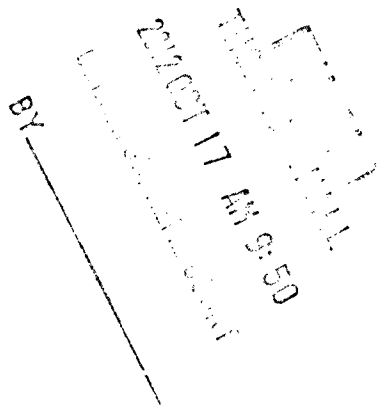
IN THE SUPREME COURT OF FLORIDA
CASE NO. SC12-407



WILLIAM JAMES DEPARVINE,
Appellant,

vs.

THE STATE OF FLORIDA,
Appellee
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

INITIAL BRIEF OF THE APPELLANT

David R. Gemmer
Assistant CCRC-Middle
Florida Bar Number 370541
Office of The Capital
Collateral Regional Counsel
3801 Corporex Park Drive
Suite 210
Tampa, Fl 33609-1004
(813) 740-3544

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

OTHER AUTHORITY

STATEMENT OF THE CASE AND FACTS[1]

William Deparvine (appellant) was charged by indictment for the Hillsborough County murders of Richard and Karla Van Dusen, as well as armed kidnapping (two counts), and armed carjacking (one count) ROA 1/71-74. The two murder counts allege only that appellant "did unlawfully and feloniously kill a human being" by shooting him with a firearm (as to Richard Van Dusen) and by shooting her with a firearm and/or stabbing her with a sharp object (as to Karla Van Dusen); the indictment contains no allegation by the grand jury either that the killings were premeditated or that they occurred during the commission of an enumerated felony ROA 1/71.

Appellant was found guilty of two counts of first degree murder and one count of carjacking ROA 13/2299-2302; ROA 40/3737. Following the penalty phase, the jury returned two 8-4 death recommendations. ROA 14/2412-13; ROA 41/3930-31. Finding four aggravating factors and giving little weight to mitigating factors, the judge imposed sentences of death ROA 15/2558- 62.

This Court affirmed the conviction and sentence. *Deparvine v. State*, 955 So.2d 351 (Fla. 2008). Justice Lewis, Quince, J., concurring, dissented to the

---

[1] References to the postconviction record on appeal are designated "PCR vol/page. References to the 2006 record on appeal are designated "ROA vol/page."

majority's reasoning which sustained the admission of some of the hearsay statements Karla Van Dusen's mother testified to at trial.

Mr. Deparvine filed his motion for postconviction relief in the circuit court. An evidentiary hearing was held and the circuit court denied all relief.

The bodies of Richard and Karla Van Dusen were found on the morning of November 26, 2003 on a dirt road near a residence in northern Hillsborough County ROA 28/1809-10. Each had been shot in the head; Karla was also stabbed twice in the chest ROA 29/1957-58,1970-83,1981-83. Their Jeep Cherokee was found in the parking lot at a business (Artistic Doors) 1.3 miles away. ROA 28/1812-13.

The prosecution's theory of the case was that appellant killed the Van Dusens for their 1971 Chevrolet Cheyenne pickup truck. ROA 14/2527; 15/2560. According to the State, appellant had coveted such a truck for some time. ROA 40/3661, 3663; ROA 14/2525; ROA 32/2328-68; ROA 38/3280-96;ROA 39/3405-19. Mr. Deparvine struck a deal to buy the Van Dusen truck. Rick Van Dusen signed and had notarized a bill of sale stating a purchase price of $6500 paid in full by Mr. Deparvine. ROA 32/2396,2401-03.

The prosecution contended that appellant never had the money or intention to pay for the truck, and contended that the Rolex watch he said he had sold to fund the purchase never existed.. The State claimed Mr. Deparvine lured the Van

Dusens to an isolated location on the pretext of getting the paperwork done, where he caught them off guard and shot them in the front seat of their Jeep Cherokee. ROA 14/2525-26.

The state's hypothesis was that Mr. Deparvine drove the Jeep to the parking area at Artistic Doors, took the keys and dropped on the pavement a Florida identification card belonging to Henry Sullivan (a black male who was a former neighbor of appellant) as a red herring. ROA 14/2526. Although none of the tire tracks at either the dirt road where the bodies were found or the parking area where the jeep was abandoned could have been made by the Chevy truck ROA 34/2705-17, the state's hypothesis was that appellant, having use the Jeep to get back to the truck, then drove the truck back to his apartment.

Mr. Deparvine's testimony in his defense was that the Van Dusens brought the truck early in the evening to his apartment building in central St. Petersburg, where he paid for it in cash (using funds obtained by selling a Rolex watch which he'd been given in prison from a terminally ill inmate he'd befriended, ROA 38/3299-3300. Mr. Deparvine testified that he never left the vicinity of his apartment building that night, and he did not kill the Van Dusens. ROA 38/3344, 3380 .

