of your hands a bit, and ask you did you consider objecting there based on violation of Caldwell?
> A No, sir.

PC ROA Vol. XI, 1664. Trial counsel was clearly ineffective for failure to object to the State's repeated *Brooks* and *Caldwell* violations.

Defense Failure to File Appropriate Motions in Limine and Object During the State's Case-in-Chief

Several pieces of evidence introduced by the State at trial were objectionable, improper, and highly prejudicial. Trial counsel failed to prevent improper evidence from being received by the jury.

At trial the State called witness Janet Staples Gosha. At the time leading up to Mr. Peterson's arrest, Ms. Gosha lived with Mr. Peterson. Without objection, Ms. Gosha testified that she located some cash money under the sink in the home she shared with Mr. Peterson. She did not remember exactly when that was, but she agreed it was sometime between 1996-September of 1998. She testified:

> Q: Could you tell us the circumstances under which you were underneath the sink and found the wad of cash?
> A: I was looking for cleaning supplies and there was this box, and kind of bulging so I opened it and there was this money. So I closed it back and called Charles and asked him, where did the money come from. He told me–
> Q: No, I didn't ask you that one.
> A: Okay.

Dir. ROA Vol. XXV, 1243. The above testimony should have drawn several

objections. In light of Ms. Gosha's pre-trial deposition taken by the defense in 2002 (*See* Dir. ROA Vol. IX, 1546-1567), the defense was on notice that a pre-trial motion *in limine* to exclude this testimony should have been filed. At some point during a three year period, Ms. Gosha found money under the sink. The defense should have objected to this irrelevant and highly prejudicial evidence. The fact that this woman found money under the sink at some point during a three year period should not make its way into this capital murder trial. The State did not match the serial numbers on this cash to any cash taken during a McCrory's or Phar-Mor robbery. No one knows if this money came from Derby Lane Dog Track, the Money Store, Nations Bank, or some high-stakes poker game. The State can show absolutely no nexus between this cash money and any of the collateral crimes. This money has no relevance, and this type of prejudicial evidence should have been excluded.

More importantly, the defense should have requested that the witness be permitted to finish her answer. The State asked her about the circumstances under which the cash was found, and the witness was about to inform the jury that she understood the money to come from Mr. Peterson's poker winnings. Instead, the defense allowed the State to cut her off, and this vital information never reached the jury. As such, the jury was left to speculate that perhaps Mr. Peterson informed her that he had obtained the cash through a string of robberies.

Ms. Gosha also testified that there was a safe in the residence that she shared with Mr. Peterson, and she saw money in the safe one time. Again, this evidence has absolutely no relevance or nexus to this case. To add further grounds for objection to the money in the safe, she testified that some of the money in the safe was her own money. Dir. ROA Vol. XXV, 1244-1245. Again, without any nexus shown between prior robberies and the cash under the sink, this evidence should have been excluded as irrelevant under Fla. Stat. 90.403. Because trial counsel was ineffective and failed to move to exclude it, the evidence found its way into trial. Ms. Gosha did not even know how much money was in the safe:

> Q: When you were with the, had the safe open and saw the money in the safe, not the money you were putting in it, but the money that didn't belong to you; do you know how much money that was?
> A: No.
> Q: Can you estimate at all, did you look at it?
> A: No, I just seen money.
> Q: Okay. And the money underneath the sink, did you count it.
> A: No, I didn't count it.

Dir. ROA Vol. XXV, 1247. Evidence of money found in a safe and under the sink, without more, is irrelevant to this case under Fla. Stat. 90.403. *See McDuffie v. State*, 970 S. 2d 312, 326-328 (Fla. 2007), *citing Coverdale v. State*, 940 So. 2d 558 (Fla. 2d DCA 2006). Ultimately, Ms. Gosha testified that the money under the sink was "[a]bout a quarter of an inch." Dir. ROA Vol. XXV, 1260. This really is not a substantial amount of money unless it was all 100 dollar bills, which it was not. Trial counsel should have objected to this evidence and made available

counter-arguments and provided alternative, lawful explanations.

Instead, trial counsel elicited adverse information from this witness on cross-examination: that Mr. Peterson really did not have a lot of money in general. A competent defense attorney would want to establish that Mr. Peterson in fact had money, and he had the means to make money. Trial counsel inexplicably asked Ms. Gosha the following leading question on cross-examination:

> Q: And Charles didn't have a lot of money?
> A: No. He worked every day.

Dir. ROA Vol. XXV, 1261. Besides having a full-time job, Mr. Peterson was known to make money playing poker. Dir. ROA Vol. IX, 1560. Trial counsel failed to elicit information from this witness on cross-examination that when she asked Mr. Peterson about the money under the sink, he informed her that he won the money playing poker. Instead, trial counsel only established, most favorably to the State, that Mr. Peterson "didn't have a lot of money." Even if this money was somehow relevant in this case, Fla. Stat. 90.403 states as follows:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues [and] misleading the jury [].

The defense should have moved to exclude the evidence of the money located inside of Mr. Peterson's house under Fla. Stat. 90.403. This Court should reverse.

Ineffective Assistance of Counsel: Not Objecting During the State's Closing/ Failure to Make Available Opening Statements and Closing Arguments

The State mischaracterized several pieces of key evidence during closing

argument, and the defense failed to argue strong points at closing argument that would have created reasonable doubt. Witness James Davis was a customer in the State's feature case, the Pinellas County Big Lots murder. James Davis testified that he could ***not*** make an identification of the perpetrator as follows regarding identification of the perpetrator "without a doubt." Dir. ROA Vol. XXVI, 1378. In extreme contrast, in closing argument, the State claimed that Mr. Davis testified that he would only have "some doubt" in making an in-court identification. Dir. ROA Vol. XXVII, 1669. The State argued to the jury: "I asked [Mr. Davis] if he could make an in-court identification, and he–that's when he said, 'I would have some doubt about doing that,' about making an in-court ID in 2005." Dir. ROA Vol. XXVII, 1669. The defense failed to object to this improper characterization of the evidence and failed to point out this important fact to the jury.

Furthermore, the defense did a woefully inadequate job on this crucial point in the cross-examination of witness Mary Palmisano, the State's first witness at trial. In the Family Dollar case, she testified that she could not assist a police sketch artist after the crime because she "didn't know what he looked like." *See* "Court's Exhibit 1" at PC ROA Vol. VI, 945. So, James Davis was not the only person to have problems identifying the man in the mask. Furthermore, when Detective Herren came to her home, he pressured her to pick someone out of a group of photos even though she informed him, "I didn't see him." He told her he

"wasn't leaving" her home until she picked someone. PC ROA Vol. VI, 945-46. She informed: "***I said I can't identify someone from photos, he was wearing a mask***, I cannot stand here and tell you yes, this is him and you need to go arrest somebody when I don't know." PC ROA Vol. VI, 951. (***emphasis added***). The defense needed to present this information to the jury. Trial counsel also should have argued at closing that Big Lots employee Shirley Bellamy also could not identify the perpetrator. *See* Dir. ROAVol. XXVI, 1368-69.

Regarding Officer Jerry Herren, besides putting improper pressure on witnesses to make illegitimate identifications, he used a racial slur while acting as a sworn law enforcement officer and then lied about it under oath. Due to trial counsel's failure to investigate this case, trial counsel neglected to present highly impeaching evidence that this officer was the subject of an internal affairs investigation. The investigation ultimately concluded that Officer Herren had in fact referred to a person involved in a case he was investigating as a "sand nigger," and then he lied about using this term when sworn and formally questioned about the incident. (*See* PC ROA Vol. V, 879). Officer Herren defended the accusations by saying that he had only referred to the subject as a "sand person." Trial counsel should have presented evidence to the jury that Officer Herren improperly pressured witnesses to make illegitimate identifications, he used a racial slur, and he lied about it during a formal internal affairs investigation. This information was

readily-available to trial counsel as it was in fact contained within trial counsel's files. Officer Herren was the man who personally carried the blood of Mr. Peterson, a person of color, to FDLE after it was drawn. (*See* Dir. ROA Vol. XXIII, 995). This was key evidence in the State's case against Mr. Peterson in the collateral Hillsborough County Family Dollar rape/robbery trial.

Trial counsel was also ineffective for failing to argue that the State failed to prove the collateral crimes beyond a reasonable doubt. There certainly was reasonable doubt as to whether Mr. Peterson actually committed the other crimes, and trial counsel needed to point out that the State had not proven those cases beyond a reasonable doubt. This omission may have led his appellate counsel to inform this Court that Peterson was either convicted or pled guilty to each collateral robbery." *Peterson v. State*, 2 So. 3d 146, 153 (2009).

Additionally, trial counsel was ineffective for failing to do an opening statement and inform the jury that the State's evidence was weak and lacking. For all these reasons, this Court should reverse.

The Family Dollar DNA and the Ineffective Stipulation

The defense handled the Mary Palmisano/DNA issue very ineffectively in this case. It may have been the defense's *hope* of having very damaging evidence of the Family Dollar rape not reach the jury, but due to certain defense omissions and failures to take precautionary measures with the DNA evidence and the

accompanying stipulation, this hope became futile. At Dir. ROA Vol. XXIII, 939-940 trial counsel addressed the court and expressed anxiety that the jury might deduce that the Family Dollar case involved a sexual battery. And, the jury *in fact* basically came to hear this very damaging information. Trial counsel should have made a pre-trial motion *in limine* to prevent the State and its witnesses from referring to the DNA from being recovered from Mary Palmisano. Once this information reached the jury, they were ineffective for failing to request a mistrial.

The jury was initially informed by DNA analyst Tina McMichen-Delaroche that Mary Palmisano was "the victim" in the Family Dollar case. Dir. ROA Vol. XXIII, 1064. She might have technically been ***one*** of the victims in the Family Dollar case, but it was unnecessary for the State to characterize her as ***"the victim"*** to achieve their *Williams* rule purposes. At most, this case should have been characterized by the State as the "Family Dollar robbery in which Mary Palmisano was a ***witness***," not ***"the February 14, 1997 robbery in which Mary Palmisano was the victim."*** The State and the defense entered into a pre-trial stipulation whereby evidence of the rape in the Family Dollar case would not be mentioned to the jury. The stipulation did not go far enough to preclude mention of the rape.

