IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC12-238
Lower Tribunal No.: 16-2005-CF-010263-CXXX-MA

MICHAEL JAMES JACKSON

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of a trial Court order denying Appellant's Rule 3.851, Fla. R. Crim. P. Initial Motion for Post-Conviction Relief in a death-penalty case. The motion is formally titled "Defendant's Amended Rule 3851 (e)(1) Initial Motion for Postconviction Relief" and appears at Volume 2, pages 225 through 277 of the Record on Appeal for *this* appeal. However, for ease of reading, that denied motion is referred to simply as the "subject motion." This appeal contains references to the record on appeal created for the subject post-conviction motion proceedings. They are designated by the letter "R" followed by the applicable record volume number, followed by the applicable record page numbers which are stamped at the bottom of each page of the record on appeal.

The appeal also contains references to the prior record of the original jury trial proceedings. They are designated by the letters "TR" followed by the applicable record volume number, followed by the clerk's record-on-appeal page numbers (bottom of page).

The Defendant Michael Jackson is referred to herein primarily as "Defendant, " but sometimes also as "Appellant" and "Michael Jackson."

The trial Court conducted an evidentiary hearing on the subject motion. R4, p481-547. That hearing is also referred to simply as the "evidentiary hearing" in

this brief. The trial Court order denying the subject motion (R2, p. 325 to 355), which is appealed here, is formally titled Order Denying Defendant's Amended Motion for Post Conviction Relief. It is hereafter also referred to as simply the subject "denial Order."

On August 10, 2012, The trial Court conducted a hearing pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993) to determine which postconviction motion claims could be adjudicated solely on the existing evidence and which postconviction motion claims required the presentation of additional evidence. R2, p. 313-214; R4, p. 576-604. Such hearing is referred to as the "*Huff*" hearing in this brief.

Later, on November 4, 2011, the trial court conducted a different hearing at which such additional, needed evidence was presented. R3, p. 481-547. It is referred to as the "evidentiary hearing" in this brief.

STATEMENT OF THE CASE AND FACTS

This is a death-penalty case. Defendant Michael Jackson remains incarcerated under a sentence of death at Death Row, Union Correctional Institution, Raiford, Florida for the 2005 murders of James and Carol Sumner. TR1, p. 3-5.

The basic facts of the subject kidnaping, robbery and first-degree murder case are set forth in this Court's direct appeal Opinion in Jackson v. State, 18 So.3d

1016 (Fla. 2009), as follows:

> In July of 2005, Jackson and codefendants Tiffany Ann Cole, Bruce Kent Nixon, Jr., and Alan Lyndell Wade robbed, kidnaped, and murdered James and Carol Sumner.[fn1] The plan to rob and murder the Sumners evolved from knowledge Cole obtained about the couple from a prior relationship with them. Before moving to Florida, the Sumners had resided in South Carolina and Tiffany Cole became acquainted with them there. The Sumners had been neighbors of Cole's family and had sold Cole a vehicle.
>
> Cole and Jackson were involved in a personal relationship and often traveled together. In June of 2005, this couple came to Florida to visit Alan Wade. During this visit, the Sumners allowed Cole and Jackson to stay with them in their Jacksonville home. During this initial visit, Jackson noticed that the couple was frail and would be easy victims. The Sumners were in their early sixties but in ill health which required a daily regimen of various prescription medications. Jackson informed Wade of the Sumners' financial position, which included $90,000 from the sale of their South Carolina home and multiple television sets. Following the initial **PAGE 1021** visit, Jackson, Wade, and Cole began to develop a plan to rob the Sumners. Wade invited his best friend Bruce Nixon to join the scheme. At the time of the crimes, Wade and Nixon were eighteen years old, and Jackson and Cole were twenty-three years old.
>
> Bruce Nixon testified at trial after entering into a plea agreement.[fn2] He stated that the foursome planned the robbery together but Jackson was in charge. Jackson informed the codefendants that he would "take care" of the Sumners by injecting them with a shot of medicine to cause their deaths. In preparation for the robbery, Nixon

stole several shovels to dig a hole and Cole rented a Mazda from a rental agency in South Carolina to transport the group. After arriving in Florida, the foursome secretly watched the house for several days as they developed a strategy for the logistics of the robbery. Several days before the murders, Nixon assisted Jackson and Wade in digging a six-foot-deep hole in a remote area of Georgia. The group left the shovels at that location when the excavation was completed. In further preparation for the attack, Jackson, Cole, and Wade purchased gloves, duct tape, and plastic wrap to be used in securing the victims. A "toy gun" was also obtained. Video surveillance captured the group entering and leaving the store where the items were purchased, and receipts for the purchases were found in the motel room where Jackson, Cole, and Wade were eventually apprehended.

On the evening of July 8, 2005, Nixon and Wade approached and knocked on the door of the Sumner residence. When Carol Sumner responded, Wade asked if he could use the telephone and Carol allowed Wade and Nixon to enter the house. Once inside, Wade ripped the telephone wire from the wall. The Sumners were held at "gunpoint" with the toy gun as Nixon and Wade bound them with the duct tape.

While Nixon and Wade entered the Sumner residence, Cole and Jackson remained outside in the rented Mazda because the Sumners knew and could identify them from their previous visit. As the crime unfolded, the foursome communicated with Nextel phones which operated as two-way handheld transceivers. After the men inside the residence informed Jackson through the Nextel phone that the Sumners were restrained, Jackson entered the home and began searching for bank statements and automated-teller-machine (ATM) cards. The

codefendants found and removed jewelry, a lockbox of rare coins, and documents which were in the house.

While Jackson searched the house, Nixon and Wade forced the Sumners to the garage where they ordered the victims to climb into the trunk of the Sumners' Lincoln Town Car. Nixon and Wade then drove the vehicle to a gas station and refueled as Jackson and Cole followed in the Mazda. The four then drove to the Georgia gravesite as the Sumners remained trapped in the trunk of the vehicle. The Lincoln was driven close to the hole which the group had previously prepared, while Cole remained with the Mazda at the edge of the road. When the codefendants opened the trunk, they discovered that the duct tape had released and the bindings were not secure. Jackson then ordered Nixon to tighten the bindings and Nixon complied. Nixon stated that Jackson had obtained the personal identification number for the ATM card of the victims which **PAGE 1022** Jackson verified through a telephone call to their bank.

The Sumners, still alive and bound, were placed in the deep hole. Jackson admitted that he heard Carol Sumner moan while she was in the hole. Nixon asserted that he walked away from the open grave and left Jackson and Wade to bury the victims.[fn3] Once the hole was filled with dirt, the group placed the shovels in the trunk of the Sumners' Lincoln and departed the Georgia site to return to Florida. After attempting to wipe the vehicle to remove any identifying information, the Lincoln was abandoned in Sanderson, Florida, which is located approximately twenty miles from the gravesite. The shovels used in the episode remained in the trunk.

The next stop for the group was an ATM in Jacksonville from which Jackson withdrew a large sum of money. After distributing the money among the codefendants, the

group retired to a motel for the night. Later that evening, Wade and Cole returned to the Sumner residence to retrieve a computer which they later pawned.

The following day, Bruce Nixon separated from the group and returned to his home in Baker County, Florida. He attended a party there where he displayed a plastic bag filled with multicolored prescription medications. During the party, Nixon announced that he had buried people alive and killed them without expressly stating that he had been assisted by others.

On July 10, 2005, Carol Sumner's daughter reported to law enforcement that her parents were missing. The Jacksonville Sheriff's Office (JSO) responded to the Sumner residence the following day to investigate. The back door of the Sumner home was unlocked. Ingredients that appeared to be associated with preparation for a dinner were on the stove and dirty plates were in the kitchen. Carol's shoe and surgical boot were discovered which was unusual because these items were necessary for Carol to walk. That same day a JSO officer spotted a Lincoln Town Car in Sanderson. A subsequent analysis of items found in the Lincoln revealed Jackson's fingerprints on an unopened roll of plastic wrap.

As the JSO continued to investigate the disappearance of the Sumners, Jackson continued to withdraw money from the Sumner bank account. Between July 9 and July 13, 2005, approximately $5,000 was removed from the bank account. Photo surveillance captured Jackson using the Sumner ATM card several times from July 9 to July 13. The rented Mazda could be seen in the background of some of the surveillance photos.

When Jackson began to have difficulty accessing the account, he contacted the bank purporting to be James

Sumner. The bank informed Jackson that the daily withdrawal limit for the account had been exceeded. Jackson then attempted to solicit assistance from the JSO in accessing the accounts. Continuing to pretend that he was James Sumner, Jackson explained to a member of the JSO that he had left town hurriedly with his wife to attend the funeral of her sister in Delaware. When the officer asked to speak to his wife, Tiffany Cole responded under the pretense of being a tired and ailing Carol Sumner.

The JSO detective suspected that he was not actually speaking to the Sumners. Accordingly, he contacted a United States Marshal to assist the JSO in tracking the **PAGE 1023** cellular telephone used by the caller, who was later identified as Jackson. The cellular telephone had been used in the vicinity of the Sumner residence during the approximate time of the abduction. Using the rental car global positioning system, law enforcement determined that the Mazda was within blocks of the Sumner residence on the night of the murders. Based upon the ATM photos of the Mazda, South Carolina law enforcement were able to track Tiffany Cole to two motel rooms rented under her name in the Charleston, South Carolina, area.

On July 14, 2005, law enforcement found Jackson, Cole, and Wade at the motel. The police obtained a search warrant for the motel rooms. Upon receiving the entry code for the safe located in the motel room from the management, the police opened the safe and discovered identification, credit cards, a checkbook, and papers belonging to the Sumners. Some paperwork and mail were also in the motel room. A key ring that belonged to the Sumners was discovered in Wade's motel room. Law enforcement found and recovered the Sumner coin collection in the trunk of Cole's vehicle.

Cole, Jackson, and Wade were arrested. Jackson was interrogated by several detectives. Law enforcement discovered an ATM card in a trash can in the interrogation room which lacked an identifying personal name but had been issued by the Sumners' bank. Jackson informed the detectives that he had knowledge of the location of the Sumners but that Wade and Nixon were responsible for kidnaping and burying the victims. Jackson claimed that the ATM card belonged to Wade's mother and that Wade had convinced Jackson to make withdrawals from the account. Jackson admitted that he was at the gravesite and saw the Sumners placed in the hole while they were still alive.