DNA matching appellant's profile was found on the Jeep's steering wheel ROA 28/1820-21; ROA 31/2280-90; ROA 35/2841-44,2875-76,2887-91; ROA

36/2907-08,2928-30. The prosecutor contended that it got there at the time of the murders, while Mr. Deparvine testified that he had opened a scab while priming the carburator after the truck had run out of gas during a test drive two days earlier, and that he must have gotten drops of blood on the wheel while driving the Jeep back to the Van Dusens' house ROA 38/3312-20.

Peter Wilson, a co-worker who had traveled with Rick Van Dusen in the Jeep on the afternoon before the murders did not observe any stains on the steering wheel. ROA 32/2377-84; ROA 31/2290; ROA 35/2876. The state's two DNA experts acknowledged that there was no scientific way to determine how long any of the samples containing DNA had been on the steering wheel. ROA 36/2907-08, 2947.

SUMMARY OF THE ARGUMENT

ISSUE 1 FAILURE TO CALL DARYL GIBSON AS AN ALIBI WITNESS

Mr. Gibson saw Mr. Deparvine meet the Van Dusens and leave with them. However, he told investigators as trial approached that he had seen Mr. Deparvine outside the apartment building around dusk the same day, providing and alibi. Gibson resisted testifying at trial, but trial counsel made no attempt to compel him to testify. Gibson testified to the dusk alibi at the evidentiary hearing.

ISSUE 2 FINGERPRINTS ON THE SULLIVAN ID

Trial counsel did not seek to have additional fingerprint matching done, when evidence photos showed a thumb squarely planted on the ID card before processing for prints. Counsel claimed it was better to have a mystery print to suggest the real culprit left the print. A print comparison done before the evidentiary hearing matched the remaining usable print to a deputy at the scene. Her report failed to disclose she touched the ID surface, and a supervisor's report falsely indicated she had handled it only by the edges. The deputy's print obscured other prints, indicating evidence was damaged by investigators. Trial counsel's decision to forego additional testing was unreasonable. The false reports of the deputies and testimony at trial violated *Brady* and *Giglio*.

ISSUE 3 FAILURE TO CALL WENDY DACOSTA AS A WITNESS.

Ms. Dacosta lived across the street from the parking area where the victim's Jeep was found. Law enforcement failed to discover that she had seen a red truck like the victims' truck leaving an area adjacent to the Jeep. A defense investigator later discovered Dacosta had seen a truck, but showed her only a side view of the victims' truck, which Dacosta indicated was like the truck she had seen. Trial counsel failed to follow up, even when Mr. Deparvine pointed out that only a side view of the truck had been shown, and Dacosta had seen the truck as she followed it down the road.

Mr. Deparvine always maintained a man in a second red truck picked up Mr. Van Dusen after the sale of the Van Dusen truck at Mr. Deparvine's apartment. At the evidentiary hearing, Dacosta immediately determined that the tailgate view of the victims' truck established that she had seen another truck like the victims', not the victims' truck. Failure to follow up with Dacosta resulted in failure to present exonerating evidence.

ISSUE 4 FAILURE TO EFFECTIVELY ARGUE FOR JUDGMENT OF ACQUITTAL ON THE "ARMED CARJACKING" CHARGE

Trial counsel failed to draw the court's attention in the JOA argument to the fact that the State was flip-flopping on which vehicle had been carjacked. Counsel had refused to file a motion for a bill of particulars pretrial to resolve the fact the indictment did not identify the object of the carjacking, based on outdated case law counsel acknowledged had long been superseded by more contemporary decisions (fearing the State would "cure" purportedly faulty homicide indictments if its attention were drawn to the indictment).

ISSUE 5 DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO IMPEACH PAUL LANIER.

Paul Lanier purported to establish that he saw Mr. Deparvine riding as a passenger in the Van Dusen truck, refuting the defendant's claim that he left blood on the Jeep steering wheel during a test drive episode two days before the murders. Lanier's stories never repeated, but trial counsel failed to fully exploit the

discrepancies. Lanier's companion refuted his testimony, but was not called.. A registrar's certificate from USF established that Lanier lied at trial that he attended and graduated from there, but the jury never heard argument on this, or had its attention drawn to the document, which was admitted without comment.

ISSUE 6 FAILURE TO DEAL WITH PROOF OF VALUE OF THE TRUCK BASED ON AUCTION DOCUMENTS

The State introduced evidence the truck was worth more the double the $6500 Mr. Deparvine said he bought the truck for. This included auction documents showing Mr. Van Dusen set a $17,000 reserve on the truck. The State argued that Mr. Van Dusen had turned down a $15,000 offer, which was a misrepresentation of the circumstances, yet trial counsel failed to object or argue the point to the jury. Also, trial counsel failed to challenge the admissibility of the documents when one of the documents showed a $1,700 reserve, indicating a laxity in precision.