The analyst then confirmed that "DNA samples from [] Mary Palmisano [were compared] with the known samples of Charles Peterson." Dir. ROA Vol. XXIII, 1065. Here trial counsel only objected in general terms that the *Williams*

rule evidence was an undue feature of trial. Trial counsel failed to specifically object to the State violating the terms of the stipulation barring the introduction of evidence of a rape in the Family Dollar case. Dir. ROA Vol. XXIII, 1066.

Finally, at the ***third*** prejudicial mention in the DNA analyst's testimony that ***"the question sample from Mary Palmisano matched the DNA profile of Charles Peterson,"*** Dir. ROA Vol. XXIII, 1068, trial counsel ***finally*** made an appropriate objection. After that testimony, Mr. McDermott wisely asked to approach the bench and stated, "I'm sure it was inadvertent, but the witness said, 'sample from Mary Palmisano.' I'd like–I think that hints pretty strongly it was bodily fluid obtained from her. I don't know how to correct that." Dir. ROA Vol. XXIII, 1068. The problem is, this *cannot* be corrected. The defense should have moved for a mistrial at this point, and failure to so move was ineffective. The court then offered the following, but was cut off: "I'm willing to do an instruction, but I'm afraid by doing it, it's only going to cause more attention to it. But I'm leaving it in your–" Dir. ROA Vol. XXIII, 1069. At that point, the defense settled for, "If maybe Mr. Crow can correct it–refer to it as 'from the crime scene.'" Dir. ROA Vol. XXIII, 1069. Trial counsel then ineffectively waived the issue by unwisely stating, "That's okay with us." Dir. ROA Vol. XXIII, 1070. So, no curative instruction was given and the prejudice remained. The jury heard four times that DNA evidence from either Mary Palmisano or "the Mary Palmisano case" matched

Charles Peterson (the fourth reference came at Dir. ROA Vol. XXIII, 1070).

On cross-examination, trial counsel compounds the problem and prejudice by referring to the DNA evidence using the rape victim's name again. Dir. ROA Vol. XXIII, 1075. Trial counsel was ineffective for failing to prevent this damaging and prejudicial evidence of a collateral rape from reaching the jury.

Failure to Object to and Challenge the Fingerprint Evidence

At trial, the State presented the testimony of fingerprint analyst Melinda Clayton. *See* Dir. ROA Vol. XXVII, 1592-1603. Ms. Clayton testified that she analyzed the known fingerprints of Charles Peterson, and compared them with prints located on a cash register receipt and a check that were stolen from McCrory's. Without objection, Ms. Clayton informed the jury that the "latent print from the receipt was his left index–left middle finger. And the latent print from the check was his right palm print." Dir. ROA Vol. XXVII, 1598. This improper testimony was made in no uncertain terms. In her testimony, the analyst went even further than declaring a simple "match," which would have been improper under *Ramirez v. State*, 810 So. 2d 836 (Fla. 2001). Without any qualifiers or doubts whatsoever, this analyst improperly testified that Mr. Peterson's fingerprints were in fact located on the recovered stolen items. Again, without objection, Ms. Clayton agreed with the State's bold leading assertion that "no two people have the same fingerprints," "including identical twins." Dir. ROA Vol. XXVII, 1599.

Trial counsel was ineffective for failing to object to the testimony cited above based on the holdings of *Ramirez, Id.* at 849. There, this Court reversed a conviction based on the following improper testimony from a forensic analyst:

> [the analyst] claims that a "match" made pursuant to his method is made with absolute certainty. Such certainty, which exceeds even that of DNA testing, warrants careful scrutiny in a criminal-indeed, a capital-proceeding.

Id. at 849. Although the "science" of tool mark identification differs from fingerprint identification, their limitations are similar. Such forensic analysis is extremely inferior to DNA analysis. Ms. Clayton declared not just a "match" in fingerprints, but stated that Mr. Peterson left his fingerprints on the stolen items.

Trial counsel should have filed a motion *in limine* to challenge the anticipated fingerprint testimony to prevent this type of unreliable opinion evidence from reaching the jury, should have objected to Ms. Clayton's testimony, and should have requested a curative instruction or mistrial. In the alternative or in conjunction with the above, trial counsel should have consulted with a scientific validity expert such as Simon Cole to inform the jury of the problems and limitations with fingerprint evidence, including its lack of scientific validation. *See* Committee on Identifying the Needs of the Forensic Scientific Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (2009), which cites to Simon Cole's research and conclusions regarding problems with fingerprint evidence. Although this 2009 report is

relatively new, Simon Cole and others in his field of expertise have been available for consultation as early as 1999. Trial counsel was deficient for failing to challenge the fingerprint evidence and for failing to consult an expert to challenge the fingerprint evidence. (*See* Dr. Cole's affidavit and CV at PC ROA Vol. II, 198-237). Mr. Peterson was prejudiced, and this Court should reverse.

Failure to Raise Adequate Challenge to the Williams Rule Evidence, Specifically, Failure to Raise an Apprendi/Sixth Amendment Violation

Mr. Peterson did not receive a fair trial as required under the Sixth and Fourteenth Amendments to the United States Constitution. Over fifty years ago, introduction of prejudicial *Williams* rule evidence was authorized by *Williams v. State*, 110 So. 2d 654 (Fla. 1959). Under our evolving standards of decency and with the release of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), no longer should the introduction of collateral offenses be determined only judicially by clear and convincing evidence. The Sixth Amendment guarantees the right to a trial by jury. *Apprendi, Id.* reminds us of that important notion.

As an initial matter, these issues should have been raised in the pre-trial *Williams* rule motion filed by the defense. They were not raised. Mr. Watts testified at the evidentiary hearing that he never considered that *Apprendi* and *Ring* might have some legal effect on the determination of the admissibility of the *Williams* Rule evidence. PC ROA Vol. IX, 721. Mr. Watts stated that he never considered that the fundamental right to a jury trial discussed in these two cases

might actually abrogate the over 50 year old *Williams* Rule decision, which permits "the matter of relevancy [of collateral crime evidence to] be carefully and cautiously considered by the trial judge" rather than a jury. *Williams, Id.* at 663. Trial counsel failed to use *Apprendi* to challenge the judicial determination of the *Williams* rule evidence. As such, trial counsel was ineffective. Mr. Peterson was prejudiced through the introduction of the alleged collateral offenses, and he was consequently denied his right to a fair trial by jury on the McCrory's, Phar-Mor and the instant case.

IAC for Failing to File a Motion to Suppress In-Court-Identification for All of the Alleged Witnesses That Supposedly Identified Mr. Peterson During Trial

In-court-identification by witnesses has a very prejudicial effect on the identified. This was especially so in the instant case because there was no dispute that the charged and uncharged offenses had occurred. The identifications here involved cross-racial identifications and highly-suggestive procedures.

Counsel acting reasonably should have challenged the identification of Mr. Peterson by all available means and at each of the stages of proceedings against Mr. Peterson. Pretrial, this included filing a motion to suppress the in-court and out-of court identifications that prejudiced Mr. Peterson. An expert should have been retained to address the suggestive nature of the identifications and the implication of cross-racial identifications. Counsel failed in this regard, and as a result Mr. Peterson was prejudiced by the unreliable identifications made at trial.

The following identifications should have been at issue and challenged further:

> Karen Smith: Ms. Smith was an Assistant Manager at Big Lots, St. Petersburg on December 24, 1997, the date the homicide occurred. Ms. Smith made a photo-pack identification which was allegedly 90% certain. At trial Ms. Smith's in-court-identification became 100% certain. Ms. Smith saw Mr. Peterson's photograph on the news prior to photo pack identification made in the photopack. Ms. Smith is a white female.
>
> Maria Soto: Ms. Soto was an Assistant Manager at Big Lots, St. Petersburg, on December 24, 1997. Law enforcement showed Ms. Soto a photopack and she was unable to make an identification. On the date of the homicide, Ms. Soto observed an individual steal a cassette tape earlier in the day. Ms. Soto described the suspect as wearing shorts as part of her description. Ms. Soto believed that the cassette thief was the same person who committed the homicide. Despite not being able to make a photo-pack ID, at trial Ms. Soto positively identified Mr. Peterson as the person who committed the offenses at Big Lots based in part on her view of a person who stole a cassette tape on the date in question. Ms. Soto is a white female.
>
> James Davis: Mr. Davis was a customer at the Big Lots and was in the store shortly before the events in question. Mr. Davis allegedly saw an African-American male in the store. Mr. Davis made a pretrial identification in the photo-pack on the third try but was not able to identify Mr. Peterson at trial. Mr. Davis is a white male.
>
> Ann Weber: Ms. Weber worked at McCrory's and identified Mr. Peterson in a photo-pack (90%) and in-court. She is a white female.

In *Foster v. California*, 394 U.S. 440 (1969), the Supreme Court held that "the suggestive elements" of an identification procedure that make it all but inevitable that a witness would identify the accused can "so undermine the reliability of the eyewitness identification as to violate due process." *Id.* at 443.

The Court held in *Simmons v. United States*, 390 U.S. 377 (1968), "that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* at 384. A few years later the Court stated:

> It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in *Foster*. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.

Neil v. Biggers, 409 U.S. 188, 198 (1972).

The in-court and out-of-court identification of Charles Peterson violated due process, and counsel should have moved to suppress them. The perpetrator of the instant homicide and robbery and the *Williams* rule crimes was identified as being African-American. Numerous witnesses could not identify Mr. Peterson, but the witnesses who did were white, according to the police reports. Cross-racial identification entails a higher possibility of misidentification. This is well known in the legal community but the jury was never asked to consider the effects of cross-racial identification in the instant case. Either through argument, or through the testimony of an identification expert such as Professor Brigham, the jury should have been allowed to consider this as part of Mr. Peterson's defense.

Also, by all accounts, the suspect in all of the *Williams* rule cases and in the instant case wore a mask. A mask, by definition is used to change the appearance of the masked person's face. The fact that the suspect in these cases was alleged to have worn a mask only increases the possibility of misidentification. The identification of Mr. Peterson by numerous witnesses as the perpetrator when Mr. Peterson was alleged to have worn a mask shows the suggestive nature of the in- and out-of-court identifications of Mr. Peterson. Detective Herren's suggestive and abusive conduct in Mr. Peterson's Hillsborough County case shows how such procedures lead to false identification.