Bruce Nixon was also arrested and revealed the burial location of the Sumners to law enforcement. On July 16, 2005, the bodies were discovered four miles north of the Florida-Georgia border in Charlton County, Georgia. The medical examiner testified that death was caused by mechanical obstruction of the airways by dirt. In essence, they were buried alive and asphyxiated from the dirt particles smothering their airway passages. Once the dirt covered their heads, they would have fallen unconscious and died within three to five minutes.

Items of mail addressed to the Sumners were recovered from the rented Mazda. Both the Lincoln and the Mazda contained sand particles on the seats and floorboards. At the gravesite, law enforcement recovered cigarette packs, shell casings, and empty beer cans.

Jackson testified in his defense that the plan was limited to robbing the Sumners and did not involve murder. He stated that Wade and Nixon went into the home while Jackson and Cole waited outside. Wade and Nixon then drove off in the Sumners' vehicle and Jackson followed.

At that point, Jackson asserted that he had no knowledge that the Sumners were bound and in the trunk. Jackson's version of the facts was that when they arrived in Georgia, Wade and Nixon directed Jackson and Cole where to park and asked Jackson to bring them a flashlight. Jackson thought they were abandoning the Lincoln but when he approached the codefendants he heard Carol Sumner moan. Jackson stated that he was surprised and questioned Wade and Nixon about their actions before returning to the Mazda where Cole waited. Jackson admitted that he impersonated James Sumner during telephone calls with the JSO. After deliberations, the jury returned guilty verdicts on all counts. **PAGE 1024**

opportunities to present mitigation evidence but he declined to do so. Instead, defense counsel proffered the mitigation evidence already prepared. The trial court conducted a colloquy and consequently found that Jackson knowingly, intelligently, and voluntarily waived his right to present mitigation evidence and also that he had been well informed by counsel of the potential ramifications of this waiver. After deliberation, the jury recommended death sentences for the murders of both victims by votes of eight to four.

> [fn1] Of the foursome, Jackson was tried first and subsequently convicted on all counts. Cole and Wade were also convicted and sentenced to death for the murders.
>
> [fn2] Nixon pleaded guilty to lesser charges and received concurrent sentences of forty-five years' imprisonment on each count.
>
> [fn3] The evidence conflicted as to which of the codefendants actually carried out the burial. Nixon implicated Wade and Jackson; however, Jackson contested his involvement and testified that either

Wade or Nixon effectuated the burial.

Following this direct-appeal decision, the Defendant filed his subject motion for post-conviction relief. R2, p. 225-277. It contained seven enumerated claims. However, Claim 3 was withdrawn prior to the final draft of the subject motion. R2, p. 225. Claims 1, 2, 4, 5, and 6 are "ineffective assistance of counsel" claims.

Claim 7 challenged Florida's death-sentencing scheme pursuant to Ring v. Arizona, 536 U.S. 584 (2002) progeny case entitled Paul H. Evans vs. Walter A. McNeil, Case No. 09-14402-CIV-MARTINEZ, U.S. Specifically, on June 20, 2011 Judge Jose E. Martinez of District Court of the Southern District of Florida, Miami Division, entered an Order finding that portions of Florida's death-sentencing law not in compliance with the death-sentencing requirements of Ring.

Waiver of Guilt-Related Issues

On or about October 10, 2011, following this Florida Supreme Court's affirmation of Defendant's Judgment and Sentence of Death, the Defendant wrote the trial court judge a letter. R2, p. 281-282. In it, the Defendant told the trial court judge, ". . . I've asked my attorney Mr. Christopher Anderson to do the right thing and allow me to tell the truth. It is my hope he will not try to hinder that in

any way . . . As you are aware, I've dropped all guilt phase challenges, for I am indeed guilty . . . all I seek is to tell the truth and your mercy. . . I also wanted to write this letter and make you aware of my intentions because I fear that my attorney Mr. Anderson may somehow try to hinder me from doing what is right." R2, p. 281-282.

Thereafter, on or about October 20, 2011. the Defendant mailed the trial judge a second letter. The Defendant told the trial court judge, ". . . I've lied so much about everything. . ." and "I do hope to be able to tell the truth. . ." and added:

> Secondly, my attorney Mr. Anderson seems to think that my agenda in seeking to tell the truth has something to do with "Religion." While yes, I have been saved, and yes, the conviction to tell the truth does stem from the Spirit and the desire to obey God, I assure that I will respect the law of your Courtroom and the State of Florida. I will keep all my testimony within the scope of the case. It is not my intention to go on any "rant," only to confess the truth."
>
> (R2, p. 279-280).

The fifth page of the subject postconviction motion includes the following statement:

> The Court and counsel may be surprised at the absence of issues relevant only to guilt-phase issues. The undersigned defense counsel advised Defendant to pursue both "guilt" and "penalty" issues. However, Defendant has chosen to accept his adjudications of guilt for the crimes charged and has instead instructed his undersigned

> counsel not to raise issues or do things which are intended to challenge Defendant's adjudications of "guilty" for the crimes charged. Defendant *does* want his undersigned attorney to pursue the sentence-related issues presented in this motion.
>
> (R2, p. 230).

It is also important to note that on August 16, 2011, the Defendant signed the subject motion which was drafted –as Defendant requested– without "guilt" issues. (R2, p. 258).

At the evidentiary hearing held on the subject postconviction motion, the Defendant bluntly informed the Court that he had lied to his trial counsel, falsely insisting that he was innocent of the subject murders throughout the jury trial proceedings. R3, p. 507. Defendant further testified under oath as follows at the evidentiary hearing on the subject postconviction motion:

> First, I'd like to say that I am guilty for the crimes of first degree murder, kidnaping and robbery against Mr. And Mrs. Sumner. My reason for wanting to address the Court today is because of the many lies I told to everyone years ago at pretrial and then trial. I downplayed my involvement to look as if I were not guilty but the truth is that – the truth is that it was my idea to do this. Truly, I did not make anyone do anything. All were willing participants but I was, in fact, the leader. It was my idea to do it.
>
> I lied to this Court all throughout my trial testimony, same to Mr. Mizrahi (prosecutor), to Mr. Kuritz (lead defense counsel) and Mr. Steinberg (second-chair defense counsel). Even more so I lied to the people who deserve the truth the most, the family of Mr. and Mrs. Sumner, and for that I am deeply sorry.

> There are no words that I could ever offer that would convey the depth of my remorse or sorrow, but again, I say that I am truly sorry for what I have done and though I'm undeserving, I do ask forgiveness. My desire today is to reconcile the truth to the family of Mr. and Mrs. Sumner and to Your Honor, the attorneys and to the Court record. If necessary, I will answer any and all questions fully and truthfully. Thank you.
>
> (R3, p. 538-539).

Defendant's two trial attorneys testified at the evidentiary hearing on the subject postconviction motion. Defendant's "lead" jury-trial defense attorney, Mr. Richard Kuritz, testified that the Defendant never admitted to being involved in the killing of the victims and insisted he was innocent of the killings. Mr. Richard Kuritz further explained that, as such, he regarded victim-outreach activities (which are explained more fully below) as so opposed to Defendant's proclamation of innocence that victim-outreach activities were never discussed. R3, p. 509-510. Defendant's second jury-trial defense attorney, Mr. Greg Steinberg, concurred, adding that Defendant's insistence that he did not participate in the killing of the victims ruled out the admission of guilt and apology which are essential elements of victim-outreach activity. R3, p. 526-527.

The Florida Rules of Professional Conduct govern the conduct of Florida attorneys. Such Rules impose upon Florida lawyers a duty to "zealously assert the

client's position under the rules of the adversary system." *See* Preamble: A lawyer's Responsibilities, Fla. R. Prof Cond. Furthermore, Rule 4-3.1 of the same Rules provides that "A lawyer for the defendant in a criminal proceeding . . . may nevertheless so defend the proceeding as to require that every element of the case be established." On the other hand, Rule 4-1.2 of the Florida Rules of Professional conduct requires Florida lawyers to abide by their client's decisions and Rule 4-3.3 of the Florida Rules of Professional Conduct require Florida lawyers be honest with the courts. Obviously, the present Defendant made an unusual choice in forbidding his undersigned attorney from pursuing "guilt" related issues in the subject postconviction motion. The undersigned candidly discloses such client choice to this Florida Supreme Court in compliance with these same ethical rules and also to clarify Defendant's position in this appeal.

SUMMARY OF ARGUMENT

The Defendant was tried before a jury and sentenced to death for the 2005 murders of James and Carol Sumner. TR1, p. 146-147, 169-170, 228-237. This Florida Supreme Court affirmed Defendant's Judgment and Sentence of death in Jackson v. State, 18 So.3d 1016, 1025 (Fla. 2009).

The Defendant then filed his subject motion for postconviction relief. In it, Defendant claimed he suffered ineffective assistance of counsel as a result of his

trial lawyers' (1) failure to engage in victim-outreach activity, (2) failure to prepare an adequate motion to suppress Defendant's inflammatory and disrespectful recorded jail phone conversation with his mother, (4) failure to object to the State's argumentative and speculative questions to trial witnesses, (5) failure to object to improper victim-impact testimony, and (6) cumulative errors . R2, p. 225-277 and R1, p. 1—179. The Defendant also made a seventh claim that the Florida's death-sentencing law under which Defendant received his Judgment and Sentence of Death has been held unconstitutional in the recent Federal District Court case of Evans v. McNeil, Case No. 08-14402-CIF-MARTINEZ, S.D. Fla June 20, 2011. R2, p. 256-257.

On January 30, 2012, the trial court entered its Order denying every claim in Defendant's subject motion for postconviction relief. R2, p. 325-355. In this appeal, the Defendant contends that all of the claims he raised in his subject postconviction motion were meritorious and the trial erred in denying each of them and in denying his subject postconviction motion as a whole.