ISSUE 7 NEWLY DISCOVERED EVIDENCE CONCERNING THE MARKET VALUE OF THE 1971 CHEVROLET PICKUP TRUCK REQUIRES A NEW TRIAL.

The Sheriff's Office released the truck to the Van Dusen estate after trial but before sentencing. They did so without notice or hearing, violating law giving the criminal court exclusive jurisdiction over the disposition of such evidence. The family quickly sold the truck for $6,000 cash, after rejecting a $9,000 time payment offer. This paralleled Mr. Van Dusen's behavior, when he rejected a time

payment offer from Lanier and accepted Mr. Deparvine's $6,500 offer. The two sale prices are consistent with the valuation the defense expert gave at trial, and directly refutes the State's expert who claimed the truck was worth more than $15,000. A jury informed that Mr. Deparvine paid a fair price fore the truck would have been more amenable to accepting the rest of the defense theory of the case.

ISSUE 8 DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO CHALLENGE BILLIE FERRIS ON THE ACCURACY OF HER RECOLLECTION OF KARLA VAN DUSEN'S STATEMENTS.

AND

ISSUE 9 DEFENSE COUNSEL WAS INEFFECTIVE IN DEALING WITH THE ERRONEOUS ADMISSION OF HEARSAY TESTIMONY BY BILLIE FERRIS, FAILING TO PRESERVE HARMFUL ERROR OR EMPHASIZE THE EXCULPATORY ELEMENTS OF THE TESTIMONY WHICH WAS ALLOWED.

Ms. Ferris told Detective Hoover shortly after the murders that her daughter told her she was following her husband and a man in a truck, and that her husband had sold the truck for cash. At trial, Ms. Ferris was led by the State to testify that the buyer was paying cash, supporting the State's theory that Mr. Deparvine had not completed the purchase.

Trial counsel failed to impeach Ms. Ferris with her prior statement to Hoover indicating the sale was completed. Counsel also failed to ask Ms. Ferris about a stroke that occurred after she first spoke to Hoover, but before trial, to allow the jury to evaluate whether her memory, which was imperfect at trial, may have been so clouded as to render her recollections suspect.

ISSUE 10 DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO FULLY DEVELOP EVIDENCE AND CROSS-EXAMINE STATE WITNESS PETER WILSON

Mr. Wilson testified he saw no blood on the steering wheel. However, the crime scene technician who gathered the blood evidence said some of the blood was not visible except on close inspection with a flashlight. Mr. Deparvine's statement of leaving trace blood from a finger injury was consistent with the technician's observations.

ISSUE 11 DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO CALL PAUL DOMBROWSKI AS A DEFENSE WITNESS CONCERNING DEFENDANT'S ROLEX WATCH.

Mr. Dombrowski was an inmate in the same prison as Mr. Deparvine in the years before the murders. Both were inmate law clerks, and they often took payment in jewelry such as watches. A Rolex watch could have easily been obtained and kept by Mr. Deparvine at the prison. Another fellow inmate, Mr. Klein, testified that the prison housed drug dealers who had plenty of gold jewelry. Their testimony would have corroborated Mr. Deparvine's testimony that he received a gold watch in prison and sold it to raise the $6,500 to buy the truck.

ISSUE 12 DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO REQUEST A LIMITING JURY INSTRUCTION ADDRESSING THE VOLUNTARINESS OF THE VAN DUSENS' ASSOCIATION WITH DEFENDANT.

The JOA on the kidnaping charges opened the door to defense argument regarding the lengthy delay from when the Van Dusens' arrived in North Pinellas/West Hillsborough County, and when they were killed.

ISSUE 13 DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO CHALLENGE HENRY SULLIVAN'S CLAIM THAT HE LOST HIS FLORIDA ID CARD IN JUNE 2003.

As stated in the issue.

ISSUE 14 DETECTIVES FAILED TO CONDUCT A PROPER INVESTIGATION

Multiple problems with the investigation were not presented to the jury.

ISSUE 15 THE LETHAL INJECTION OF MR. DEPARVINE UNDER THE STATE'S PROCEDURES VIOLATES HIS RIGHTS.

As stated in the issue.

ISSUE 16 FDOC'S LETHAL INJECTION PROCEDURES, COUPLED WITH FLORIDA STATUTE 945.10 WHICH PROHIBITS MR. DEPARVINE FROM KNOWING THE IDENTITY OF SPECIFIED MEMBERS OF THE EXECUTION TEAM VIOLATES HIS CONSTITUTIONAL RIGHTS.

As stated in the issue.

ISSUE 17 THE RULES PROHIBITING INTERVIEWING JURORS VIOLATES CONSTITUTIONAL PRINCIPLES.

The severe limitations to juror interviews prevented counsel from ensuring no juror improprieties affected the verdicts.