The false identification of Mr. Peterson was contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Mr. Peterson was convicted and sentenced to death based on these identifications which only could have been the result of suggestion or speculation. Counsel had a duty to challenge these identifications at every possible stage of the proceedings against Mr. Peterson. As a result of this deficiency, Mr. Peterson was prejudiced because he was convicted based on these questionable identifications. Under *Strickland*, this denied Mr. Peterson his Sixth and Fourteenth Amendment Rights.

Evidentiary Hearing Testimony Regarding the Above Issues

Ms. Gosha's Testimony– Misleading the Jury, The Rule of Completeness

Richard Watts was asked why he did not explain to the jury that Mr.

Peterson told Ms. Gosha that the money found under the sink was poker proceeds, and he answered "I simply thought it's hearsay and I–it's from him. I can't get into it without objection. So that would be the initial reason." PC ROA Vol. XII, 1675. Then Mr. Watts volunteered a possible exception to the hearsay rule, an exception that he did not think of at trial: then existing state of mind 803(3)(a). Mr. Watts admitted, "No, I didn't think of that." PC ROA Vol. XII, 1676. The most solid legal justification for the introduction of such evidence is the rule of completeness. Just because Mr. Watts did not envision an exception to the hearsay rule does not mean there was not an exception available. *See also Brunson v. State*, 31 So. 3d 926 (Fla. 1st DCA 2010).

Mr. Watts testified that he did not consider citing the rule of completeness for allowing introduction of the testimony about poker proceeds. PC ROAVol. IV, 1676-77. Mr. Watts also responded that he did not consider filing motions *in limine* to exclude references to the money underneath the sink and in the safe based on relevance. PC ROA Vol. XII, 1677-78. Because the State could provide no nexus between the money under the sink and in the safe to a crime, this evidence was irrelevant, confused the issues, and was unfairly prejudicial.

Evidentiary Hearing Testimony: Eyewitness Identification Issues

With regard to the State's closing argument at trial [Dir. ROA Vol. XXVII, 1669] wherein the State argued Mr. James Davis only had "some doubt" about

making an in-court identification, Mr. Watts stated that there was no strategic reason why the defense did not object to that characterization of the evidence. PC ROA Vol. XII, 1687. At PC ROA Vol. XII, 1688 Mr. Watts was asked about the fact that Karen Smith testified that she saw a picture of Charles Peterson on the TV prior to her identification, and he stated that there was no strategic reason why he failed to move to exclude any subsequent identifications based on that taint.

Regarding Mary Palmisano's unwillingness or inability to meet with and assist a police sketch artist, Mr. Watts candidly informed that "there was no strategic reason for not pointing that out." PC ROA Vol. XII, 1690. He informed that there was no strategic reason why the defense failed to point out at trial that Officer Herren improperly pressured her to make an identification when she could not. PC ROA Vol. XII, 1692. This is very relevant exculpatory information to this case, and it would also be impeaching. The State chose to utilize *Williams* rule evidence, including the Family Dollar crimes, to prove that he was also the perpetrator of the Big Lots robbery and homicide. During the instant case, Jerry Herren testified that he transported the defendant's blood, and he never improperly pressured anyone to make an identification. He should have been impeached with the testimony of Mary Palmisano about the pressure he placed on her to make an identification.

Mr. Watts informed that neither he nor Mr. McDermott considered hiring an

expert to assist them in challenging the various identifications in this case, although he has in the past. PC ROA Vol. XII, 1693. He informed that he did not think to bring up the lack of Family Dollar identifications and "did not think of introducing that bit of information into the trial and then arguing that the Big Lots [witnesses] couldn't have made an identification of a similarly disguised or masked perpetrator." PC ROA Vol. XII, 1695. The stipulation read at Dir. ROA Vol. XXVI, 1368 informed the jury that Shirley Bellamy, a Big Lots employee, also could not identify a perpetrator. Mr. Watts testified that there was no strategic reason why that information in the stipulation was not highlighted during the defense guilt phase closing argument. PC ROA Vol. XII, 1695.

Mr. Watts confirmed that there was no strategic reason for his failure to cross-examine Jerry Herren on his improperly pressuring Mary Palmisano to make an identification, and on the internal affairs issues. PC ROA Vol. XII, 1695-96. The internal affairs report showed that Officer Herren not only used a racial slur on the job during an investigation, but that he lied about it under oath. PC ROA Vol. V, 879. Racial bias and untruthfulness are certainly areas that should have been covered on cross-examination at trial. Trial counsel was ineffective for failing to cross Officer Herren on the disturbing and shocking findings in the internal affairs report.

Evidentiary Hearing Testimony: Failure to Challenge the State's Case(s)

As seen at PC ROA Vol. XII, 1706-09, the defense knowingly left the State's *Williams* Rule case(s) virtually untested. The only strategy contemplated at trial apparently was a strategy to ***not*** challenge the evidence in the collateral cases, which is unreasonable and deficient performance. This Court should reverse.

Evidentiary Hearing Testimony Regarding the Fingerprint Evidence

Regarding the fingerprint evidence presented against Mr. Peterson at trial, Mr. Watts stated the defense never considered consulting a fingerprint expert such as Simon Cole. PC ROA Vol. XII, 1716. This was ineffective because experts were available at the time to refute the notion that fingerprint analysts could testify with absolute certainty that fingerprint science could declare a match to the exclusion of all others. Mr. Watts stated that he did not object to Melinda Clayton's fingerprint testimony in these terms because, "At the time I believed that fingerprint identification was certain. And so therefore I wouldn't have thought to make an objection." PC ROA Vol. XII, 1718-19. Had he consulted someone like Simon Cole, that expert could explain the problems with the science of fingerprinting, explained how it is possible contrary to the trial testimony in Peterson that two people *can* have essentially the same fingerprint, and explained how fingerprinting is not scientifically valid like DNA testing.

More Evidentiary Hearing Testimony Regarding the Identification Issues

Regarding the identification evidence, Mr. Watts stated that he never

considered consulting an expert witness like Dr. Brigham or someone in his field. PC ROA Vol. XII, 1739. Regarding the motion to suppress identification wherein the defense only moved to suppress one witness's identification on the Family Dollar case, there was no strategic reason for failing to include any of the other witnesses in that motion. PC ROA Vol. XII, 1740. He said that there was no strategic reason why he failed to move to suppress the identification of Karen Smith PC ROA Vol. XII, 1741, and no strategic reason why he failed to move to suppress the identification of Ann Weber. PC ROA Vol. XII, 1742-43.

Evidentiary Hearing Testimony of Dr. Jack Brigham

Dr. Jack Brigham was tendered as an expert in eyewitness memory and eyewitness identification. PC ROA Vol. IX, 1325. Dr. Brigham explained that certain factors increase the risk of an inaccurate eyewitness identification. He testified at length, describing how many of those risk factors were present in the instant Big Lots case and the collateral offenses. PC ROA Vol. IX, 1325-1459. Dr. Brigham testified that "Traumatic events, stressful events are less likely to be remembered accurately. They may be remembered with certainty, but not with accuracy." PC ROA Vol. IX, 1328. Dr. Brigham stated that race is also an issue in identifications. Dr. Brigham stated that "you're about twice as likely to make an error, to make a false identification if you're trying to identify somebody of another race than if you're trying to identify somebody of your own race." PC ROA Vol.

IX, 1337. This case poses several cross-race identifications.

Dr. Brigham stated that the more complex an event is, the more difficult it is to encode information, and, "if the perpetrator is wearing a mask or hat, research those that persons are less likely to be able to identify them later on." PC ROA Vol. IX, 1338. This is all information that should have been presented at trial. Very relevant to the instant case, Dr. Brigham informed:

> Well, if a person hears from another witness or hears or sees in the media information relative to the crime and memory of it, that can influence their memory, and, unfortunately, one can never be aware of that. So if, for example, you see somebody's picture on television or see them in a courtroom in an earlier hearing or something and you're later asked to make an in court identification and you may be asked are you identifying this person solely on your memory from the crime, not from anything that happened subsequent to that, and a person may say yes with -- very truthfully, but, in fact, there's no way anybody can know whether their memory had been influenced by having seen this person in another situation or having seen them on television.

PC ROA Vol. IX, 1342. With the aid of this testimony, the defense could have persuaded the court that the identifications tainted by media views or composite sketches should have been suppressed. If not suppressed, Dr. Brigham could have informed the jury of the problems with the identifications in this case.

Although the information below was just proffered at the evidentiary hearing because the court sustained the State's objections based on relevance, Mr. Peterson would urge the reversal of that ruling, and ask that this Court consider the testimony relating to the Family Dollar case regarding the confrontation between

Officer Jerry Herren and Mary Palmisano. Dr. Brigham described that situation:

> My understanding from her deposition is that he demanded that she make an identification, to pick somebody, said he wasn't leaving until she did. That --if that's true, that's a blatant violation of every standard on interviewing witnesses, on instructions to be given before a photograph lineup, and it's one -- certainly one of the most blatant that I have encountered in 30 years of reading about lineups and instructions given to lineups. It's just absolutely unacceptable and remarkable that he would have done that.

PC ROA Vol. IX, 1368.

Trial counsel was ineffective for failing to move to suppress the identifications made by Karen Smith, a Big Lots employee. Not as a proffer, Dr. Brigham stated the following about Karen Smith:

> From my understanding of the transcripts, Ms. Smith saw a photograph of the suspect on TV before she saw the photo lineup. If so, that's a major issue in that when she or anybody in that situation picks the person from the lineup later on, there's no way of knowing whether he was picked because -- based on the memory of the crime or based on the memory from having seen the photo on TV. And, again, what research shows is that people may-try very hard to forget that TV image and go back only to the -- what they saw at the time of the crime, but that's impossible. The two images are tangled up with each other, and there is no way to take them apart. So once you've seen an image on TV and newspaper, at a hearing, whatever, it's from that point forward impossible to know whether a subsequent identification is based on -- more on the image that was encoded at the time of the crime or the image that was encoded more recently when the person -- the suspect was seen.

PC ROA Vol. IX, 1391-92. Even if trial counsel was unsuccessful in failing to suppress the identifications, Dr. Brigham's testimony could have been presented to the jury to cast doubt on the State's evidence.

Dr. Brigham confirmed that stress was applicable to these identifications. PC ROA Vol. IX, 1393. He stated that Anne Weber from McCrory's "saw a composite drawing of the criminal on television which could have also have a biasing effect on her memory." PC ROA Vol. IX, 1393. That episode could have been cited in support of a motion to suppress her identification, or used to cast doubt on Mr. Peterson's involvement in that case.