ARGUMENT WITH REGARD TO EACH ISSUE

Issue 1: The Trial Court Erred in Not Finding Defendant's Trial Counsel

Ineffective for Failing to Engage in Victim-Outreach Activity

Claim 1 of Appellant's subject postconviction motion alleged ineffective assistance of trial counsel for failing to engage in victim-outreach activities. R2, p. 5.

The Commentary to Guideline 10.9.1 of The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) explains the victim-outreach concept as follows:

> A very difficult but important part of capital plea negotiation is often contact with the family of the victim. In some states, the prosecution is required to notify and confer with the victim's family prior to entering a plea agreement. Any approaches to the victim's family should be undertaken carefully and with sensitivity. *Counsel should be creative in proposing resolutions that may satisfy the needs of the victim's family, including providing more immediate closure by expressly foregoing appeals or arranging an apology or meeting between the victim's and the client if the client is willing and able to do so.* The defense team may consider seeking the assistance of clergy, a defense-victim liaison, or an organization of murder victims' families in the outreach effort and in crafting possible resolutions. The victim's family can be critical to achieving a settlement.
>
> (Parenthesis added by Appellant for emphasis)

The Defendant incorporated this description of the victim-outreach concept in his subject postconviction motion. R1, p. 232-233.

Obviously, "a*rranging an apology,"* can be done only with a Defendant

who is willing to meet with the victim's survivors and admit what he did wrong and accept responsibility for killing.

Similarly, victim outreach requires reaching out to the victim's survivors and taking *their* need for closure into consideration. A defense attorney who does this may be able to craft a plea agreement which gives some emotional relief to the survivors while at the same time sparing the Defendant the death penalty. In his subject postconviction motion, the present Defendant alleged that his trial counsel was ineffective in failing engage in this type of victim-outreach activity. R2, p. 230- 231.

At the beginning of the evidentiary hearing on the subject postconviction motion, the trial court expressed doubt as to whether "victim outreach" is even a legitimate defense strategy. R3, p. 491. However, the State grasped the defense argument that victim-outreach activities might make a survivor more amenable to a non-death sentence. R3, p. 496. Defendant's undersigned postconviction-motion counsel added that victim-outreach activities might also soften the blow of the usual victim-impact testimony (R3, p. 497) and perhaps even motivate a survivor to urge the judge to be merciful later on, in the judge-only sentencing decision made pursuant to Spencer v. State, 615 So.2d 688 (Fla. 1993).

As explained in the "Waiver of Guilt-Related Issues," section above, the

Defendant admitted at the evidentiary hearing on his subject postconviction motion that, *during his original jury trial proceedings*, he lied to everyone, including his defense counsel, downplaying his involvement and falsely trying to make it appear that he was not guilty of the subject killings. Similarly, Defendant's trial counsel testified at the postconviction motion evidentiary hearing that victim-outreach activity was so opposed to Defendant's denial of guilt that it was not even discussed. R3, p. 29-30 and R3, p. 536-527.

However, the Defendant argued in his subject postconviction motion that failing to exploring and discuss victim-outreach with the Appellant foreclosed an opportunity for the Appellant to reconsider the errors of his way and right his wrongs and thereby avoid the death penalty. R2, p. 231-231.

A review of the victim-impact evidence presented at Defendant's jury trial reveals that there was significant survivor anguish to assuage. The State had called two "victim-impact" witnesses. Mr. Revis Sumner, the brother of victim Reggie Sumner, testified first:

> My name is Revis Sumner and Reggie Sumner is my brother. I'm here to tell you today about Reggie. Reggie was one of 11 children and his family meant everything to him. His laid-back personality and his sense of humor made him the centerpiece of our close-knit family. His door was always open and his love for family was most evident – made evident by the way his younger siblings looked up to him as a mentor. Reggie had an extraordinary gift for touching not

only the lives of his family, but he pulled family, affected the lives of his neighbors and others who found themselves blessed by knowing him and his wife Carol. They were very trustworthy and were kind and were always helping others who were in need. In the last couple of years so many neighbors have come up to us and told us Reggie was – excuse me – they were kind and always helping others who were in need. In the last couple of years so many neighbors have come up to us and told us how Reggie and Carol helped them. One single mother said that Reggie knew that she was struggling to make ends meet. With tears in her eyes she told Reggie just walked up to her one day and gave her $100 and told her to go to the family – to the store and buy her family some groceries. This is just one of the ways that Reggie and Carol were always helping the needy. You might say that getting to know other people and helping them was a life-long hobby of Reggie's. He was the rare type of person who would – who would give ut not expect anything in return. If you were visiting Reggie in his home and mentioned that you liked any particular item at the house, he would give it to you. There's no telling how many pieces of furniture that he gave away to family friends and neighbors. Reggie was also very active in church. Our mother taught us from a young age the importance of supporting the church and it was better to give than receive. These were lessons that Reggie took to heart. The church could always depend upon Reggie to help them with financial contribution to the church building and any other church program that was in need of assistance. Not only did Reggie contribute to his local church, but he was a faithful sponsor of Save a Child Foundation. After Reggie's death, the creators of Save a Child told me they just lost their biggest contributor. His kindness and generous nature was not just to his – for his family and friends. It stretched half-way around the world. Reggie took several missionary trips to Russia.

Reggie enjoyed traveling and I share that love of traveling with him and often we would take trips together. One of the most memorable trips was when we took a weekend trip to Paris. It was so funny to see the expression of our co-workers – of our co-workers' expressions on their faces when they asked us what did you all do for

> the weekend and we replied we went to Paris. Reggie and Carol were looking forward to enjoying retirement. Reggie had just retired from a 30-year career as an administrator with CSX. He and Carol worked all their lives and they were ready to enjoy having more time together.
>
> Reggie and Carol had developed several health problems, but in spite of this they were always quick with a smile and a joke and being in their presence was a real pleasure. Losing them has been very difficult for the family and it's been hard for me because Reggie was not only my brother, he was my best friend. I feel this part of me is – this part of me is missing because were so close. After a time the tears stop flowing, but the pain of losing Reggie and Carol will never go away.
>
> (TR 13, p. 1636-1639)

Rhonda Alford, victim Carol Sumner's daughter, was the State's second and final victim-impact witness. She testified as follows at Defendant's jury trial:

> My name is Rhonda and Carol Sumner is my mother. It's been two years since my Mom and her husband Reggie were taken away and every time the phone rings I still think, oh, that's Mom calling me to tell me about her day or some crazy thing that Reggie had done or my daily favorite, did you see the store is today. We usually talked about nothing in particular, but we talked every day. Not only was she my mother, but she was also my best friend.
>
> My mother was such a strong person. She always found a way to rise above whatever problem she was facing. She was in poor health, she had received a blood transfusion that caused her to contract Hepatitis C. This later caused her to develop cirrhosis, which in turn caused liver cancer. Despite the serious health problems, my mother never collected welfare or accepted hand–outs.

She would work two, sometimes three jobs just to make ends meet. She never let on to anyone any of her problems. She did, however, always lend an ear and a shoulder to those in need. She rarely gave advice, but she listened and she always had a joke to share. It still baffles me how she could always remember so many jokes. She was like a beacon of light in that she could not see how brightly she shown, but shown on all those that she touched.

My mother was born on February 16, 1944. She was her parents' baby girl. She was a baby sister and a beauty in high school. She later became a wife and a mother. She was a registered nurse and she returned to school and received her paralegal degree at age 45 and her PI license just for fun. She also worked civil service for 25 years. She never met a stranger. I remember thinking while we were out here, over there, does she know or is my Mom just that friendly. People were drawn to her, her stories, her encouraging words and the life that poured out of her was hypnotizing.

I'll never forget the night –I'll never forget the night I heard about this Reggie fellow. Mom was working at her second job with Comcast Cable and James R. Sumner, or Reggie, called in with a problem, a technical problem. After a few moments on the phone with him she couldn't contain herself and she blurted out, "Are you the same Reggie Sumner that graduated from Garrett in 1962?" and seven months later they were married.

Reggie was running late to the church and Mom was sure that he had backed out. He hadn't and shortly thereafter her prince arrived. They were so in love and acted like 16-year-olds that day. She was a new woman. Reggie was her Mr. Right. You can't buy that kind of happiness and love that they shared.

Mom and Reggie became grandparents on August 12, 2003. My baby boy, Sebastian, and Reggie became fast friends. Reggie was curious about the tiny new bundle. The day of his birth Mom and Reggie must have stared at him for hours. Reggie, who did not have any biological children, just drank him in. He smelled his tiny little head, he rocked him and he gazed at him making goofy faces

> for hours. A year and a half later my second son, Gabriel, was born. Unfortunately, Reggie was very ill by this time with his diabetes. They moved to Jacksonville just after Gabe was born.
>
> On May 29th my husband and I, along with both babies, made a trip to Jacksonville for the first time. Mom was so excited to show me her home and all that she had done to decorate it and make it their own. I was shocked, however, at their physical appearance. Mom had become thin and gaunt and Reggie endlessly battled his diabetes. My husband and I went to work cleaning the garage and de-junking this and that. We had accumulated quite a pile of stuff that the neighbors soon began rummaging for treasures. Later that night mom and Reggie snuck out there and began returning some of the times back to the garage. My last memory of him is saying, "What, this is still good, it still has life in it."
>
> That was their outlook on life. Even with their health problems, they still had life in them. I miss them so much and what I wouldn't give to see her one more time, to feel their hug, or smell her perfume. All I can do is keep living and hopefully make my parents proud up there fore I am so proud of them.
>
> (TR 13, p. 1640-1643)

As the above-quoted jury trial testimony indicates, the Defendant had good reason to question his trial counsel's failure to reach out to survivors Revis Sumner and Rhonda Alford. Accordingly, the Defendant complained about it in his subject postconviction motion. R2, p. 5-11.

At the *Huff* hearing, Defendant's counsel informed the court it intended to call only one survivor witness on this "no victim outreach" postconviction-motion claim: Ms. Rhonda Alford, victim Carol Sumner's daughter. R4, p. 581. The

trial Court held that Ms. Rhonda Alford would be allowed to testify at the evidentiary hearing. However, the Court deferred ruling on the relevance and admissibility of her testimony until after it would have an opportunity to hear what she had to say. R4, p. 583.