ISSUE 18 FLORIDA STATUTE 921.141 IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE 8TH AND 14TH AMENDMENTS.

As stated in the issue.

ISSUE 19 THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE 6TH, 8TH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

As stated in the issue.

ISSUE 20 FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED FOR FAILING TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY AND FOR VIOLATING THE GUARANTEE AGAINST CRUEL AND UNUSUAL PUNISHMENT.

As stated in the issue.

ISSUE 21 CUMULATIVE ERROR COMPELS RELIEF.

As stated in the issue.

ARGUMENT

STANDARD OF REVIEW

Evaluating IAC claims on appeal:

> When evaluating ineffective assistance of counsel claims on appeal, this Court will evaluate whether the alleged errors undermine our confidence in the outcome of the proceeding. *See Rose v. State*, 675 So.2d 567, 574 (Fla. 1996). Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the *Strickland* test. *See Stephens v. State*, 748 So.2d 1028, 1033 (Fla. 1999). This requires an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings. See *Id.*"

Gaskins v. State, 822 So.2d 1243, 1247 (Fla. 2002).

Denials of 3.850 claims after evidentiary hearings:

> Generally, our standard of review following a denial of a 3.850 claim after holding an evidentiary hearing affords deference to the trial court's factual findings. 'As long as the trial court's findings are supported by competent substantial evidence, this Court will not 'substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as the weight to be given to the evidence by the trial court." *McLin v. State*, 827 So.2d 948, 954 n. 4 (Fla. 2002) (*quoting Blanco v. State*, 702 So.2d 1250, 1252 (Fla. 1997).

Nixon v. State, 857 So.2d 172, 175 n. 7 (Fla. 2003).

INTRODUCTION

The claims raised herein seek protection pursuant to the appropriate provisions of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and the equivalent provisions of the Florida Constitution. The constitutional protections asserted are intended to be adopted and incorporated as to each claim, and no protection of the Federal and State Constitutions is waived.

Many of the claims allege ineffective assistance of counsel, and, each and every time such a claim is raised, the Defendant is claiming relief pursuant to the State and Federal Constitutional protections outlined below.

INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Deparvine was deprived of his right to effective assistance of counsel throughout his trial proceedings. Mr. Deparvine had the right to the effective assistance of counsel at every stage of the proceedings.

Ineffective assistance of counsel is comprised of two components: deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Both prongs have been established in the IAC claims in this case.

In deciding claims of ineffectiveness professional standards that apply in a capital case the United States Supreme Court, as this Court should, has been informed by the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases for guidance in deciding whether defense counsel's acts and omissions violated *Strickland. See Wiggins v. Smith*, 539 U.S. 510, 522 (2003).

Counsel had the duty to investigate and file motions to protect Mr. Deparvine's rights and to ensure that he received a fair trial. The ABA Guidelines recognize counsel's obligations for effective representation, e.g. Guideline 10.8—the Duty to Assert Legal Claims, and Guideline 10.5(C)(1)-(4), requiring meaningful and competent dialogue with the defendant.

At all stages of trial, counsel failed to effectively assert the legal claims available to Mr. Deparvine. As a result, Mr. Deparvine's rights were violated.

This was deficient and prejudiced Mr. Deparvine. This argument is intended to be incorporated at each instance of a claim of ineffective assistance.

Many of the claims herein include allegations of failure to properly investigate, cross-examine and argue certain matters.

> Cross-examination is at once an important incentive for, and the adversary system's great engine for testing for, truthful testimony. Eschewing the rack and screw, we count on cross-examination ... to ferret out the truth from any and all witnesses, and to gain a fuller understanding of the import of their testimony. . . .
> "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

Bordelon v. State, 908 So.2d 543, 545-46 (Fla. 1st DCA 2005).

Trial counsel has a duty to conduct reasonable investigation and formulate the defense strategy accordingly. *Wiggins v. Smith*, 539 U.S. 510, 921 (2003). The omissions of counsel in this case led to constitutionally insufficient cross-examination and argument to the jury of the numerous weaknesses of the State's case, and of the facts which would have raised a reasonable probability that, absent the errors in this claim and cumulatively, the fact finder would have had a reasonable doubt respecting guilt and penalty.

Mr. Deparvine was denied due process and the other protections of the applicable elements of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and the equivalent Florida protections. Defense counsel's failure was unreasonable under prevailing professional norms. Had

counsel acted competently, there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt, in light of the totality of the evidence. *Strickland.*

The circuit court's finding that defense counsel Skye was credible to support denial of the claims of ineffective counsel is refuted by the conflicting and self-serving post hoc rationalizations apparent on the record. The record refutes his testimony. The court's conclusions to the contrary and denial of relief are an unreasonable application of *Strickland* and the settled law as found by the United State Supreme Court, and are based on unreasonable findings of fact.

ISSUE 1

DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO CALL DARYL GIBSON TO TESTIFY AS AN ALIBI WITNESS.