All of these identifications are tainted and unreliable, and trial counsel was ineffective for effectively bringing these available points out to the jury. An expert should have been consulted and utilized in this death penalty case. Dr. Brigham and other experts in his field were available for consultation, just as he was available when he first testified in Daytona Beach over 30 years ago in 1981. PC ROA Vol. IX, 1401. Trial counsel was ineffective for failing to consult either Dr. Brigham or someone else in his field of expertise to either suppress these identifications or cast doubt on their reliability.

The Admissibility of the Williams Rule Evidence Was Contrary to Mr. Peterson's Right to Due Process, Right to Confrontation and the Right to the Effective Assistance of Counsel in Violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The State violated due process for failing to fully inform the motion court about Darrell Sermons' lack of credibility and improperly relying upon his numerous statements to obtain the admission of prejudicial *Williams* rule evidence. (*See* discussion at the *Williams* rule hearing at Dir. ROA Supp. Vol. II, 119; *see*

also Grand Jury Testimony at PC ROA Vol. V, 886-940). Trial counsel was ineffective for failing to demand a hearing at which the motion court could assess the credibility and motives of witnesses and fairly determine whether there was clear and convincing evidence in support of the admission of the *Williams* rule evidence. Counsel was also ineffective for failing to move for reconsideration of the admissibility of the *Williams* rule evidence when counsel received a transcript of the grand jury testimony of Mr. Sermons. Lastly, counsel was ineffective for failing to move for a mistrial after the State did not admit evidence of the other *Williams* rule cases that the State initially relied on to convince the motion court to allow the admission of the most of the *Williams* rule evidence cases. Counsel's deficiency in these regards prejudiced Mr. Peterson.

In *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340 (1935), the Supreme Court held that the 14th Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. *Miller v. Pate*, 386 U.S. 1, 7 (1963) *citing Id. See also Napue v. People of State of Ill.*, 360 U.S. 264 (1959).

Mr. Peterson had the right to confront the witness against him and a due process right to a hearing under the Fifth, Sixth, Eighth and Fourteenth Amendments. *See Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2536 (2009); *citing Crawford v. Washington*, 541 U.S. 36, 61-62, 124 S.Ct. 1354 (2004). Counsel was ineffective for failing to protect Mr. Peterson's rights by demanding a

hearing.

At the evidentiary hearing on the instant motion, trial counsel was questioned in this area. Mr. Watts admitted that he did not consider filing a motion to exclude the *Williams* rule evidence because the jury did not have to determine guilt on the *Williams* rule cases. PC ROA Vol. XII, 1725. Mr. Watts admitted that "there was no strategic reason" for failing to move for reconsideration of the admissibility of the *Williams* rule evidence when defense counsel received the grand jury testimony of Mr. Sermons. PC ROA Vol. XII, 1725-26. There also was no strategic reason that the defense never moved for a mistrial after the State failed to admit evidence of the other *Williams* rule cases that the State initially used to allow the admission of most of the *Williams* rule cases. PC ROAVol. XII, 1726.

Regarding the State's improper argument and vouching for the credibility of Darryl Sermons, Mr. Watts stated that there was no strategic reason for not objecting. PC ROAVol. XII, 1738. When Mr. Crow said, "Mr. Sermons is capable of giving coherent and quite believable testimony," Mr. Watts agreed that there was no strategic reason for failing to object. Moreover, Mr. Watts stated that there was no strategic reason for failing to object when Mr. Crow told the motion court, "They are all strikingly similar, and I don't think in - - I don't think in 30 years of prosecution that I've had quite this many similarities and this unique a pattern in this many cases so consistent..." PC ROAVol. XII, 1738-39. Had

counsel not acted ineffectively, there was a reasonable probability that the outcome of the guilt phase would have been different.

Problems with the Lower Court's Order—Legislative Legitimacy

Regarding the numerous unchallenged improper comments by the State asserting how the legislature deemed this case proper for the death penalty, the lower court curtly dismisses this claim in one page. PC ROA Vol. V, 760. In only conclusory fashion without citing to any case, and without distinguishing the cases cited by the Appellant, the lower court finds "that the State's comments were not improper, and thus trial counsel was not deficient for failing to object. At the postconviction evidentiary hearing Mr. Watts confirmed that he saw no legal objection when the State commented that the Legislature defines the aggravating circumstances that support a death recommendation." PC ROA Vol. V, 760. Without any reference to the numerous other examples of improper comments by the State (there are eight previously cited earlier in this brief), the court then immediately turns the question of prejudice. Mr. Watts' failure to appreciate the legal basis for objections should not support denial of relief.

In denying relief, the lower court also reasoned that because four jurors actually voted for life, there obviously was no prejudice following the State's comments: "Four jurors were not compelled to vote for death and, thus, the defense fails to show that Peterson was prejudiced." PC ROA Vol. V, 760. This reasoning

fails to acknowledge that the eight jurors who voted for death may have been influenced by the State's improper comments. In fact, had just 2 of the death-voting jurors been influenced by the State's improper comments, prejudice is established. The close 8-4 vote should weigh in favor of relief, not denial.

Problems with the Lower Court's Order—Janet Gosha and Ronald Hillman

At PC ROA Vol. V, 761, the lower court again justifies denial of this claim because "Mr. Watts testified that he saw no legal basis to object to Ms. Gosha's testimony that she found money hidden underneath the sink." The lower court also reasoned that if evidence was introduced, characterized as "self-serving hearsay," that the money came from poker winnings, "the State would have been permitted to impeach Peterson with his 13 prior convictions." PC ROA Vol. V, 761. If the defense was attempting to introduce evidence that Mr. Peterson told Ms. Gosha that the money was proceeds from poker winnings, perhaps the door might be opened to the prior convictions. But, in this particular instance, it was the State who was presenting the testimony of Ms. Gosha. As such, the State was required to admit the rest of Ms. Gosha's statement about source of the money under the sink because it is purposely misleading to cut her off and create a false impression.

Regarding the misimpression left with Ms. Gosha's testimony about the money found under the sink, the lower court ruled: "The State has no duty to present a defendant's explanation of events." PC ROA Vol. V, 761. This

normally might be the case. But here, they indeed have a duty to avoid giving the wrong impression of the source of the money under the sink. Ms. Gosha informed during her deposition that Mr. Peterson told her that the money under the sink was poker winnings. *See Brunson v. State*, 31 So. 3d 926 (Fla. 1st DCA 2010).

At PC ROA Vol. V, 762, the court reasons that testimony about poker winnings would have been a "double-edged sword" because this "could also provide a reason that Peterson was in debt and provide a motive for the robbery." Lacking was evidence that Mr. Peterson was in debt, or that he lost money playing poker. The lower court erred in finding that "cross-examination [of Ms. Gosha] did not bring out new damaging information." PC ROA Vol. V, 762. The cross-examination of Ms. Gosha actually solicited testimony that Mr. Peterson "didn't have a lot of money." Dir. ROA Vol. XXV, 1261. The defense should have been trying to solicit testimony that Mr. Peterson worked, and he in fact made money. Contrary to the lower court's order, damaging information did surface on cross.

Problems with the Lower Court's Order—Opening Statement, Closing Argument

"Without a doubt," James Davis said could *not* make an identification at trial. Dir. ROA Vol. XXVI, 1378. He was absolutely certain he could not identify the Appellant as the perpetrator at Big Lots. Therefore it was improper for the State to mischaracterize his testimony and argue that he said he had "some doubt" about his ability to make identification. Dir. ROA Vol. XXVII, 1669. The lower

court erred in finding that the State's argument was something that could be inferred from the evidence, and that the argument was not objectionable.

The lower court also erred in finding the same with regards to the State mischaracterizing what the perpetrator said about the victim being shot and killed. The perpetrator never said, "do what I say or you'll end up like John," (argued at Dir. ROA Vol. XXVII, 1654), he instead stated that because he had shot and killed someone he was "already in trouble." (testimony at Dir. ROA Vol. XXV, 1288). Rather than sounding intimidating, the perpetrator was expressing remorse for the killing. The defense should have objected.

Problems with the Lower Court's Order—Officer Herren, ID Pressure

At PC ROA Vol. V, 764, the court takes Mr. Watts' word that the defense "repeatedly tried to interject statements by Mary Palmisano that Officer Herren pressured her to make an identification." The defense obviously did not go far enough to introduce this evidence. The lower court here also found that it "correctly limited the scope of the inquiry." This limitation of evidence was contrary to law and deprived Mr. Peterson of his due process rights to a fair trial. *See* Fla. Stat. 90.608. At Dir. ROA Vol. XXIII, 1004, Officer Herren denied that he ever pressured Mary Palmisano to pick someone out of a photo pack in the Family Dollar case. At that point, the defense had a right and a duty to present evidence through Mary Palmisano to the contrary. This would have directly

impeached the testimony of Officer Herren. Additionally, evidence that Mary Palmisano could not identify the perpetrator would show that the Big Lots employees likewise could not have been able to identify the same masked perpetrator.

Detective Herren was involved in the chain of custody of Mary Palmisano's blood, and the jury should have heard evidence of his racial prejudice and untruthfulness discovered during the internal affairs investigation. The lower court was wrong here to find this evidence "irrelevant and inadmissible." PC ROA Vol. V, 765.

Problems with the Lower Court's Order—Eyewitness Identification Experts

Trial counsel was ineffective for failing to consult an expert such as Dr. Brigham to challenge the eyewitness identifications in this case. In denying this claim, the lower court basically reasons that an expert was not necessary because "Mr. Watts confirmed he was familiar with Elizabeth Loftus[']s books on eyewitness identification [] substantially similar to the beliefs of Dr. Brigham." PC ROA Vol. V, 766. Mr. Watts' familiarity with those books would not help cast substantial doubt on the reliability of the several witnesses who testified that they could identify Mr. Peterson through a mask in a high stress situation.

In denying this claim, the lower court cites this Court's opinion in *Simmons v. State*, 934 So. 2d 1100, 1116-17 (Fla. 2006), suggesting at PC ROA Vol. V, 767

that eyewitness identification expert testimony is *per se* inadmissible. The lower court erroneously fails to embrace the wisdom and guidance found in the separate concurring opinions in *Simmons* informing that eyewitness identification testimony is certainly ***not*** *per se* inadmissible. The lower court cites to various other cases from Florida demonstrating that, in the lower court's words, "Trial courts have ruled that testimony of eyewitness experts, like Dr. Brigham, should not be admitted." PC ROA Vol. V, 767. The lower court holds here that "counsel cannot be deemed deficient in failing to employ a strategy that has proved an almost universal failure." PC ROA Vol. V, 767. The lower court fails to appreciate that there are evolving standards in the assessment of this type of testimony, especially in a capital case. In then Chief Justice Pariente's specially concurring opinion in *Simmons*, she wrote:

> In the years that have passed since we stated our belief in 1983 that jurors can accurately assess eyewitness identifications without the aid of expert testimony as they do most other evidence, we have learned that quite the opposite is true.