The defense also informed the Court at the *Huff* hearing that the Defendant himself intended to testify on this victim-outreach issue. R4, p. 14-25. As noted above, the Defendant's willingness to admit and accept responsibility for the crimes is a key part of victim-outreach activity. Testifying at his own postconviction-motion evidentiary hearing afforded the Defendant the opportunity to demonstrate such willingness to the trial court.

As it turned out, Ms. Rhonda Alford changed her mind at the last moment and chose not to voluntarily appear and testify at the evidentiary hearing. R3, p. 485-489. The Defendant then informed the court and the prosecutor and his undersigned postconviction-motion attorney that *he* did not want Rhonda Alford compelled to testify if she did not choose to do so voluntarily. The Defendant then personally excused Rhonda Alford from testifying at the evidentiary hearing. R3, p. 489-490. The trial-court judge asked the Defendant if he was sure he wanted to proceed without Rhonda Alford's testimony. The Defendant confirmed that he did indeed want to proceed with the evidentiary hearing without

Ms. Rhonda Alford's testimony. R3, p. 504-508.

Under the circumstances, the defense had to admit that, without Ms. Rhonda Alford's testimony, it had no survivor witnesses to testify about whether or not victim-outreach efforts would have made a difference. R3, p. 536. This necessitated the trial court adjudicating this postconviction motion claim based solely on the record, the arguments of counsel, and the above-quoted, evidentiary hearing testimony of the involved jury trial attorneys and the Defendant himself. The Defendant and his two defense lawyers testified as quoted in the "Waiver of Guilt-Related Issues" section above. The primary jury-trial prosecutor, Mr. Alan Mizrahi, testified that his State Attorney's Office evaluates the aggravating and mitigating circumstances and then decides whether to pursue a life or death sentence. R3, p. 533-534. Mr. Mizrahi added that, although the State Attorney's Office "takes into account" the survivors' life-or-death sentencing preference (R3, p. 533), such survivor's sentencing preference makes a difference only in a "close" case. R3, p. 535. Mr. Mizrahi added that Defendant's case was not "close." R3, p. 535.

In its denial Order, the trial court stated, "This Court has grave doubts about whether this claim even presents a legally cognizable claim." R2, p. 338. The court went on to hold that, even if a duty exists for trial counsel to engage in such

victim-outreach activity, there was no deficient performance by Defendant's trial counsel. R2, p. 338-39.

The trial court based its finding of no deficient performance by trial counsel on several things. First was the Defendant's previous insistence that he was involved only in the robbery and theft portions of the crimes (R2, p. 338), not the murders (R2, p. 338). Second was Defendant's trial counsel's evidentiary-hearing testimony that victim-outreach activities are effective only when the defendant is remorseful and fully admits to his involvement in the crimes charged (R2, p. 339). Third was prosecutor Alan Mizrahi's evidentiary-hearing testimony indicating that the State would have sought the death penalty regardless of whether one or more of the survivors would have opposed it. R2, p. 339-340.

Standard of review:

For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917

So.2d 213 (Fla. 4th DCA 2005).

In Strickland v. Washington, 466 U.S. 668 (1984) the United States Supreme Court held that a defendant is entitled to "reasonably effective assistance" of counsel. The United States Supreme Court went on to explain that "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*, at p. 688. The United States Supreme Court identified the American Bar Association standards as one source of prevailing professional norms as follows:

> Prevailing norms of practice as reflected in American Bar Association standards and the like, e. g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

(*Id.*, p. 688-689).

In other words, the United States Supreme Court regards ABA Standards as guides to prevailing norms of criminal-defense practice. As Defendant alleged in his subject postconviction motion (R2, p. 232-235), the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,

(rev. ed. 2003) therefore serve as useful guides in evaluating the effectiveness of defense counsel in death-penalty cases like the present one. The "Commentary" section of guideline 10. 9.1 includes the following statement:

> A very difficult but important part of capital plea negotiation is often contact with the family of the victim. In some states, the prosecution is required to notify and confer with the victim's family prior to entering a plea agreement. Any approaches to the victim's family should be undertaken carefully and with sensitivity. Counsel should be creative in proposing resolutions that may satisfy the needs of the victim's family, including providing more immediate closure by expressly foregoing appeals or arranging an apology or meeting between the victim's and the client if the client is willing and able to do so. The defense team may consider seeking the assistance of clergy, a defense-victim liaison, or an organization of murder victims' families in the outreach effort and in crafting possible resolutions. The victim's family can be critical to achieving a settlement.

The same "Commentary" refers to and incorporates Subsection B of this Guideline as an example of the kinds of concessions that such communications might facilitate. Subsection B, in turn, provides as follows:

> B. Counsel at every stage of the case should explore with the client the possibility and desirability of reaching an agreed-upon disposition. In so doing, counsel should fully explain the rights that would be waived, the possible collateral consequences, and the legal, factual, and contextual considerations that bear upon the decision. Specifically, counsel should know and fully explain to the client:
>
> 1. the maximum penalty that may be imposed for the charged offense(s) and any possible lesser included or alternative offenses;

2. any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation, civil liabilities, and the use of the disposition adversely to the client in penalty phase proceedings of other prosecutions of him as well as any direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement and good-time credits;

3. the general range of sentences for similar offenses committed by defendants with similar backgrounds, and the impact of any applicable sentencing guidelines or mandatory sentencing requirements;

4. the governing legal regime, including but not limited to whatever choices the client may have as to the fact finder and/or sentencer;

5. the types of pleas that may be agreed to, such as a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere or other plea which does not require the client to personally acknowledge guilt, along with the advantages and disadvantages of each;

6. whether any agreement negotiated can be made binding on the court, on penal/parole authorities, and any others who may be involved;

7. the practices, policies and concerns of the particular jurisdiction, the judge and prosecuting authority, the family of the victim and any other persons or entities which may affect the content and likely results of plea negotiations;
8. concessions that the client might offer, such as:

a. an agreement to proceed waive trial and to plead guilty to particular charges;

b. an agreement to permit a judge to perform functions relative to guilt or sentence that would otherwise be performed by a jury or vice versa;

c. an agreement regarding future custodial status, such as one to be confined in a more onerous category of institution than would otherwise be the case;

d. an agreement to forego in whole or part legal remedies such as appeals, motions for post-conviction relief, and/or parole or clemency applications;

e. an agreement to provide the prosecution with assistance in investigating or prosecuting the present case or other alleged criminal activity;

f. an agreement to engage in or refrain from any particular conduct, as appropriate to the case;

g. an agreement with the victim's family, which may include matters such as: a meeting between the victim's family and the client, a promise not to publicize or profit from the offense, the issuance or delivery of a public statement of remorse by the client, or restitution;

h. agreements such as those described in Subsections 8 (a)-(g) respecting actual or potential charges in another jurisdiction;

9. benefits the client might obtain from a negotiated settlement, including:

a. a guarantee that the death penalty will not be imposed;
b. an agreement that the defendant will receive a specified sentence;

c. an agreement that the prosecutor will not advocate a certain sentence, will not present certain information to the court, or will engage in or refrain from engaging in other actions with regard to sentencing;

d. an agreement that one or more of multiple charges will be

> reduced or dismissed;
>
> e. an agreement that the client will not be subject to further investigation or prosecution for uncharged alleged or suspected criminal conduct;
>
> f. an agreement that the client may enter a conditional plea to preserve the right to further contest certain legal issues;
>
> g. an agreement that the court or prosecutor will make specific recommendations to correctional or parole authorities regarding the terms of the client's confinement;
>
> h. agreements such as those described in Subsections 9 (a)-(g) respecting actual or potential charges in another jurisdiction.
>
> (R2, p. 232-235)

Accordingly, Defendant's trial attorneys were ineffective in failing to broach the victim-outreach concept to the Defendant before trial and in failing to let the Defendant decide for himself whether or not victim-outreach activity was something he wished to pursue. Because the Defendant later admitted to murdering the victims and later apologized to the survivors for doing it, there is a good possibility that he would have reached out to the victims and admitted his wrongdoing and apologized to the victims beforehand, if his trial counsel had given him the chance.

In Wiggins v. Smith, 539 U.S. 510, 511 (2003) the United States Supreme Court looked to the ABA Guidelines for the Appointment and Performance of

Defense Counsel in Death Penalty Cases, the " American Bar Association's capital defense work standards" as guidance as to what is "reasonable" defense work in capital cases. In holding that the penalty-phase preparation done by Defendant Kevin Wiggins' defense counsel was deficient, the United Supreme Court explained:

> Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA) — standards to which we long have referred as "guides to determining what is reasonable."
>
> Wiggins v. Smith, 539 U.S. 510, 524 (2003)

In failing to explore and discuss victim-outreach with the Defendant prior to Defendant's trial, Defendant's trial counsel's work fell short of the standards for capital defense work articulated by the American Bar Association. The trial court erred in not finding trial counsel ineffective on this basis.

Constitutional violations:

In failing to make victim-outreach efforts as described above, Defendant's trial counsel provided ineffective assistance of counsel and thereby deprived the Defendant of a fair jury trial in violation of the 6th and 14th Amendments to the U.S. Constitution and in violation of Article 1, Sections 14 and 16 of the Florida

Constitution.

Issue 2: The Trial Court Erred in Not Finding Defendant's Trial Counsel Ineffective for Failing to Prepare an Adequate Motion to Suppress Defendant's Inflammatory and Disrespectful South Carolina Jail Conversation With His Mother

Factual details:

Claim 2 of Defendant's subject postconviction motion alleged ineffective assistance of trial counsel for failing to prepare an adequate motion to suppress Defendant's inflammatory and disrespectful South Carolina jail telephone conversation with his mother. R2. P. 236.