A resident of Mr. Deparvine's apartment building said he had seen Mr. Deparvine the evening of the murders, around dusk, standing in front of the apartment building in St. Petersburg. Darryl Gibson had seen Mr. Deparvine go out to meet the Van Dusens' and saw them drive off, but had a limited view and did not see what direction they went. Mr. Deparvine always said he met the Van Dusens and drove off with them, but they drove around the block to the rear of the apartment building where the purchase was completed.

Trial counsel said he did not want to call Gibson because Gibson would be impeached by prior inconsistent statements to the state – the first when police first went to the apartment building, when Mr. Gibson said he knew nothing, the second when he described seeing Mr. Deparvine meet and leave with the Van Dusens. The third time, Mr. Gibson advised a state attorney investigator of the additional fact that he had seen Mr. Deparvine at the apartment building around dusk, which was a complete alibi for the crimes given that the state's evidence showed the Van Dusens were miles north of St. Petersburg by then.

The fact that Mr. Gibson initially denied knowing anything would be easily explained as simply not knowing that what he had seen was relevant, or a ploy to avoid getting involved. The second occasion, Mr. Gibson told police what he saw while the Van Dusens' were at the apartment building, but there is no evidence that Mr. Gibson denied seeing Mr. Deparvine after they left, or that he was asked about events after the departure. There is no evidence Mr. Gibson knew that seeing Mr. Deparvine at dusk was exonerating – Mr. Deparvine continued to live at the apartment, and Mr. Gibson would have seen him on a regular basis.

A negative inference amounting to an admissible prior inconsistent statement cannot be sustained when there are other reasonable explanations. More than silence is required:

> Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted.

Jenkins v. Anderson, 447 U.S. 231, 238-39 (1980).

> This Court recognizes the principle:
>
> To be inconsistent, a prior statement must either directly contradict or materially differ from the expected testimony at trial. That includes allowing eyewitnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted. *Jenkins v. Anderson* ... ."

State v. Smith, 573 So. 2d 306, 313 (Fla. 1990).

The court of appeals for the District of Columbia discussed the nature of "circumstances in which that fact naturally would have been asserted." Citing *Jenkins,* the court wrote:

> Silence in those circumstances is akin to a prior inconsistent statement. Applying that principle, this and other courts have held it proper for the trial court to allow cross-examination of a defense witness about his or her prior failure to bring an alibi or other exculpatory information to the attention of law enforcement. *Cain v. United States*, 532 A.2d 1001, 1006 (D.C.1987) ("[S]uch questioning amounts to no more and no less than testing the credibility of the witness."); *accord, Morris v. United States*, 622 A.2d 1116, 1125 (D.C.1993). See generally Milton Roberts, Annotation, Impeachment of Defense Witness in Criminal Case by Showing Witness' Prior Silence or Failure or Refusal to Testify, 20 A.L.R.4th 245, § 9 (1983).
>
> However, such cross-examination "is permissible only where the circumstances are such that the witness' normal and natural course of conduct would have been to go to the authorities and furnish the exculpatory information." *Alexander v. United States*, 718 A.2d 137, 143 (D.C.1998).FN3 Typically, this threshold is viewed as depending primarily on the existence of a close relationship between the witness and the defendant. *Davis*, supra footnote 3, 686 A.2d at 1089-90; see,

e.g., *Cain*, 532 A.2d at 1006 (questioning held "especially" probative of credibility where witness and defendant were father and son and lived together).

> 3 As with impeachment generally, the prosecutor is required to lay a proper foundation. For impeachment by silence of the kind we are now discussing, this may be accomplished, under the majority view, "by first demonstrating that the witness was aware of the nature of the charges pending against the defendant, had reason to recognize that he possessed exculpatory information, had a reasonable motive for acting to exonerate the defendant and, finally, was familiar with the means to make such information available to law enforcement authorities." *People v. Dawson*, 50 N.Y.2d 311, 428 N.Y.S.2d 914, 406 N.E.2d 771, 777 n. 4 (1980); *cf. Davis v. State*, 344 Md. 331, 686 A.2d 1083, 1090 (1996) (holding that to inquire into the alibi witness's pretrial silence, the prosecutor need only establish "that the relationship between the witness and the defendant is such that the witness would have a natural tendency to disclose the exculpatory evidence he or she possessed to the proper authorities," leaving other factors for the defense to elicit if it so desires).

Matthews v. U.S., 892 A.2d 1100, 1103-04 (D.C. 2006).