Simmons, Id. at 1124. *See also U.S. v. Smithers*, 212 F. 3d 306 (6th Cir. 2000), an opinion cited by then Chief Justice Pariente in her concurring opinion in *Simmons*, reversing a bank robbery conviction where the defense was not permitted to present expert eyewitness identification testimony to the jury, holding:

> The jurisprudential trend [permitting the presentation of expert testimony in the area of eyewitness identification] is not surprising in light of modern scientific studies which show that, while juries rely

> heavily on eyewitness testimony, it can be untrustworthy under certain circumstances.

Smithers, Id. at 311-312. This Court should reverse as the lower court unreasonably discounted Dr. Brigham's testimony.

Problems with the Lower Court's Order—IAC, No Opening Statement

The lower court unfairly excuses the defense for not making an opening statement because "Mr. Watts testified that the defense had nothing to offer the jury to exonerate Peterson and the defense was left to attacking the State's evidence." PC ROA Vol. V, 768. The lower court then cites to Mr. Watts' testimony where he rationalizes that if they would have commented on the six *Williams* Rule cases, then the jury only heard about three of those cases, they would have been prejudiced by making an opening statement. All the defense had to say is that there was reasonable doubt in the case in chief, and in the collateral cases the State would be presenting. There would be no surprise that the defense in this case would be reasonable doubt. There was no danger in "reveal[ing] the defense strategy." PC ROA Vol. V, 768.

The lower court gives too much credit for the defense not presenting any available evidence. The court credits Mr. Watts with rationalizing that "[t]he defense was able to make the first and last closing." PC ROA Vol. V, 769. This worked to Mr. Peterson's detriment rather than to his benefit. What the attorneys say is not evidence, and the defense was ineffective for presenting absolutely no

evidence, especially in a case where several jurors stated in *voir dire* that they would require the defense to present evidence.

Problems with the Lower Court's Order—Failure to Argue Collateral Crimes were not proven Beyond a Reasonable Doubt

The lower court finds at PC ROA Vol. V, 769 that this claim is procedurally barred because "Peterson challenged the admission of the Williams rule evidence on direct appeal." Although a challenge was indeed made to the similar crime evidence at trial and that specific issue was raised on direct appeal, trial counsel, after realizing that the evidence was coming in at trial, failed to cast doubt on it, and failed to argue to the jury that evidence had not been proved beyond a reasonable doubt. That specific issue was not raised, not preserved, and therefore should not be subjected to a procedural bar.

Mr. Peterson was only found guilty of 1 of the 3 collateral offenses. Although "It was not necessary for the jury to find any or all of the collateral crimes to be proven beyond a reasonable doubt in order for them to have circumstantial value in proving Peterson guilty of the charged offense" as stated in the order at PC ROA Vol. V, 769, it *was* necessary for the defense to challenge the evidence in those cases precisely because the cases were being used against him in the case in chief. Though there was evidence against Mr. Peterson in those cases, that evidence needed to be challenged by trial counsel. Nothing prevented trial counsel from challenging evidence in the case in chief and the collateral offenses,

thus the lower court should not have credited counsel's failures as strategy.

Problems with the Lower Court's Order—The Family Dollar DNA and the Ineffective Stipulation

In denying this claim, the lower court cites to Mr. Watts testimony wherein he stated that "MP was properly referred to as a victim of the Hillsborough County Family Dollar store crime. . . .[and the court reasons] There was little doubt that MP was the victim of a robbery. . . .It is purely speculative that the jury inferred that MP was the victim of a rape." PC ROA Vol. V, 771. To the contrary, the ultimate objection finally made by Mr. McDermott shows that counsel became concerned, and their concern and efforts to cure the prejudice came too late.

Problems with the Lower Court's Order—"Failure to Object to and Challenge the Fingerprint Evidence"

The lower court here acknowledges that "Ms. Clayton agreed on redirect by the defense that that her 2005 testimony did not include the qualifying language from the resolution adopted after Peterson's trial and, therefore, if offered today, it could be deemed conduct unbecoming a member of the IAI [International Association for Identification]." PC ROA Vol. V, 773. The lower court then overlooks this admission and credits Ms. Clayton's testimony on recall by the State, reasoning that she came back and "explained that her trial testimony was fully correct and consistent with the regulations at that time." PC ROA Vol. V, 773. The point here is that even if those were the regulations at the time of Ms.

Clayton's trial testimony, *at that time* experts like Simon Cole were available to explain what should have been limits on analysts' testimony. Just because it took a while for the governing bodies like the International Association for Identification ("IAI") to embrace the opinions of Simon Cole should not have relieved defense counsel's duty to educate the jury with his available testimony. Simon Cole could have explained that there should be limitations on the opinions of Ms. Clayton, specifically, that she could not find a match.

Problems with the Lower Court's Order—"Failure to Raise Adequate Challenge to the Williams Rule Evidence, Specifically, Failure to Raise an Apprendi/Sixth Amendment Violation"

The lower court at PC ROA Vol. V, 774 again finds this *Williams* Rule-related claim procedurally barred. Just because *a* Williams Rule claim was raised on direct appeal does not mean that *all* claims related to the *Williams* Rule evidence should be procedurally barred. On direct appeal the cases of *Ring* and *Apprendi* were not raised nor discussed. Though a *Ring* claim might have been raised on direct appeal, it was not raised in the context of prohibiting the use of the *Williams* Rule evidence in the case. This claim is not "meritless." Just as juries, not judges should decide if aggravators exist to justify the death penalty under *Ring* and *Apprendi*, juries, not judges should determine whether a defendant has committed collateral offenses before they are admitted in a criminal case.

Problems with the Lower Court's Order—"Counsel was Ineffective for Failing to File a Motion to Suppress In-Court-Identification for All of the Alleged

Witnesses That Supposedly Identified Peterson During the Trial"

At PC ROA Vol. V, 776 the lower court identifies Detective Herren as "formerly of Hillsborough County Sheriff's Office." He was actually with the Tampa Police Department until he was fired for making a racial slur on the job then lying about it during an internal affairs investigation. The lower court states that it previously ruled "at the time of trial that the actions of Detective Herren in the Hillsborough County case were largely irrelevant." At PC ROA Vol. V, 776. That case was used against Mr. Peterson circumstantially to show that he was the perpetrator of the instant case. The internal affairs matters *were* relevant. Even if those matters were not relevant, at trial when Detective Herren denied placing undue pressure on Mary Palmisano to make an identification, he should have been impeached with MP's testimony about his interactions with Mary Palmisano.

In denying this claim, the lower court makes a very significant, glaring factual error, reasoning: "Detective Herren's role in the Pinellas case was in the chain of custody for the blood of MP. . . .There was no legal basis to attack his truthfulness based upon a specific isolated act." PC ROA Vol. V, 777. Detective Herren ***carried Mr. Peterson's blood to FDLE for testing, not the victim's blood,*** and he identified Charles Peterson as counsel table as the man whose blood was drawn in his presence. *See* Detective Herren's testimony at Dir. ROA Vol. XXIII, 994-95. In a case where identification of the perpetrator was made on DNA

evidence, the fact that Detective Herren carried Mr. Peterson's blood is quite significant. And the fact that he made an in-court identification of Mr. Peterson in the instant case is quite significant. The defense should have impeached him with Mary Palmisano's testimony about the improper identification procedures he utilized at the very least. This evidence should be admissible.

Regarding the identification by Karen Smith, the lower court denied the claim that a motion should have been filed to suppress her identification reasoning as follows: "The fact that Ms. Smith coincidentally saw Peterson briefly in profile on a news report, not attributable to State action or misconduct, does not prevent her from attempting an in-court identification." PC ROA Vol. V, 777. There is not necessarily a requirement that there be State action or misconduct before an identification be suppressed. It can be indirect, like it was in this case, and like in the case of *State v. Gomez*, 937 So. 2d 828, 832-33 (Fla. 4th DCA 2006). The fact that she saw Mr. Peterson's photograph on a news report prior to her looking at a police photopack irreparably damages her ability to make any future identifications, and is grounds for suppression. The omissions were not strategy.

In denying this claim, the lower court unreasonably failed to consider the testimony of Dr. Brigham regarding the suggestive police procedures associated with the identifications in this case which supported suppression.

Problems with the Lower Court's Order—Failure to Fully Challenge the Williams Rule Evidence

The lower court finds at PC ROA Vol. V, 779 that "the admissibility of the Williams rule evidence was the subject of extensive pretrial discovery, legal memoranda, and argument." But again, Mr. Peterson was denied his right to cross-examine the witnesses at a hearing, including Darryl Sermons, who was the key figure in tying together all of the collateral cases against Mr. Peterson. Mr. Peterson was denied the opportunity to utilize the grand jury testimony to impeach Mr. Sermons. As acknowledged by the lower court at PC ROA Vol. V, 779, the State erroneously asserted that Sermons was "capable of giving coherent and quite believable testimony." This served as one of the main reasons that the lower court admitted the *Williams* rule evidence. This erroneous assertion ran contrary to the grand jury testimony initially withheld by the State, and the defense was ineffective for failing to fully exploit Mr. Sermons' lack of credibility.

For all of the reasons discussed above, this Court should reverse the lower court's order.

CLAIM III

THE CIRCUIT COURT ERRED IN DENYING PENALTY PHASE RELIEF. MR. PETERSON'S DEATH SENTENCES ARE MATERIALLY UNRELIABLE BECAUSE TRIAL COUNSEL WAS INEFFECTIVE FOR FAILURE TO INVESTIGATE AND PRESENT AVAILABLE MITIGATION IN VIOLATION OF MR. PETERSON'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Under the principles set forth by this Court in *Stephens v. State*, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring *de novo* review with deference only to the factual findings by the lower court.