On April 30, 2007, prior to the commencement of Defendant's trial, Defendant's trial counsel filed a motion to suppress various items of State-acquired evidence, including a recording of a Charleston County (South Carolina) jail telephone conversation that the Defendant had with his mother. TR 1, p. 92. The Defendant had been raised by his grandmother since infancy and therefore addressed her as "mother." The trial court denied the motion to suppress the Defendant's recorded jail conversation (TR 6, p. 407) and the recording was played to defendant's jury. The jurors therefore heard the following statements, among others, during the playback of the recorded jail conversation between the subject Defendant, Michael Jackson, and his mother (R9, p. 1063– 1079) :

UNIDENTIFIED VOICE: This call is from the Charleston County Detention center (another unidentified voice interjects, "Oh Shit.") Any attempt to use three-way or call waiting will automatically disconnect the call. This a –(inaudible) – collect call . . .

JACKSON'S MOTHER: Michael.

* * *

JACKSON: Hey, what's up?

JACKSON'S MOTHER: Michael, I want to come see you tomorrow. Put me on the book (of approved visitors).

JACKSON: You coming up here today?

JACKSON'S MOTHER: No. I called them down there and they told me, no, to come tomorrow but I could only come if you told them I could.

JACKSON: I don't know how to do that shit.

JACKSON'S MOTHER: Well, that's what they told me. You have to let them know to let me in.

JACKSON: I need you to get me some fucking money, man. I need you to –
JACKSON'S MOTHER: What money?

JACKSON: All right. . . . I got to bond (out) today to do this, all right? My shit is $5,000. Alan (co-defendant Alan Wade) is $5,000.

JACKSON'S MOTHER: Michael, listen to me and don't say a word. You're in the newspaper, all over the newspaper, yesterday and today.

JACKSON: For what?

JACKSON'S MOTHER: Murder. Hang on. And I don't mind spending the money to tell you. . . . Bodies I.D.'d as former South Carolina couple, James and Carol Sumner, were in their Charleston home. Jacksonville Sheriffs Department . . . . .Bail was denied for 18-year-old Bruce Nixon of Florida who was arrested and charged with murder, home invasion robbery and kidnaping. He took them to the grave site and everything."

JACKSON: Oh, my God, man. He took them to the fucking – are you kidding me?

JACKSON'S MOTHER: It's right here in today's paper .

JACKSON: Bruce took them to that fucking spot?

JACKSON'S MOTHER: He didn't say anything – wait a minute. Let me see what he says –Bruce – all right. Alan Wade 18, Tiffany Cole 23 and Michael Jackson 23. Authorities say the three were arrested in North Charleston on Thursday night after allegedly using the bank card belonging to the Sumners. They face credit card fraud charges in North Charleston. . . . In Florida authorities gave local police the tip that led to the three captives.

JACKSON: Mother fucking showed them where the spot was at.

JACKSON'S MOTHER: yes, dear.
JACKSON: Bruce (co-defendant Bruce Nixon) just killed us all.

JACKSON'S MOTHER: Yes, dear. Any questions?

JACKSON: I don't know.

JACKSON'S MOTHER: What did I tell you the last time I talked to you? Never trust nobody.

JACKSON: We got fucking arrested. We couldn't get in touch with

him or nothing to tell him that the . . .

JACKSON'S MOTHER: Honey, somebody told on him. He took – he took – how did you get the credit cards?

JACKSON: We got that. I don't know, man. Oh, my God. Listen. What's –what's going on – okay. I got – I got to bail out here and get to fucking Jacksonville somehow.

JACKSON'S MOTHER: If I pay your bail you will not get out. I've done tried . . . They (are) holding out for Florida to come get you.

JACKSON: I know. But maybe Florida is going to charge me and I can get a bond.

JACKSON'S MOTHER: You cannot get out here. They will not let me pay bond, nothing. They denied everybody.

JACKSON: So they're going to fuck around and deny my bond?

JACKSON'S MOTHER: They're coming after you from Jacksonville, Florida.

JACKSON: For fucking murder?

JACKSON'S MOTHER: That's what it says, accessory to murder . . That's what's on the Internet . . .You're in the newspaper with your picture, Tiffany's picture, Alan's Nixon's . . . .

JACKSON: Oh, my God.. . . . I didn't touch them fucking people though.

JACKSON'S MOTHER: Whether you touched them or not, you're an accessory because you have credit cards and you've been using their credit cards. If they can prove that you were anywhere around when that body was disposed of you're an accessory and all of you, every one of you, are looking at a big, long stay.

JACKSON: No. The most they can give you for an accessory is up to ten years. Fuck that. Oh, my God. I need a fucking lawyer I need a goddamn fucking lawyer.

JACKSON'S MOTHER: I don't know if Nixon went bragging. I don't know what happened.

JACKSON: Bruce didn't brag. They fucking found him and he started crying like a little bitch and they started threatening, telling him that we told on him and all this other shit. I guarantee it and he took them right out to that fucking spot.

JACKSON'S MOTHER: Well, he'll get a lighter sentence if he snitched.

* * *

JACKSON'S MOTHER: How did you get the Credit card?

JACKSON: Alan and all them, man. Alan don't even know this probably, man.

* * *

JACKSON: Bruce found the fucking – Bruce told them where the fucking shit – me and Alan both said we got to get in touch with Bruce to tell him to get the hell out of town. . .

* * *

JACKSON: Bruce found the fucking – Bruce told them where the fuck these people were at. Oh, my God. How the fuck could he do that? Bruce just hung us all.

JACKSON'S MOTHER: Yeah.

RECORDED JAIL ANNOUNCEMENT INTERJECTS INTO CALL: "This call is monitored or recorded." (P. 1071)

* * *

JACKSON: I'll see what – goddamn. I can't believe Bruce fucking did this, man. Alan and Tiffany don't even know that we're about to all go down.

JACKSON'S MOTHER: Well, I don't think I can see Alan or Tiffany.

* * *

JACKSON'S MOTHER: How did you get into this?

JACKSON: I told them I called yo and told you about the bullshit.

JACKSON'S MOTHER: Yeah.

JACKSON: Yeah. But, Mom, like I said, we were clean, man. We had – everything was fine

JACKSON'S MOTHER: You may be clean but you ain't going to be clean now, not with the way the papers are going.

* * *

JACKSON: Well . . . Bruce told them every fucking thing they (the police) wanted to hear. I guarantee it. He got scared. He ain't never been in trouble before and now he about to go down. They told him, "Hey, if you tell us what happened, show us where the bodies are at, we'll let you off." Guarantee that's what the fuck he did.

JACKSON'S MOTHER: Well, he's up for murder now.

JACKSON: Yeah. I know. He fucked hisself.

JACKSON'S MOTHER: How did they die?

JACKSON: Bruce and Alan took care of that. . . . and they put the people's names in the fucking newspaper too?

JACKSON'S MOTHER: There's pictures, good pictures. You took a good picture. You're the only one that come out good and clear. Everybody else looks green.

JACKSON: Ain't that a son of a bitch. I don't know what to do now except, you know, be fucked. . .

JACKSON'S MOTHER: All right, I'll talk to you later. I love you.

JACKSON: I love you too, Ma . . . Listen, ... I'm going to give Alan your number and I'm going to give Tiffany your number, okay? Listen, we have to all have the same fucking story here, man. . . . and I'm going to need you to relay fucking messages through me, Alan and Tiffany.

* * *

JACKSON'S MOTHER: And don't forget these are $5.56 a call . . .

JACKSON: Fuck the $5, okay? . . . . I'll pay yo the $5. . . . I got a whole other eight grand sitting in Alan's fucking bank account. I can give them your number . . . We all have to have the same fucking story. . . .
JACKSON'S MOTHER: All right.

* * *

JACKSON: All right. I love you.

JACKSON'S MOTHER: I love you too."

(TR9, p. 1063– 1079)

The original, pre-trial motion to suppress this recorded jail conversation is at Volume 1, page 92 of the Record on Appeal for the original, "direct" appeal of Defendant's original Judgment and Sentence of Death. (TR1, p. 92). At paragraph 10, the Defendant alleged that, "In order to legally and properly obtain those recordings from the jail, members of law enforcement must obtain a warrant in conformity with South Carolina law and Charleston County Jail policy. This was confirmed by Detective James Rowan of the North Charleston Police Dept. During his deposition on January 18, 2006, pages 60-61." (TR1, p. 92).

The transcript of Detective James Rowan's deposition appears to have been filed in the trial court on April 27, 2007. *Record Reference:* Trial Court Clerk's Docket print-out, p. 7 of 13, a copy of which was included at the top of TR1.

The trial court heard this motion to suppress the recorded jail conversation on May 1, 2007. TR5, p. 397-400 and TR6, p. 407-408. At no time did the State object to the Court considering Detective James Rowan's same deposition testimony. In fact, the State regarded Detective Rowan's deposition testimony as supporting the State' position that the jail phone recording was admissible without a warrant, as follows:

> MR MIZRAHI (Prosecutor): These are jail phone calls. Whether Detective Rowan thinks that it's a policy or not is irrelevant. He is told these are phone calls that are recorded by the Charleston County

> Jail kept in their database. There is no conceivable notion that you have to execute a search warrant upon yourself to execute the materials that you have within *your* department.
>
> (TR5, p. 398-399; italicization added by Appellant for emphasis)

At no time in these pre-trial proceedings did the prosecutor or court say anything about Detective James Rowan's deposition testimony being inadmissible.

The trial Court denied the motion to suppress the jail phone recording, essentially on the ground that the Charleston jail gave inmates adequate advance notice that their jail phone conversations were being recorded. TR6, p. 407-408.

The Defendant alleged in his subject postconviction motion that the recorded jail conversation was so offensive and disrespectful to Defendant's mother that it was damaging –arguably fatal– to his chances of getting a life sentence. R2, p. 241. As noted above, during the pre-jury-trial hearing on Defendant's motion to suppress the same Charleston County Jail phone recording, Defendant's trial counsel pointed out to the trial court that North Charleston Police Department Detective James Rowan was deposed and testified that under South Carolina State law and Charleston County Jail policy, the State cannot acquire and use recorded South Carolina jail conversations without a warrant. TR5, p. 397.