To impeach Mr. Gibson with his prior silence, the State would have had to prove:

- "that the witness was aware of the nature of the charges pending against the defendant" – Thanksgiving Day there were no charges pending against Mr. Deparvine, and no evidence the police informed Mr. Gibson what they suspected of Mr. Deparvine;
- "had reason to recognize that he possessed exculpatory information" – there is no evidence Mr. Gibson knew that seeing Mr. Deparvine Tuesday evening at dusk was any more exonerating than seeing Mr. Deparvine around the apartment building any other time;
- "had a reasonable motive for acting to exonerate the defendant" – Mr. Gibson did not have a "close relationship" with Mr. Deparvine. They lived in the same apartment building;

- "was familiar with the means to make such information available to law enforcement authorities." – Mr. Gibson undeniably knew how to make such information available.

There is no evidence Mr. Gibson knew the dusk sighting was exonerating, even when he told the state attorney investigator about it. Thus, his refusal to speak to Skye was not necessarily a knowing withholding of exonerating information, but simply a desire not to get involved.

In this case, Darryl Gibson provided Mr. Deparvine an alibi the first time he was ever pressed under court compulsion to testify to the fact. Once the alibi was established, all of the other observations Mr. Gibson reported corroborated Mr. Deparvine.

Trial counsel never tried to test Mr. Gibson's assertion that he would not testify at the trial. The first time that resolve was put to the test, at the evidentiary hearing, Mr. Gibson was forthcoming with his testimony.

In the evidentiary hearing, Mr. Gibson initially refused to take the oath. PCR 32/319. Defense counsel explained Mr. Gibson's concerns about being transported with the two other prison witnesses in the case. In Mr. Gibson's presence, the court ordered that Mr. Gibson be transported separately and back to prison. PCR 32/319-21. Mr. Gibson did not want to become known as a jailhouse snitch. Defense counsel explained to him that he was only going to testify about Mr. Deparvine, and was not being asked to implicate anybody in any offense that

would cause them to have any animus towards Mr. Gibson. The court succeeded in administering the oath. PCR 32/322-24.Mr. Gibson then testified.

> Q I believe you also told the state, Mr. Pruner I think actually, that at a later time that you also saw Mr. Deparvine back at the apartment complex a little bit later.
>
> A Later on that day, yeah.
>
> Q And was it around -- what time of day was it when you saw him?
>
> A It was still light, you know, during the time, you know, the sun going down, but it was still light.
>
> Q Was it was it along the line of five minutes, a half an hour, an hour?
>
> A No. It was a little while.
>
> Q A little while like a half an hour or more?
>
> A A little longer than that maybe.
>
> Q And Mr. Deparvine -- you saw him standing on the sidewalk in front of the apartment?
>
> A No. I seen him as he was coming from – from the front of the building if I'm sitting upstairs, you know, facing and this is the front of the building, he was coming from like the bay walk area as if he was coming from around the building from the back side. It got two gates, so he could have came in from the back gate instead of walking around the building, but he looked as if he was coming from around the side of the building.
>
> . . . .
>
> Q And that the last time you saw Mr. Deparvine that day?
>
> A That day, yes.

After the State in cross examination established Gibson's reluctant to testify at the time of trial, defense counsel questioned the witness:

> Q We spoke just a few minutes ago in the back there. Did you also tell me then you weren't going to testify?
>
> A That's right.
>
> Q You just did, though, didn't you?
>
> A You know why? Because I want you to leave me alone.

PCR 32/325-30.

Defense counsel Skye initially testified that he had never successfully gotten a reluctant witness to testify. PCR 33/416. Then he said it was a matter of Mr. Gibson's testimony being 90% extremely harmful and 10% helpful to Mr. Deparvine. Mr. Skye said he feared that if he forced Gibson to testify, "he would let it all hang out and it would not be in favor of Mr. Deparvine." PCR 33/417.

Skye speculated that Gibson "threw in that helpful tidbit to Mr. Deparvine's case," seeing Mr. Deparvine in front of the apartment at dusk, in an effort to have the State not call him because he did not want to testify. Gibson never told him the alibi was fabricated. PCR 33/417-18.

Mr. Skye never considered deposing Mr. Gibson to compel him to testify about the alibi. PCR 33/418. He also said he really didn't consider other tools at his disposal to get Mr. Gibson to testify because he was convinced that Mr. Gibson would have been an "absolutely devastating witness against Mr. Deparvine." PCR 33/420.

Skye said Mr. Gibson's observation that Mr. Deparvine came down to meet Mr. Van Dusen with a backpack would damage the case. However, Skye said that Mr. Deparvine had told him that he had brought the backpack with him because it contained a lock and chains to secure the steering wheel of the truck. PCR 33/421. Mr. Skye said that the fact Mr. Gibson did not see the second red truck "would

have been devastating...." However, Mr. Skye agreed that Mr. Gibson could not see the parking area behind the apartments from his vantage point and that Mr. Deparvine had told him that Mr. Van Dusen left in the second red truck from the rear parking area. PCR 33/422-23.

Mr. Skye argued that Mr. Gibson's report that he saw Mr. Deparvine standing in front of the apartment at dusk "pretty much eliminates him as a State witness." PCR 33/424. Thus, Mr. Skye inherently recognized that the alibi Mr. Gibson provides was sufficient to turn the other elements of his observations into corroboration of Mr. Deparvine's innocent behavior.