Counsel Was Ineffective for Failing to Object to the State Using the Williams Rule Cases as Evidence of Aggravation When the Whole Premise Behind the Admission of the Williams Rule Cases Which Mr. Peterson Was Convicted and Those Which He Was Not Convicted Was Limited to Proving the Similar Facts.

The State's case during penalty phase consisted of introducing documents showing Mr. Peterson's prior felony convictions, documents showing his parole status and the testimony of Dale Smithson. After that, the State concluded by asking the trial court to take judicial notice of the guilt phase, and the court granted that request. Dir. ROA Vol. XVI, 2696.

The only penalty phase testimony that the State presented was that of Dale Smithson, the clerk at the 1981 Jimmy Spur Gas Station robbery. Initially, as led by the State, Mr. Smithson agreed that the robber was not "wearing any type of mask or anything to disguise his facial features." Dir. ROA Vol. XVI, 2690. Later, Mr. Smithson clarified that the robber was wearing a hat and sunglasses during this nighttime robbery. Dir. ROA Vol. XVI, 2687-88, 2694-95. Mr. Smithson detailed the rest of events during the robbery throughout his testimony. Effective counsel would have objected to the State leading a witness in support of the State's unsupported theory that Mr. Peterson had evolved in criminal sophistication while at the same time the events at Jim's Spur Station exhibited the

striking similarity that the State initially sought to admit as *Williams* rule evidence. Without objection, and prejudicing Mr. Peterson's case for life, the State was able to gain fodder for its argument that Mr. Peterson was essentially a clever evolving criminal who "learned from his mistakes." *See* Dir. ROA Vol. XVI R. 2785, 2789.

One *Williams* rule case, occurring in Hillsborough County, involved four sexual batteries of two victims, two robberies with a firearm and two false imprisonment charges. Mr. Peterson, as stipulated to by the defense, was convicted of these charges. Again, purportedly for the sole purpose of showing permissible similarity facts such as identity and *modus operandi* the State called one victim, who should not have been identified as such, and presented testimony of forensic evidence. The State went beyond the scope of the stipulation. For purposes of this issue, however, the evidence from the guilt phase was admitted to only to show similarity with the robbery and suspect in the instant case.

In the penalty phase, the State was limited to arguing aggravating factors from the facts of the actual murder the State was seeking Mr. Peterson's death and the evidence that the State presented in the penalty phase. This did not include the *Williams* rule evidence that the State presented in the guilt phase. Section 404 does not allow the admission of *Williams* rule evidence for purposes of justifying a death sentence. When *Williams* rule evidence is admissible, as the trial court instructed the jury during the guilt phase, it is admissible solely for a limited

purpose. Indeed, showing bad character or conformity therewith is precisely what *Williams* rule evidence is not and precisely what is legally forbidden. It was also precisely how the State used the *Williams* rule evidence against Mr. Peterson in penalty phase and did so unimpeded by Mr. Peterson's defense counsel.

Through argument and questioning of defense witnesses the State improperly put forth arguments and theories such as:

> * Mr. Peterson allegedly showed an evolving sense of criminal sophistication. The only argument the State could properly make was the evolution from the alleged level of sophistication of the Jim Spur robbery to the alleged sophistication of the instant offense by way of comparison of the two offenses. Such a comparison would have shown only that Mr. Peterson allegedly evolved to using a mask which was apparently transparent in the instant case. If the State did not use the cases that were admitted solely for *Williams* rule purposes in the guilt phase, this was all that the State could argue if the State could even make a credible argument on this front. But the State used the *Williams* rule cases to show that Mr. Peterson was evolving in sophistication and was not impaired as the defense's mental health witnesses testified. Vol. XVI R.2785-2789.
>
> * Mr. Peterson allegedly showed contempt towards the victims. The so-called after-the-fact-feelings towards the victims, which the Florida Supreme Court found in part was improper but harmless, should have been from the instant case and the Jim Spur case. Contempt-towards-the-victims argument should have been limited to the Jim Spur and the instant case if it was even admissible at all. The evidence of the uncharged offenses and the Family Dollar case were limited to showing identity and like evidence, not contemptuousness which by definition is impermissible character evidence.
>
> * Death was required because of the impact on the victims in the noncapital *Williams* rule cases. The State argued that the guilt phase *Williams* rule testimony of one of the Sexual Battery victims showed "the impact seven years later it still has on her life. These are not

minor offenses. They're severe. They're numerous. They're repetitive. It is a pervasive pattern." Dir. ROA Vol. XVI, 2786. The *Williams* rule evidence admitted in the guilt phase was admitted solely for the purposes of identity, not to impermissibly show that a death sentence should be imposed for the impact on the victim of a non-capital offense.

* Mr. Peterson's lack of intellectual capacity was supposedly refuted in part because of the evidence that the State presented as *Williams* rule evidence. The State used the facts of the evidence solely admitted for purposes of *Williams* rule evidence in the guilt phase to rebut Mr. Peterson's lack of intellectual capacity in the penalty phase. The State argued "how much intellectual capacity is necessary to know that raping . . . was wrong, that pointing the gun at the back of victim after victim was wrong, that murdering John Cardoso was wrong." Dir. ROA Vol. XVI, 2976. Without the *Williams* rule evidence there was not victim-after-victim with a gun to their head. Using the *Williams* rule evidence to argue intellectual capacity was clearly outside the limited bounds of what such evidence may be used.

* Based on the on the number of life sentences that Mr. Peterson already had been sentenced to, a life sentence in the instant case was allegedly inconsequential. Dir.ROA Vol. XVI, 2788. The State based this argument in part on the fact that Mr. Peterson had 6 life sentences from the Family Dollar case. Here the jury was allowed to consider the State's guilt phase evidence of the Family Dollar case, not just the conviction, even though the evidence presented during the guilt phase was admitted for limited *Williams* rule purposes. Moreover, the jury was free to consider the Phar-Mor and McCrory's robberies as well, for which Mr. Peterson was not convicted. Counsel should have objected because the State was arguing an escalating criminal pattern which is not a valid aggravating factor in a capital case.

At the evidentiary hearing, Mr. Watts was questioned in this area and provided no reasonable strategic reason for failing to object to the State's use of *Williams* rule evidence to prove its case for the death of Mr. Peterson.

Counsel Was Ineffective for Failing to Object to the State Arguing Facts Not in

Evidence.

Counsel was deficient for failing to object to the State arguing facts not in evidence. During penalty phase closing argument the State "suggested" to the jury that, "if you consider the angle of that bullet, if you consider the evidence, then the only logical explanation for what happened is he was on his knees leaning forward in a submissive position, and he was taken out with a gunshot wound to a vital area, aimed at the back bone, aimed at the heart, penetrating both lungs, lacerating the thoracic aorta and going into the liver." Dir. ROAVol. XVI, 2790. Here the State was arguing that this was premeditated murder in addition to felony murder. Defense counsel made a counter-argument during the defense close, but this was hardly the remedy for the State's inflammatory argument of facts not in evidence.

The State's personal interpretation of the facts of a homicide that no one testified to seeing was clearly not in evidence. Indeed, the evidence in support of premeditation was so lacking that Florida Supreme Court found that, as a matter of law, "there was insufficient evidence of premeditation in this case." *Peterson* at 161. What was clear to this Court and seemingly understood by defense counsel, was not clear to the jury when the jury was presented with the State's inflammatory argument based on nothing but the State's own conjecture. Counsel's failure to object and move for a mistrial was ineffective.

Counsel Was Ineffective for Presenting Just Two Lay Witnesses to Testify on Behalf of Mr. Peterson.

Counsel's performance was deficient for failing to present additional witnesses in support of the mitigating factor that Mr. Peterson had close relationships with friends and family and did good deeds. This was a failure to investigate and present supportive witnesses. The jury that sentenced Mr. Peterson to death was denied important information in support of Mr. Peterson receiving life. Mr. Peterson suffered further prejudice when the State improperly, and without objection, shifted the burden of proof in the penalty phase by arguing: "But of all of the people that Charles Peterson has encountered in his 45 years on earth, you heard from two." Dir. ROA Vol. XVI, 2798-99. Counsel should have presented more than "two" witnesses. Mr. Peterson had siblings, other family, friends and acquaintances that knew him and valued knowing him.

At the evidentiary hearing Mr. Peterson called additional witnesses Lily Johnson and Sally Dennis. Both are family members who lived close to the courthouse which Mr. Peterson's evidentiary hearing was held, and would have testified had they been asked by trial counsel.

Ms. Johnson was originally from Eufaula, Alabama and lived her whole life there until she moved to Tampa about 30 years ago. (PC ROA Vol. XI, 1535). Mr. Peterson's mother is also from Eufaula.

Ms. Johnson is the sister of Mr. Peterson's mother, thus making her Mr. Peterson's maternal aunt. Mr. Peterson has other aunts in Alabama. (PC ROA

Vol. XI, 1537).

When Mr. Peterson was a young boy growing up, Mr. Peterson visited Ms. Johnson and family members in Alabama during the summer. (PC ROA Vol. XI, 1537). Ms. Johnson recalled that there were never any problems with Mr. Peterson when he was a young man and would come to visit. As a young boy, Mr. Peterson liked to "run around and play and go on." (PC ROA Vol. XI, 1537). He also liked to go fishing. (PC ROA Vol. XI, 1537).

Ms. Johnson recalled that Mr. Peterson appeared to be a happy when he was at playing as a child. (PC ROA Vol. XI, 1538). Ms. Johnson never heard of Mr. Peterson having and problems with his parents or that he gave them any trouble. (PC ROA Vol. XI, 1538). Mr. Peterson got along with all of his family members in Alabama. (PC ROA Vol. XI, 1538). It seemed to Ms. Johnson that Mr. Peterson very much loved his family in Alabama and that his family very much loved him. (PC ROA Vol. XI, 1538).

At the time of trial, Ms. Johnson was never contacted by Mr. Peterson's lawyer or investigator about coming to testify on Mr. Peterson's behalf. (PC ROA Vol. XI, 1539). Had Ms. Johnson been contacted she would have testified on Mr. Peterson's behalf.

Sallie Dennis also lives in Tampa and was originally from, and grew up in, Eufaula, Alabama. (PC ROA Vol. XI, 1542). She has lived in Tampa for 30 or 35

years. (PC ROA Vol. XI, 1542). Ms. Dennis is Mr. Peterson's mother's sister, thus making her Mr. Peterson's maternal aunt. (PC ROA Vol. XI, 1543).