In his subject postconviction motion, the Defendant again alleged that Charleston Detective James Rowan had been deposed about the need for a warrant to obtain inmate telephone conversations back at the time of Defendant's original trial court proceedings and had testified that the Charleston County jail requires a search warrant for them. R2, p. 242. Defendant attached a copy of Detective Rowan's same deposition as an exhibit to Defendant's subject postconviction motion (R1, p. 148) At pages 61-64 and 85 of that deposition transcript (R1, p. 148, 149 and 154) is Detective Rowan's testimony about how all Charleston County jail phone calls are recorded, and how inmates hear a recorded phone announcement and see warning signs posted in the jail telephone area notifying inmates that their jail phone calls are being recorded.

At page 83 (R1, p. 154) of Detective Rowan's deposition testimony is his explanation of how a search warrant must be delivered to the Charleston County jail to obtain recorded inmate phone conversations. At pages 63-64 (R1, p. 149) of his deposition is Detective Rowan's testimony about the various signs and the recorded announcement notifying Charleston jail inmates that their phone calls are recorded.

At the original, trial-court motion to suppress the recorded jail phone conversation, after Defendant's trial counsel informed the trial Court of this

deposition testimony by Detective Rowan, the trial court asked Defendant's trial counsel for the specific, South Carolina legal authority (" statutory authority") requiring a warrant to acquire and use recorded jail phone conversations. Defendant's trial counsel did not provide any. TR5, p. 399 - R6, p. 406. This omission was ineffective assistance of counsel. It caused the trial court to deny Defendant's motion to suppress the recorded jail phone conversation. R6, p. 407.

However, as the Defendant has alleged in his subject postconviction motion, all Defendant's trial counsel had to do was call the Charleston County Public Defender's office and ask for a copy of its form motion to suppress jail phone recordings. R2, p. 242-243 and R1, p. 169-179. It contains a great deal of South Carolina case law and federal-court case law supporting the suppression of recorded South Carolina jail phone calls. R1, p. 169-179.

The Defendant further alleged in his subject postconviction motion that his trial counsel failed to include adequate references to U.S. law, South Carolina law and South Carolina jail procedure. R2, p. 241-244.

At the *Huff* hearing, both sides agreed that this claim required no new evidence and should be adjudicated solely based on the existing, record evidence. R4, P. 586

The trial court denied this postconviction motion claim, essentially on

grounds that the Defendant impliedly consented to the jail phone recording and monitoring (R2, p. 340-342) and failed to provide the Court with a South Carolina court decision precluding the warrantless acquisition and use of South Carolina jail recorded phone conversations. R2, p. 342-345.

Also, with regard to Detective Rowan's deposition testimony about how a search warrant must be delivered to the Charleston County jail to obtain recorded inmate phone conversations (R1, p. 154) the trial court seemed to deem such pre-jury-trial deposition testimony to be inadmissable hearsay in the subject postconviction motion proceedings. R2, p. 342. This was error. As explained above, during the hearing on trial counsel's motion to suppress the jail phone recording, there was no objection to Detective Rowan's deposition testimony and prosecutor himself itself alluded to Detective Rowan's testimony in support of the prosecution's argument that requiring a law enforcement agency to obtain a warrant to obtain it's own jail records would be an absurdity. TR5, p. 398-399. A trial court cannot subsequently deem inadmissible some testimony that was previously admitted without opposition for the same reasons in prior proceedings. Doing so thwarts the purposes of the pre-evidentiary-hearing Case Management Conference required by Rule 3.851 (f)(5), Fla. R. Crim. P. and by *Huff* , supra.

Actually, it was Defendant's *trial* counsel who failed to provide the trial

court with any South Carolina court decisions precluding the warrantless acquisition and use of South Carolina jail recorded phone conversations. TR1, p. 92, TR5, p. 399 to TR 6, p. 408. In fact, as the subject postconviction motion reveals, although Defendant's postconviction-motion counsel could not find any South Carolina case directly on point, Defendant's subject postconviction motion counsel did find and provide citations to various South Carolina and federal-court cases that at least indirectly supported trial counsel's motion to suppress the South Carolina jail phone conversation. R2, p. 242, R1, p. 79-89. Unfortunately, Defendant's trial counsel did not go to the trouble of finding and using such case law. R1, p. 83 to 89.

State v. Mattison, 352 S.C. 577, 575 S.E. 2d 852 (Ct. App. 2003), for example, was cited in the South Carolina public defender's "form" jail phone conversation suppression motion which was incorporated by reference into Defendant's subject postconviction motion. R2, p. 243 and R1, p. 83. Although Mattison dealt with a police search of a car rather than jail phone recordings, the South Carolina Court of Appeals held that the question of whether consent to a search is voluntarily or coerced is a question of fact to be determined by the totality of the circumstances. In that same South Carolina Public Defender's "form" suppression motion are citations to U.S. v. Turner, 169 F.3d 84, 87 (1st

Cir. 1999) (R1, p. 83) and U.S. v. Lanoue, 71 F. 3d 966, at 981-982 (1st Cir. 1995) (R1, p. 84) and Bell v. Wolfish, 441 U.S. 520, 546 (1979) (R1, p. 85) and Katz v. United States 389 US 347 (1967) (R1, p. 85) and In the Matter of An Anonymous Member of the S.C. Bar, 304 S.C. 342, 344 (1991) (R1, p. 86) and State v. Forrester, 343 S.C. 637 (2001) (R1, p. 87). All of these cases could have cited by Defendant's trial counsel in support of the proposition that the subject South Carolina jail phone recording was not done for legitimate jail security purposes and Defendant's requisite "voluntary" consent to the jail phone recording had not been obtained.

Even if it is assumed, for purposes of argument only, that the recorded jail phone conversation *was* somehow legally acquired by the police and prosecution, the trial court erred in not finding Defendant's trial counsel ineffective for failing to seek the redaction and removal of the profane, inflammatory and disrespectful parts of it. With respect to such profane and disrespectful portions of the recorded jail phone conversation, the Defendant argued at page 19 of his subject postconviction motion (R2, p. 244) that "At the very least, Defendant's trial counsel should have moved to redact the profanity, as it could have been done without altering the meaning or impact of Defendant's Statements. As it was, the jail phone recording characterized the Defendant as a profane and disrespectful

son: an aggravating circumstance not specifically allowed by Florida's death-sentencing statute." R4, p. 244).

Courts and counsel involved in death-penalty cases like the present one are held to higher standards than the courts and counsel that are involved in non-death-penalty cases. As noted by this Florida Supreme Court in Gardner v. Florida, 430 U.S. 349, at 357-358 (1977):

> . . . death is a different kind of punishment from any other which may be imposed in this country (citation to Gregg v. Georgia, 428 U.S. 153 at 181-188 (1976)). From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Defendant's jury recommended that Defendant be sentenced to death by a vote of 8 to 4. He came within two votes of being sentenced to life instead of death. Given the very conservative, southern, "bible-belt" venue of this case, it is likely that Defendant's profane and disrespectful statements to his mother tipped the scales of justice against the Defendant and motivated his jury to recommend that he be sentenced to death instead of life. The trial court erred in failing to find Defendant's trial counsel ineffective in connection with the recorded jail

telephone conversation.

Standard of Review:

For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Allegations that trial counsel was ineffective in failing to properly resist evidence obtained as a result of an illegal search or seizure is a proper subject for post-conviction relief proceedings. Wells v. State, 598 So.2d 259 (Fla. 1st DCA 1992). Defendant's trial counsel was remiss and ineffective in failing to move to exclude the recorded jail conversation on Fla. Stat. § 90.403 grounds. The probative value of it was substantially outweighed by its danger of unfair prejudice. Jacksonville, Florida is a famously conservative, southern, "bible belt" part of the United States. Jacksonville jurors cannot abide a son who uses the words "shit," "fuck," "fucking," " mother fucking," "bullshit," when speaking to

his mother. At the very least, Defendant's trial counsel should have moved to redact the profanity, as that could have been done without altering the meaning or impact of Defendant's statements. As it was, the jail phone recording characterized the Defendant as a profane and disrespectful son: an aggravating circumstance not specifically allowed by Florida's death-sentencing statute. There is no "profane and disrespectful son" aggravating circumstance among the specific, limited aggravating circumstances set forth in Fla. Stat. §921.141.

Allowing the state to introduce aggravating circumstances which are not specifically allowed by Florida's death-sentencing statute is error. Bowles v. State, 716 So.2d 769, 773 (Fla. 1998), Perry v. State, 801 So.2d 78 (Fla. 2001), Valle v. State, 581 So.2d 40 (Fla. 1991), Robinson v. State, 520 So.2d 1 (Fla. 1988), Patterson v. State, 513 So.2d 1263 (Fla. 1987), Pope v. State, 441 So.2d 1073 (Fla. 1983), Waldon v. State, 547 So.2d 622 (Fla. 1981). *See also* Furman v. Georgia, 408 U.S. 238 (1972).

The trial court erred in not finding ineffective assistance of counsel in Defendant's trial counsel's failure to prepare an adequate motion to suppress Defendant's inflammatory and disrespectful South Carolina jail phone conversation.

Constitutional violations:

In failing to adequately resist the improperly obtained jail phone-call recordings as described above, Defendant's trial counsel provided ineffective assistance of counsel and thereby deprived the Defendant of a fair jury trial in violation of the 6th and 14th Amendments to the U.S. Constitution and in violation of Article 1, Sections 14 and 16 of the Florida Constitution. Such deficiency also violated the prohibitions against illegal searches and seizures contained the Fourth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 12 of the Florida Constitution. It resulted in Defendant receiving an unduly harsh sentence in violation of the 8th Amendment to the U.S. Constitution.

Issue 3: Withdrawn

Claim 3 of Defendant's subject postconviction motion was withdrawn by the defense prior to the evidentiary hearing (R4, p. 586). It is listed here solely to maintain the same claim-enumeration system used throughout these proceedings and thereby eliminate confusion.

Issue 4: The Trial Court Erred in Not Finding Defendant's Trial Counsel Ineffective for Not Objecting to Argumentative and Speculative Witness Questions

Claim 4 of Defendant's subject postconviction motion alleged ineffective assistance of trial counsel for failing to object to argumentative and speculative

witness questions and answers. R2, p. 247. At the *Huff* hearing, both sides agreed that an evidentiary hearing was required on this Claim and the trial court judge allowed it. R4, p. 586-587.