In State's Exhibit 5, page 4, Mr. Skye wrote that Mr. Gibson's report of seeing Mr. Deparvine outside the apartment at dusk was "far more helpful to the defendant than to the State." PCR 34/582. However, Mr. Skye disavowed that analysis in the hearing, testifying that "I would say that that was probably an incorrect evaluation of the whole situation at the time." PCR 34/582. Asked if what he put in his memos was therefore not "what you recollect you actually believed or intended at the time," Mr. Skye said "No, it's pretty close. It's as close as you can do trying to get work done." PCR 34/583. Mr. Deparvine would later testify that Mr. Skye never took notes when meeting with him– the investigator, Corey Warren, took the notes. PCR 35/663.

Mr. Skye claimed that Mr. Gibson's accounts were contradictory– that he didn't see a second red truck, but observed Mr. Deparvine later at dusk in front of the apartment. "If he saw one he should have seen the other, that's how they're inconsistent. And besides which Mr. Deparvine never told me that he came back and was outside of the apartment complex at dusk." However, Mr. Deparvine had told Mr. Skye he had stayed home after buying the truck. Mr. Skye never asked if he had stepped out at dusk. PCR 34/590. And Skye never explained how the two independent observations were in any way contradictory.

Mr. Deparvine testified that he pressed Mr. Skye on every barrier Skye put up to calling Gibson. Mr. Skye told Mr. Deparvine that the defense could not compel Gibson to testify. When Mr. Deparvine challenged Skye with the fact that the State successfully compelled testimony, Skye told him "we're not the State, we can't do that." Skye never discussed taking Gibson's deposition, or what other tools were available to compel his testimony. PCR 35/635.

The State's report indicated that Mr. Gibson told police he had been sitting with another man named "Derrick." PCR 35/616. Mr. Deparvine testified that he agreed with Mr. Skye that Mr. Gibson would not be called, but only if the defense could get the same alibi evidence from "Derrick." Mr. Deparvine said Mr. Skye came back at a later date and told him "Derrick" did not have any useful recollection. PCR 35/622-23.

After being told that "Derrick" was of no value, Mr. Deparvine testified that he got into an argument with Mr. Skye about calling Mr. Gibson, his only alibi witness. PCR 35/623-24. Mr. Deparvine said the jury would "give [Gibson] a pass" on his initial denial of knowledge because Gibson would understandably be reluctant to get involved under the circumstances. PCR 35/623-26.

Mr. Deparvine suggested ways to address the potential problems with Gibson's testimony and that he never acquiesced to Skye's decision to not call Gibson. PCR 35/626-28.

Mr. Deparvine testified that when he told Mr. Skye that he stayed home the rest of the evening, he meant he stayed around the apartment. He routinely would check his mail a couple of blocks away, or go to the Laundromat across the street and to the nearby convenience store. He did not consider those brief excursions to constitute "leaving home." This was consistent with what he told Skye: "I didn't go any place that night. I stayed right around the apartment there. And I'm not sure– I may have told Mr. Skye I walked down to the UPS store where I got my mailbox." PCR 35/631-33.

After the meeting, Mr. Deparvine still wanted Mr. Gibson to testify, but he relied on Mr. Skye's incorrect advice that nothing could be done to compel the testimony. PCR 35/635. Mr. Skye failed to advise Mr. Deparvine of the options available to compel Gibson's testimony. Mr. Deparvine's acquiescence to Skye's

advice was based on insufficient information, provided by counsel who had an agenda to convince Mr. Deparvine that Gibson should not be called.

To dismiss a witness who can give a complete alibi to Mr. Deparvine is unconscionable. Mr. Gibson's ultimate, albeit begrudging, cooperation at the evidentiary hearing showed that putting Mr. Gibson's resolve to the test by way of a deposition could well have demonstrated that Mr. Gibson would testify when compelled.

Mr. Deparvine was prepared to take the risk of presenting Mr. Gibson at trial. There is no evidence whatsoever, in light of Mr. Gibson's capitulation at the evidentiary hearing, that Mr. Gibson would have ever made good on his refusal to testify.

Mr. Skye testified that he advised Mr. Deparvine that if he put Mr. Gibson on the stand and Gibson testified about seeing Mr. Deparvine at dusk, the State would impeach him with his three prior inconsistent statements which would make Gibson look like a liar "and destroy whatever goodwill and credibility we had built up to that point." PCR 33/536. But a review of the trial shows that defense credibility was not a major element of the defense case. The defense lost credibility from the start of the defense case when it failed to introduce some video from the Department of Transportation, marked for identification Defense Exhibit 3, but not introduced based on the State's objection to the lack of foundation.