Ms. Dennis recalled that Mr. Peterson visited her and spent time in Alabama during the summer when Mr. Peterson was a young boy. (PC ROA Vol. XI, 1544). Ms. Dennis found that Mr. Peterson was a nice young man who was polite and respectful. Mr. Peterson seemed to be happy and "always had a smile on his face." Ms. Dennis did not recall hearing that Mr. Peterson gave his family any trouble while he was growing up. (PC ROA Vol. XI, 1544-45).

Ms. Dennis knew that Mr. Peterson went to prison as a young man. (PC ROA Vol. XI, 1545). She was "very shocked" by this. After being released from prison, Mr. Peterson would stop by and visit and say hello. (PC ROA Vol. XI, 1545-46). Including herself, Ms. Dennis agreed that Mr. Peterson had family members who loved him.

No one from Mr. Peterson's defense team ever asked Ms. Dennis to testify for Mr. Peterson at his penalty phase. (PC ROA Vol. XI, 1546). Had she been asked, Ms. Dennis would have testified. (PC ROA Vol. XI, 1546).

Counsel was ineffective for failing to rely on Mr. Peterson's Intellectual Impairment and for failing to avoid or diminish the State's Branding of Mr. Peterson with the stigma of Antisocial Personality Disorder.

Counsel was ineffective during the penalty phase for deficiently presenting evidence in support of mitigation, failing to present all available mitigation and for

failing to refute the State's case in favor of Mr. Peterson's death. *See Eddings v. Oklahoma*, 455 U.S. 104, 110-116 (1982).

Mr. Peterson had a right to have the jury consider all available mitigation, including both statutory and nonstatutory mental health mitigation. Counsel deficiently failed to develop and present all of the available mitigation. Counsel failed to hire a neuropsychologist to conduct a full battery of neuropsychological testing or any testing beyond that conducted by Dr. Valerie McClain. The results of such testing would have showed that Mr. Peterson suffered from brain damage in addition to his low intellect. Testimony from such an expert would have supported two statutory mitigating factors - - 1) capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired and 2) extreme mental or emotional disturbance. Counsel deficiently failed to effectively present the mitigation that counsel did in fact present and failed to effectively refute the State's case for a death sentence. Mr. Peterson was prejudiced because the jury and the court that sentenced him to death were denied a full understanding of his mitigation and case for life.

Counsel was ineffective for failing to call an expert that would have supported Mr. Peterson's mitigation. Dr. Maher was not such a witness. Allegedly in support of mitigation, Dr. Maher essentially testified that Mr. Peterson was not very smart. This was well-supported by Dr. McClain's testimony based on her IQ

testing. Dr. Maher should not have been put before the jury if, other than Mr. Peterson's lack of intellect, Dr. Maher essentially had nothing to offer in favor of mitigation and, much of what he did offer was harmful to Mr. Peterson.

The calling of Dr. Maher was also greatly prejudicial to Mr. Peterson because Dr. Maher readily admitted that Mr. Peterson met the criteria for Antisocial Personality Disorder. Dir. ROA Vol. XVI, 2710. This allowed the State to elicit all sorts of negative information about Antisocial Personality Disorder that included deviance, manipulation, short- run-friendliness, a lack-of-truthfulness and disregard for the rights of others. Dir. ROA Vol. XVI, 2710. The State elicited a myriad of bad character evidence from Dr. Maher, Mr. Peterson's own mental health expert and used the *Williams* rule evidence for impermissible purposes in the penalty phase. Dir. ROA Vol. XVI R. 2710-2719.

Nevertheless, even if it was not deficient to call Dr. Maher, counsel should have elicited testimony from Dr. Maher which refuted and mitigated Antisocial Personality Disorder. Counsel should have initially been familiar with the diagnostic criteria for Antisocial Personality Disorder. While Mr. Peterson possibly might have met some of the criteria listed in this Diagnostic, there was no evidence that Mr. Peterson had a Conduct Disorder with onset before age 15 years, thus precluding a diagnosis of Antisocial Personality Disorder.

Other than the alleged robberies there was no consistent pattern of Mr.

Peterson failing to conform his conduct to social norms. Mr. Peterson did not show impulsivity in his daily life. There was no evidence of "repeated physical fights or assaults" in Mr. Peterson's daily life. If any of these criteria were present they were not part of Mr. Peterson's daily life of maintaining a job and ultimately would inhere in the robberies.

Much like Mr. Peterson's low IQ, he did not have a choice in whether he had Antisocial Personality Disorder. Moreover, he had no choice in his genes or his environment from which the disorder developed. If counsel could not refute the Antisocial Personality Disorder, they were ineffective for failing to explain it.

Counsel should have hired an expert that would actually put forth mitigation. Counsel's performance was deficient in calling Dr. Maher to advance Antisocial Personality Disorder. Alternatively, counsel's performance was deficient for failing to seek further explanation from Dr. Maher of the applicability and causes of Antisocial Personality Disorder in general and specifically regarding Mr. Peterson. Mr. Peterson was prejudiced because the jury did not consider all of the available mitigation in favor of a life sentence and considered improper evidence and argument in favor of his death.

Evidentiary Hearing Testimony

After the State's *voir dire* the court heard the expert testimony of neuropsychologist Dr. Glenn Caddy, Ph.D. (PC ROA Vol. X 1479). Dr. Caddy

evaluated Mr. Peterson, conducted a general comprehensive evaluation and ultimately offered his opinions at the evidentiary hearing.

As part of his work in this case, Dr. Caddy reviewed a large number of documents. (PC ROA Vol.IX 1479). These documents dealt with Mr. Peterson's background and history, some of which dated back to Mr. Peterson's childhood and time in the Pinellas County public schools. (PC ROA Vol. X 1479-80). Dr. Caddy also reviewed the reports and testimony of mental health professionals who examined Mr. Peterson and testified at Mr. Peterson's penalty phase.

Dr. Caddy met with Mr. Peterson at Union Correctional Institution two times. During the first visit Dr. Caddy did some psychological testing, some of which was a limited amount of neuropsychological testing, and obtained detailed background and perspective from Mr. Peterson. (PC ROA Vol. X 1480-81).

Dr. Caddy did not do a standard battery of intelligence testing because there were "already a fair bit of information dealing with certain sorts of intelligence tests . . ." (PC ROA Vol. X 1481). Rather, Dr. Caddy thought it was important to test Mr. Peterson's academic achievement and compare the results to when Mr. Peterson was tested in the school system. (PC ROA Vol. IX 1481-82). The test Dr. Caddy used was the Wide Range Achievement Test. (PC ROA Vol. X 1482). Mr. Peterson scored very low in the percentiles on each of the measures of test; in arithmetic he scored at the 5th percentile; in spelling he scored in the 10th

percentile; in reading he scored in the 18th percentile, which was improved from his earlier scores and which Dr. Caddy attributed to the reading that Mr. Peterson did on death row. (PC ROA Vol. X 1482).

The next test that Dr. Caddy administered to Mr. Peterson was the Wechsler Memory Scale Revised. (PC ROA Vol. X 1483). Dr. Caddy administered this test because he wanted to evaluate Mr. Peterson's "legitimate memory functioning." Again, Mr. Peterson performed well below average: on global memory, 1st percentile; on visual memory, 1st percentile; on verbal memory, 5th percentile; on attention and concentration, 3rd percentile; and on delayed recall, meaning recalling material after delay, 3rd percentile. (PC ROA Vol. X 1483). Dr. Caddy found that this test showed that Mr. Peterson had significant difficulties in the processing of information and retrieving the information from his memory. (PC ROA Vol. X 1483).

Lastly, Dr. Caddy conducted a Halstead-Reitan Categories Test. (PC ROA Vol. X 1484). Mr. Peterson made a total of 72 errors. Dr. Caddy explained that "the criteria for mild impairment on the category test is in the range 46-65; for serious impairment it is above 65; and Mr. Peterson scored 72 on the category test. So clearly there are some meaningful limitations of function across critical areas of this man's ability to function as far as brain behavior relationships is concerned." (PC ROA Vol. X 1484).

Dr. Caddy reviewed the testing conducted by Dr. Valerie McClain and found that Mr. Peterson's score on the Wechsler Intelligence Scale Version III showed a full scale IQ of 77, verbal IQ 77 and his performance IQ was 81. (PC ROA Vol. X 1484). Dr. Caddy found that Mr. Peterson was functioning "in the borderline of intellectual functioning." (PC ROA Vol. X 1485). While Mr. Peterson is not quite mentally retarded, Dr. Caddy found "that when we add all of the variables together, we would say that he's got substantial limitations of function as far as his capacity to neuropsychologically to operate." (PC ROA Vol. X 1485). Mr. Peterson's limitations "extends through a limited capacity for education, limited capacity for memory, extremely poor memory for the sort of testing that [Dr. Caddy] did, and quite limited ability to master educational processes even after many, many years." (PC ROA Vol. X 1485).

Based on Dr. Caddy's evaluation of Mr. Peterson, Dr. Caddy found:

> That he is very significantly impaired. I cannot determine when that impairment took place, but he is -- he is globally significantly impaired. He's impaired as measured by intellectual testing. He is impaired when measured against achievement testing, and he is impaired when specific testing looks at his scores relative to brain injury, for example, brain trauma and pain injury. So in all of those various dimensions he has significant limitations of functioning.

(PC ROA Vol. X 1486). Dr. Caddy thought that it "extremely likely that what we've got here is a man who is simply genetically born with a substantially limited capacity to process information." (PC ROA Vol. X 1487). While Mr. Peterson

does not meet the criteria for mental retardation, "his performance across the board is very, very low." (PC ROA Vol. X 1487). Dr. Caddy found that it did not seem that there was evidence of gross head trauma, alcohol abuse or toxic impact so, biologically, Mr. Peterson had limited capacity to develop a more efficient brain.

Overall, Mr. Peterson's conditions affected his life. Mr. Peterson was unable to function in a normal context. This was seen in Dr. Caddy's review of Mr. Peterson's school records which showed Mr. Peterson performing below grade level and being unable to keep up with other children his own age. (PC ROA Vol. X 1487-88). The school system socially promoted Mr. Peterson but this only led to Mr. Peterson falling further behind and being unable to master the material. (PC ROA Vol. X 1488). As Dr. Caddy described, this led Mr. Peterson to "check out . . . ultimately." (PC ROA Vol. X 1488). As an adult, Mr. Peterson's conditions led to Mr. Peterson's lack of maturity in adulthood and his unfortunate inability to "make it in the real world[.]" (PC ROA Vol. X 1488).