During jury trial, in the State's direct examination of North Charleston Police Department Detective James Rowan, Detective Rowan testified regarding a wristwatch appearing in a police photograph of the Defendants' hotel-room night stand. Detective Rowan testified that police determined that it had been purchased subsequent to the subject incident, "probably with money that he (Defendant Jackson) had obtained from the (victim's) ATM" (card). TR7, p. 696. There was no objection or request for a curative instruction, or mistrial motion. At the evidentiary hearing, defendant's attorney Mr. Richard Kuritz explained that he did not oppose this statement because the defense strategy for the present Defendant involved admitting to the theft-related crimes but not the murders. R3, p. 512-513. Mr. Richard Kuritz also testified that this comment was so trivial that the irritation that objecting would inflict upon the jurors outweighed any possible benefit of objecting. R2, p. 512-514.

During the prosecution's jury-trial examination of co-conspirator-turned-State's-witness Bruce Nixon, the prosecutor elicited testimony that Defendant Jackson was dominant actor who planned the subject crimes, including the burial

of the victims and who took and maintained sole possession of the victims' bank ATM card. TR 9, p. 1154, 1183; TR 10, p. 1231-33.

On cross-examination, Defendant's trial counsel did a good job of eliciting testimony indicating that Bruce Nixon assumed substantial responsibilities and engaged in significant aspects of the subject crimes. i.e. indicating that Bruce Nixon was *not* a subservient follower of Defendant Jackson. TR 10, p. 1197, 1210-11, 1223, 1226. However, on re-direct examination by the State, the State asked Bruce Nixon the argumentative question, "If you were the mastermind . . . would you have let anyone else have that ATM card? TR10, p. 1232. Defendant's defense counsel did not object or move for a curative instruction or move for a mistrial. At the evidentiary hearing, defense attorney Mr. Richard Kuritz testified that this comment was not hurtful to the defense and, it was spoken with a disrespectful, "smart-aleck" tone that may have damaged the prosecutor's credibility with the jurors. R3, p. 513-514.

When the prosecutor asked Bruce Nixon why Defendant Jackson had him blindfold the victims and what Defendant Jackson meant when he responded, "It is a 'mind thing," Bruce Nixon testified, "I guess he (Defendant Jackson) didn't want – he didn't want them to see him kill them, I guess." TR10, p. 1235. There was no objection nor request for a curative instruction nor mistrial motion by

Defendant's trial counsel.

Defendant argued in his subject postconviction motion that such improper, "speculative" testimony by Bruce Nixon about what Defendant Jackson might have been thinking was extremely damaging to Defendant Jackson's chances of receiving a jury "life" sentence recommendation. R2, p. 248. Defendant also argued in his subject postconviction motion that such statements depicted the Defendant Jackson as an evil person who mentally controlled everyone else. R2. p. 248). At the evidentiary hearing, defense attorney Mr. Richard Kuritz testified essentially that the jurors had probably been thinking the same thing themselves anyway and therefore objecting to the comment would focused the jurors attention on the event and make it seem even more sinister. R 3, p. 515.

During the original jury trial, when the Defendant was on the witness stand testifying on his own behalf, the State asked the Defendant on cross-examination, "The truth as to any of this hurts you, right?" TR 11, p. 1429. There was no objection by the defense. At the evidentiary hearing, defense attorney Mr. Richard Kuritz explained that Defendant came across as a likeable individual and did an "excellent job" testifying in his own defense. (R3, p. 515). Mr. Richard Kuritz felt that objecting would have created the appearance that the Defendant had something to hide. TR3, p. 516.

Further along in the State's cross-examination of the Defendant, after the Defendant testified that he walked up to the grave hole with a flashlight in his hand, the State sarcastically asked if the Defendant had been holding the flashlight "like a stage hand." TR 11, p. 1442. Again, there was no objection or request for a curative instruction, or mistrial motion by defense counsel. At the evidentiary hearing, defense attorney Richard Kuritz explained that he did not oppose this comment because Defendant presented himself well to the jury and had previously admitted to police that he held the flashlight in his hand. Mr Richard Kuritz also testified that the expression "like a stage hand" had a certain facetiousness about it that likely cost the prosecution some credibility with the jury. R3, p. 515-517.

In his subject postconviction motion, the Defendant alleged that the failure to object, and to seek curative instructions and move for mistrial in connection with all of these improper witness questions was ineffective assistance of counsel. R2, p. 247-249.

In its Order denying the subject postconviction motion on this ground, the trial court quoted Defendant's own jury trial testimony in which the Defendant admitted to actively participating in the robbery and theft of the victims' money by using their bank ATM card. R3, p. 346. The trial court recalled the things

Defendant testified to regarding his own role in the crimes, and the instructions and advice that Defendant gave to his codefendants. R3, p. 346-347. The trial court found that trial counsel's decisions regarding the complained-of witness questions amounted to reasonable strategy in this case. R3, p. 347. The trial court found the complained-of witness questions and answers to be "innocuous" and there was no reasonable probability that they affected the outcome of Defendant's case. R3, p. 348.

Standard of Review:

For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

Asking trial witnesses "Argumentative" questions is impermissible. Southeast Zayre, Inc. v. Carswell, 348 So.2d 45 (Fla. 1st DCA 1977). The subject matter of such questions are irrelevant and detract the jury from its function as

fact-finder. Asking trial witnesses to give unfounded testimony about why someone thinks a certain way or does a certain thing elicit the guesswork of a witness and are hence objectionable as "calling for speculation." Calixte v. State, 941 So.2d 570 (Fla. 4th DCA 2006). Claims that trial counsel was ineffective in failing to object prosecutor remarks and witness questions are properly raised in post-conviction motions. Franqui v. State, SC05-830 (Fla. 1-6-2011). Defendant's defense trial counsel was ineffective in failing to object to the State's improper, "argumentative" and "speculative" questions of witnesses. The questions changed the tenor of Defendant' trial and distracted Defendant's jurors from their legal responsibilities as neutral finders of fact. The trial court erred in not finding ineffective assistance of counsel in connection with improper witness questions.

Constitutional violations:

Defendant's trial counsel's failure to oppose the improper witness questions and answers unfairly swayed Defendant's jurors to recommend a sentence of death instead of life. Defendant was denied effective assistance of counsel and Defendant was denied the fair, jury, life-or-death sentencing proceeding guaranteed by the 6th and 14th and 8th Amendments to the U.S. Constitution and by

Article 1, Sections 14 and 16 of the Florida Constitution.

Issue 5: The Trial Court Erred in Not Finding Defendant's Trial Counsel Ineffective for Not Objecting to Improper "Victim-Impact" evidence

Factual details:

Claim 5 of Appellant's subject postconviction motion alleged ineffective assistance of trial counsel for failing to object to improper "victim-impact" evidence. R2, p. 250. In the postconviction-motion proceedings, both sides agreed that this claim was to be adjudicated solely based on existing, record evidence. R4, p. 587. Both sides agreed that no evidentiary hearing was required for this claim. R4, p. 587.

Defendant refers to and incorporates herein by reference in support of this appeal issue all of the facts Defendant has set forth for Issue 1 above regarding ineffective assistance of counsel for failing to engage in victim-outreach activities Defendant does this because such facts comprise the context of the below, complained-of, victim-impact statement by Mr. Revis Sumner, brother of victim James "Reggie" Sumner. After giving relevant and admissible victim-impact testimony about the victims' uniqueness as individuals and resultant loss to the community as described in Issue 1 above, Mr. Revis Sumner went farther than the law allows by giving the following, "grief" testimony:

> "Losing them (victims James and Carol Sumner) has been very difficult for the family and it's been hard for me because Reggie was not only my brother, he was my best friend. I feel this part of me is – this part of me is missing because we were so close. After a time the tears stop flowing, but the pain of losing Reggie and Carol will never go away."
>
> (R13, P. 1639)

There was no objection by Defendant's trial counsel.

The trial court denied this postconviction-motion claim, holding that there was nothing improper about Mr. Sumner's above-quoted testimony. R2, p. 349-351. In such denial order, the trial Court interprets this Florida Supreme Court's recent decision in Abdool v. State, 53 So.3d 208 (Fla. 2010) as allowing "pain" and "anger" types of victim-impact testimony. R2, p. 250.

Standard of review:

For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance

set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

So-called "victim-impact" evidence is allowed provided it remains within the confines of allowable victim-impact evidence authorized in Payne v. Tennessee, 501 U.S. 808 (1991) Under Payne, victim-impact evidence is allowed *provided* it is presented to show the victim's uniqueness as an individual, and *provided* that such victim-impact evidence is no so unduly prejudicial as to render the trial fundamentally unfair and hence violate the Defendant's right to due process of law secured by the 14th Amendment to the U.S. Constitution. Payne v. Tennessee, 501 U.S. 808 (1991). There is nothing in Payne which allows "grief" or "mourning" testimony like Mr. Revis Sumner's above-quoted grief and mourning testimony.

In Payne v. Tennessee, 501 U.S. 808 (1991) the United States Supreme Court adopted Justice White's Booth v. Maryland, 482 U.S. 496 (1987) dissent as its new (current) rule allowing victim-impact testimony. In doing this, the United States Supreme Court made it clear that victim-impact evidence is limited to the *loss* to society, and particularly to the victim's family, as follows:

> We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and

> blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique *loss* to society and in particular to his family."
>
> (Payne, supra, p. 825; Emphasis Appellant's)

The trial court erred in not finding ineffective assistance of trial counsel in connection with the impermissible "grief" and "mourning" testimony given by victim-impact witness Revis Sumner.

Rule 4-3.3 of the Florida Rules of Professional Conduct entitled Candor Toward the Tribunal requires that attorneys disclose directly adverse, controlling legal authority. Accordingly the undersigned attorney is obligated to disclose to that this Florida Supreme Court recently rejected this same argument made by the undersigned attorney in McGirth v. State, 48 So.3d 777 (Fla. 2010). However, this Florida Supreme Court is now besieged with "improper victim impact evidence" cases. The perception is that *anything* is now allowable as victim impact evidence. This is wrong and needs to be corrected. Accordingly the undersigned attorney, on behalf of the present Appellant, respectfully requests that this Florida Supreme Court revisit the issue and hold that, although "victim-

impact" witnesses are allowed to testify regarding the qualities or attributes or benefits of the victim that have been lost, victim-impact witnesses are not allowed to testify about the emotional impact of such loss.

The trial court erred in not holding that the Defendant suffered from ineffective assistance of counsel in connection with improper victim-impact evidence.

Constitutional violations:

Defendant's trial counsel's failure to oppose the improper victim-impact evidence deprived the Defendant of the effective assistance of counsel and fair jury trial (fair penalty phase) guaranteed by the 6th and 14th Amendments to the U.S. Constitution and Article 1, Sections 14 and 16 of the Florida Constitution.

Issue 6: The Trial Court Erred in Not Finding Defendant's Trial Counsel Ineffective as a Result of the Cumulative Errors of Trial Counsel

Claim 6 of Defendant's subject postconviction motion alleged ineffective assistance of trial counsel as a result of the combined, "cumulative errors" of trial counsel. R2, p. 29. Both sides agreed at the *Huff* hearing that this was essentially legal argument which required no evidentiary hearing. R4, p. 587.

The Defendant alleged in his subject postconviction motion that " . . . the cumulative effect of *all* of the deficiencies complained of . . . denied Defendant a

fair sentencing phase and thus rendered the results of Defendant's trial unreliable. Hence, all of the complained-of deficiencies of defense counsel collectively constitute ineffective assistance of counsel." R2, p. 254.

The trial court denied this claim, holding that, insofar as no individual errors occurred, the "cumulative errors" claim was without merit. R2, p. 351.

Standard of Review:

For "ineffective assistance of counsel" claims like this one, the appellate courts engage in a *de novo* review because the claim is a mixed question of law and fact. Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999). The appellate Courts give deference to trial court factual findings that are based on competent, substantial evidence while applying the *de novo* standard of review to both the "deficient performance" and "prejudice" prongs of test of ineffective assistance set forth in Strickland v. Washington, 466 U.S. 668 (1984). Julien v. State, 917 So.2d 213 (Fla. 4th DCA 2005).

In addition, where, as here, a Defendant argues that his trial has been rendered unfair by the cumulative prejudice of multiple errors of trial counsel, this reviewing court considers the cumulative adverse effect of all of the errors combined. Parker v. State, 89 So.3d 844 (Fla. 2011), Hurst v. State, 18 So.3d 975, 1013, (Fla. 2009), State v. Gunsby, 670 So.2d 920 (Fla. 1996).

In the present case, the Defendant missed receiving a life sentence by just two juror votes. Accordingly, even a small mistake could have meant the difference between life and death.

The correct test of ineffective assistance of counsel is whether the Defendant has shown ". . . a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694 (1984). In the present case, there is no way to be confident that the prosecution would have received the additional two juror votes needed to sentence the Defendant to death without the complained-of errors of trial counsel. The trial court erred in not holding that the cumulative errors of Defendant's trial counsel constituted ineffective assistance of counsel.

Constitutional violations:

The errors and improprieties in all of the above claims, considered together, deprived the Defendant with ineffective assistance of counsel in violation of Defendants right to effective assistance of counsel secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 16 of the

Florida Constitution. They also violated Defendant's due process rights secured by the Fifth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Section 9 of the Florida Constitution. They also violated Defendant's right to a fair jury trial secured by the Sixth and Fourteenth Amendments to the U.S. Constitution and by Article 1, Section 16 of the Florida Constitution.

Issue 7: The Trial Court Erred in Not Holding that Florida's Death-Sentencing Scheme Violates *Ring v. Arizona*, 536 U.S. 584 (2002)

Defendant's jurors deliberated as usual after the presentation of guilt-phase evidence in Defendant's trial. The jurors unanimously found the Defendant guilty of the kidnaping of victim Carol Sumner (TR1, p. 150), robbing victim Carol Sumner (TR1, p. 148) and committing the premeditated and "felony" murder of victim Carol Sumner (TR1, p. 146). They similarly found the Defendant guilty of kidnaping of victim James Sumner (TR1, p. 151), robbing victim James Sumner (TR1, p. 149) and committing the premeditated and "felony" murder of victim James Sumner (TR1, p. 147).

At the conclusion of the sentencing phase, the jurors recommended that Defendant be sentenced to death for the murders of both victims by a vote of 8 to 4. R1, p. 169-170. The trial court followed the jury recommendation and

sentenced the Defendant to death on August 29, 2007. R1, p. 228-237.

Claim 7 of Defendant's subject postconviction motion alleged that Ring v. Arizona, 536 U.S. 584 (2002), as recently expanded upon in U.S. District Court Judge Jose E. Martinez's decision in Evans v. McNeil, Case No. 08-14402-CIF-MARTINEZ, S.D. Fla June 20, 2011, renders Florida's death-sentencing law –and hence the present Defendant's death sentence– unconstitutional. R2, p. 256- 257 and R2, p. 260-357. Both sides agreed at the *Huff* hearing that this was purely a "legal" issue for which no evidentiary hearing was required. R4, p. 595.

The trial court denied this postconviction-motion claim for several reasons. R2. P. 352-354. First, the trial court held that the federal District Court decision in Evans is not binding precedent to Florida state courts. R2, p. 352. The trial court also held that the trial court could not adjudicate this postconviction-motion claim because it had already been raised and decided adversely to the Defendant in Defendant's original direct appeal, Jackson v. State, 18 So.3d 1016, 1025 (Fla. 2009). R2, p. 353. The trial court also held that Ring is inapplicable because this Florida Supreme Court has previously ruled that Ring does not apply to capital cases in which the Defendant has been convicted of a prior violent felony or to capital cases in which the jury has unanimously found the Defendant guilty of the

non-capital felonies underlying the subject felony first-degree murder conviction. R2, p. 353-354. The trial court added that, under Florida law, Defendant's "contemporaneous conviction" for the murder of more than one of the subject two victims counts as a "prior violent felony" rendering Ring inapplicable to Defendant's case. R2, p. 354.

Standard of review:

The constitutionality of a statute is a question of law subject to de novo review." Crist v. Ervin, 56 So. 3d 745, 747 (Fla. 2011).

In State v. Steele, 921 So.2d 538, 550 (Fla. 2005) this Florida Supreme Court stated, "The bottom line is that Florida is now the only state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote both whether aggravators exist and whether to recommend the death penalty. Assuming that our system continues to withstand constitutional scrutiny, we ask the Legislature to revisit it to decide whether it wants Florida to remain the outlier state."

In Woodson v. North Carolina, 428 U.S. 280, 288 (1976) The United States Supreme Court pointed to the significance of death-case juries as arbiters of evolving societal norms as what is cruel and unusual punishment in violation of

the 8th Amendment to the U.S. Constitution as follows:

> Central to the application of the Amendment is a determination of contemporary standards regarding the infliction of punishment. As discussed in Gregg v. Georgia, ante, at 176-182, indicia of societal values identified in prior opinions include history and traditional usage,[fn11] legislative enactments,[fn12] and jury determinations.[fn13]

Footnote 13 states:

> See Witherspoon v. Illinois, 391 U.S. 510, 519, and n. 15 (1968); McGautha v. California, 402 U.S. 183, 201-202 (1971); Furman v. Georgia, supra, at 388 (BURGER, C. J., dissenting); id., at 439-441 (POWELL, J., dissenting) ("Any attempt to discern, therefore, where prevailing standards of decency lie must take careful account of the jury's response to the question of capital punishment").

(Woodson, supra, at p. 305)

In Graham v. Florida, 08-7412 (U.S. 5-17-2010) 130 S.Ct. 2011, the United States Supreme Court held unconstitutional Florida Statutes Section 810.02(1)(b), (2)(a) (2003) as applied to sentence a juvenile offender to life without the possibility of parole. The United States Supreme Court explained that, although the "cruel and unusual" standard of the Eighth Amendment to the U.S. Constitution remains the same, " . . . its applicability must change as the basic mores of society change." *Id.* p. 7. With regard to the indicia of changes in the

basic mores of society, the Graham court said, "The analysis begins with objective indicia of national consensus. [T]he `clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Id.* p. 11-12.

Regardless of whether or not U.S. District Judge Jose E. Martinez's Evans v. McNeil decision, *supra*, gets upheld or overturned on appeal, Judge Martinez's findings are indisputable. Namely, his findings that, under Florida's death-sentencing law, "the reviewing courts never know what aggravating or mitigating factors the jury found" and "There need not be anything more than a simple majority vote to recommend the death sentence to the judge" and "Without a special verdict form, it is possible that the trial judge found the existence of one aggravating factor while the jury found the existence of another, resulting in a sentence of death for the defendant based on an invalid aggravator, i.e., an aggravator not found by the jury. . . cannot be reconciled with Ring." In this regard, Judge Martinez's *reasoning* in Evans v. McNeil illuminates the connection between this Florida Supreme Court's Steele decision and Ring. The basic mores of society have changed to the point that non-unanimous jury findings of aggravating circumstances and non-unanimous jury death recommendations no

longer pass constitutional muster. Appellant respectfully requests that this Florida Supreme Court acknowledge this now and hold that the trial court erred in not deeming Florida's death-sentencing law unconstitutional on this basis.

Constitutional violations:

In its failure to require a record of the jury votes as to each aggravating circumstance and in its lack of a unanimity requirement for the jury's death-sentence vote, Florida's death-sentencing scheme, Fla. Stat. Section 921.141, violates the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution. It also violates Article 1, Sections 16, 17 and 22 of the Florida Constitution.

CONCLUSION

The Defendant received ineffective assistance of trial counsel and was sentenced to death pursuant to Florida's death-sentencing law which violates Ring v. Arizona, 536 U.S. 584 (2002). The trial court erred in denying Defendant's subject motion for postconviction relief. This Florida Supreme should reverse such denial and vacate Defendant's Judgment and Sentence of death and remand this case back to the lower Court with instructions to conduct a new penalty phase of Defendant's trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief has been served by E-mail to the following E-mail address:

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I HEREBY CERTIFY that this brief is in Times New Roman 14-point font and thus complies with the font requirement of Rule 9.210, Fla. R. App. P.

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