In relation to Mr. Peterson's alleged criminal conduct, it was a more difficult for Dr. Caddy, to fully determine because Dr. Caddy did not know "exactly what all the circumstances were operating with him back then. (PC ROA Vol. X 1488). Dr. Caddy, however, found that Mr. Peterson's emotional functioning was impaired. (PC ROA Vol. X 1488-89). "[T]hat impairment is going to not only impact how he is able to function in the world, but it's also going to influence

some of the decisions that he might make, and some of those decisions clearly had criminal implication." (PC ROA Vol. X 1489). Based on Mr. Peterson's performance measures, Dr. Caddy found that Mr. Peterson could not have good judgment. (PC ROA Vol. X 1489). Dr. Caddy explained further:

> I mean, it impacts everything we do. It's the central processing system for all our conduct. So when you've got a really impaired brain, you are going to have, you know, impaired conduct. Now, that doesn't necessarily mean you're gonna be a criminal, but it does influence things like the company you keep, who you're gonna associate with. It tends to push you into, you know, a network of other people who are limited. Sometimes they will take advantage of people who have these sorts of situations.
>
> But above all else, what it does is it creates – it creates a really negative self-image. You know, one doesn't have -- one doesn't have a sense of confidence or the ability to master things. One doesn't have the sense of the ability to effectively cope at many different levels. And so when one is in that situation and one can't get ahead, it increases the possibility of criminal conduct, especially if other people influence that process to some degree.

(PC ROA Vol. X 1488-89).

Dr. Caddy was able to offer an opinion on whether Mr. Peterson met the requirements for Antisocial Personality Disorder. (PC ROA Vol. X 1491). Dr. Caddy found that it was very difficult to establish Antisocial Personality Disorder in Mr. Peterson because there was insufficient data to show that Mr. Peterson had a Conduct Disorder before age 15. (PC ROA Vol. X 1491-92). Mr. Peterson's neuropsychological impairment offered a different explanation for Mr. Peterson's

alleged conduct than Antisocial Personality Disorder for Mr. Peterson's conduct. As Dr. Caddy explained:

> [W]e may well see some of the same sorts of limitations that might be seen in people who demonstrate antisocial personality. For example, one or the criteria in antisocial personality disorder is . . . a pattern of impulsivity. Sometimes it's also linked to the inability to plan ahead.
>
> People with the sort of limitations that Mr. Peterson demonstrates are much more likely than a normally functioning person from a neuropsychological point of view to have issues dealing with impulsivity or inability or failure to plan ahead simply because they just don't process information that well.
>
> There are -- there are other ways that -- that may be linked to an antisocial -- the evolution of an antisocial personality disorder, but they could well be linked to not only the neuropsychological circumstances but the consequences of the neuropsychological circumstances.

(PC ROA Vol. X 1493). For a diagnosis of Antisocial Personality Disorder, Dr. Caddy found "that it's really easy to look at somebody who's committed murder and say, ah-ha, antisocial personality disorder. The problem is that the real definition and the criteria for that condition really depend on behavior that's already existed by age 15." (PC ROA Vol. X 1495).

Dr. Caddy was familiar with the mitigating factor that "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." (PC ROA Vol. X 1495). Dr. Caddy found that Mr. Peterson's neuropsychological condition was some evidence in support of this mitigating factor "because everything that Mr. Peterson does is being mediated by

a very inefficient brain system." (PC ROA Vol. X 1495).

Dr. Caddy was also familiar with the mitigating factor "that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired." (PC ROA Vol. X 1496). Dr. Caddy found that Mr. Peterson's neuropsychological condition was something for the jury to consider in relation to this mitigating factor because "the limitations of this man's functioning need to be taken into account with respect to everything he does." (PC ROA Vol. X 1496). Dr. Caddy agreed that Mr. Peterson could have made better decisions with more intelligence and more intellectual functioning. (PC ROA Vol. X 1496).

Mr. Peterson was on a slippery slope towards retardation; a curve that is dropping rather quickly. (PC ROA Vol. X 1497). Regarding Mr. Peterson's culpability, Dr. Caddy explained:

> We're no longer in the normal range of intellectual functioning. We're on a curve that's dropping down relatively quickly, and he isn't going to be functioning as a normal average citizen as far as his capacity to function is concerned, and it's going to influence everything that he does. It's gonna influence his ability to work, his ability to relate to people, his ability to get ahead. It's gonna influence his self-image. It's gonna influence how other people interrelate to him, and it's also going to influence any aspect of criminal conduct.

(PC ROA Vol. X 1498).

On cross-examination, in response to the State's question, Dr. Caddy provided some background that was in the record. (PC ROA Vol. X 1498). Dr.

Caddy made clear that Mr. Peterson denied the instant crimes as well as the other crimes he had been convicted. (PC ROA Vol. X 1501-03). Dr. Caddy did not testify that there was evidence of malingering and informed the State that while there are some malingering tests, Dr. Caddy found "that any of them do a particularly fantastic job at . . .reflecting malingering." (PC ROA Vol. X 1506).

Mr. Peterson never informed Dr. Caddy that he was sexually abused or that he exhibited psychosis such as hearing voices or hallucinating, which would have greatly added to his case for mitigation, if he were indeed willing to fake mitigation. (PC ROA Vol. X 1514-15). Ultimately, Dr. Caddy concluded that he did not believe that Mr. Peterson was malingering on the tests. (PC ROA Vol. X 1515).

This Court Should Grant Relief Because Counsel Was Ineffective During the Penalty Phase.

Mr. Peterson's life, character and crimes were not fairly and accurately depicted before the jury because of counsel's ineffectiveness. Had counsel not acted deficiently in this regard, there is a reasonable probability that the outcome of Mr. Peterson's penalty phase would have been different. This Court should vacate Mr. Peterson's death sentence.

Problems with the Lower Court's Order—Failure to Object to Williams Rule Evidence Being Used as Aggravation

Per State request, and without objection from the defense, the trial court

instructed the jury in the penalty phase that it could consider *all* of the evidence from the guilt phase, including the collateral crime evidence. The lower court found that this evidence was proper "to counter the presentation of certain mitigating factors," and that "there was no legal basis for defense counsel to make an objection and succeed." PC ROA Vol. V, 782. The lower court cites to *Sochor v. State*, 580 So. 2d 595 (Fla. 1991) to support denial of this claim, but that case was actually reversed by *Sochor v. Florida*, 504 U.S. 527 (1992). The United States Supreme Court reversed *Sochor* because the trial court relied on an improper aggravator. Additionally, Mr. Peterson did not present the mitigating factor of lack of significant prior criminal history at trial, therefore the *Williams* rule evidence was presented only for improper aggravation, not in specific rebuttal of any mitigating factor presented. The defense should have objected, and was ineffective for failing to object. This *Williams* rule evidence did nothing to "counter claims of statutory mental mitigation." PC ROA Vol. V, 782.

Regarding the questions the State asked the victim of the robbery at the Jimmy Spur gas station, the lower court found that "there was no leading question." PC ROA Vol. V, 782. It *was* a leading question. The State actually asked the witness if during the robbery the assailant sounded "Gruff?" More specifically, "When that—the statements were made, can you give us the—tell us the demeanor. Was it a friendly tone? Gruff? You see where I am going with it."

Dir. Addendum ROA Vol. IV, 43. The State not only led the witness, but even informed the witness that he was leading him, or where he was obviously "going with it." The transcript clearly shows that the defense allowed the State to lead this witness repeatedly.

Had defense counsel objected and prevented the introduction of the *Williams* rule evidence, the State would not have had the opportunity to make the improper argument that Mr. Peterson had evolved in sophistication as a criminal.

Problems with the Lower Court's Order—Failure to Object to the State Arguing Facts not in Evidence

The defense failed to object when the State argued that this was an execution style killing. This was not a "reasonable inference" that could be drawn from the evidence as suggested by the lower court at PC ROA Vol. V, 784. Nothing in evidence suggested that the perpetrator performed an execution style killing in this case. The defense should have objected and the jury should not have been permitted to hear this argument.

Problems with the Lower Court's Order—Failure to Call Witnesses

In denying this claim, the lower court finds that "The testimony of Ms. Johnson and Ms. Dennis would have been cumulative to the testimony presented at trial by Peterson's mother and niece." PC ROA Vol. V, 785. But this finding ignores the fact that the State faulted the defense in closing argument for failure to call more than two lay witnesses to the penalty phase. Failure to call Ms. Johnson

and Ms. Dennis *was* prejudicial to Mr. Peterson's case for life.

Problems with the Lower Court's Order—Failure to Rely upon Intellectual Impairment and Failure to Diminish the State's Brandishing Mr. Peterson with the Stigma of Anti-Social Personality Disorder

The lower court acknowledges that Dr. Caddy testified in postconviction that Mr. Peterson met the criteria for the two major statutory mental health mitigators. PC ROA Vol. V, 789. Though Dr. Gamache may disagree with that opinion, there actually is, contrary to the lower court's order, "a reasonable probability sufficient to undermine confidence in the sentence of death." PC ROA Vol. V, 793.

With regard to the link between low intellectual functioning and antisocial personality disorder that Dr. Caddy explained, the lower court states that "science does not ***definitively*** know the causes of antisocial personalities." PC ROA Vol. V, 793. (emphasis added). As one need only be reasonably convinced that mitigation exists in the context of a penalty phase, the lower court should not have disregarded the link for failure to carry definite proof. Contrary to the lower court's order, trial counsel provided prejudicially ineffective assistance of counsel.

Problems with the Lower Court's Order—Cumulative Errors at the Penalty Phase

For all the errors referenced in this penalty phase claim, individually, and cumulatively, relief should be afforded in this case, contrary to the lower court's order at PC ROA Vol. V, 793.

CLAIM IV

CUMULATIVE ERROR

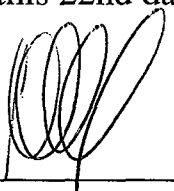
Due to the errors that occurred individually and cumulatively at both the guilt phase and penalty phase, this Court should grant relief from this unconstitutional conviction and death sentence.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Peterson respectfully urges this Honorable Court to reverse the circuit court's order denying a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by e-mail to Katherine Blanco [Katherine.Blanco@myfloridalegal.com and CapApp@MyFloridaLegal.com] on this 22nd day of January, 2013.



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