ROA 37B/3132. The defense later cured the error after the witness was properly prepared – the video showing the surveillance for the Pinellas Bayway toll plaza was not functioning the day of the murders. ROA 38/3239.

Only two defense witnesses had a connection to Mr. Deparvine such that the credibility of the defense might be a factor in the credibility of their testimony – Mr. Deparvine's daughter, who was called solely to introduce the backpack she found in her father's apartment after his arrest, ROA 37B/3186, and Mr. Deparvine's job supervisor, called to establish that Mr. Deparvine reported for work at 7:00 a.m. Wednesday morning, November 26, 2003. ROA 37B/3196 et seq.

But it was Mr. Deparvine's testimony which would have been the single most important element of the jury's evaluation of the credibility of the defense. Mr. Skye had to have known this, and had to have also known that a glitch with Gibson's testimony, e.g. a refusal to testify, could have had little impact on the defense – everything hinged on Mr. Deparvine's testimony. Gibson's refusal to testify would have had little impact, but his cooperation, with the evidence of the alibi which rendered all possible negative interpretations of the remainder of his testimony corroborative of what Mr. Deparvine would testify to, would have had a profound positive impact on the defense.

The odds were long, but the downside was not nearly as severe as Mr. Skye's exaggerated and self-serving rationalizations at the evidentiary hearing. And, as proven by Gibson's testimony in the evidentiary hearing, the alibi would have been disclosed to the jury.

Contrary to Mr. Skye's advice to Mr. Deparvine that he could not compel witnesses to testify like the State can, the defendant always has the constitutional right, State and federal, to compel the attendance and testimony of witnesses. If anything, Mr. Deparvine's right to compel is of a higher order than the State's.

The court's order denying postconviction relief found Skye "very credible" and accepted the following unsupported rationales justifying a tactical decision:

- Gibson didn't see a second truck – resolved by the simple fact Gibson did not have an unobstructed view, and, as Mr. Deparvine told counsel, it was a busy time of the day such that a second truck might go unnoticed;
- Gibson refused to testify – only because Skye failed to make the effort;
- Gibson could be impeached – the record is devoid of the foundation that would have allowed such impeachment, and even if impeached, that would only affect the weight of the alibi, a matter for the jury, not trial counsel;
- Mr. Deparvine's failure to advise counsel he stepped outside consistent with Gibson's observation – either post hoc "forgetfulness" or misunderstanding biased by Skye's post hoc need to justify not calling Gibson. Mr. Deparvine did not say he locked himself in for the night:

> A What I told him is I didn't go any place that night. I stayed right around the apartment there. And I'm not sure -- I believe I told Mr. Skye I may have walked down to the UPS store where I got my mailbox.
>
> Q How far was that?
>
> A Probably about maybe three or four blocks. What I mean is I didn't get on the bus to go out to the mall or any place like that. I was

right in the area. May have walked to the laundromat across the street, may have walked to the convenience store.

PCR 35/631-32.

In *Ford v. State*, 825 So.2d 358, 360-61 (Fla.2002), the postconviction movant claimed ineffective assistance for failure to call three witnesses who would refute the State's witnesses. The trial court summarily denied the claim without hearing. This Court took jurisdiction in *Ford* because it was in direct and express conflict with *Jackson v. State*, 711 So.2d 1371, 1372 (Fla. 4th DCA 1998). The *Ford* court's discussion of *Jackson* makes it abundantly clear that the failure of counsel in this case was not tactical:

> in *Jackson* the Fourth District in a similar case reversed a summary denial and remanded for an evidentiary hearing and explained:
>
> > Appellant's first ground included an allegation of ineffective assistance based on trial counsel's failure to call certain named witnesses to the shootout. In the motion, Appellant stated that they were willing and available to testify that Appellant was not the shooter, for the purpose of rebutting state witnesses who testified to seeing Appellant commit the offenses. The state argues that summary denial of this claim was warranted because the failure to call these witnesses clearly constituted trial tactics. It is true that such a decision is subject to collateral attack only in rare circumstances when the decision is so irresponsible as to constitute ineffective assistance of counsel. *See Roth v. State*, 479 So.2d 848 (Fla. 3d DCA 1985). However, the failure to call witnesses can constitute ineffective assistance of counsel if the witnesses may have been able to cast doubt on the defendant's guilt, and the defendant states in his motion the witnesses' names and the substance of their testimony, and explains how the omission prejudiced the outcome of the trial. *See Sorgman v. State*, 549 So.2d 686 (Fla. 1st DCA 1989). Appellant's motion met these

> requirements, and no record attachments refuted his allegations.711 So.2d at 1372.
>
> We agree with the analysis in *Jackson* and conclude that on the basis of the allegations in this petition that an evidentiary hearing should have been required in order to resolve whether what counsel did was tactical.

Ford, 360-61 (emphasis added). In the instant case, Gibson's testimony obviously casts doubt on the defendant's guilt by providing a complete and absolute alibi. All of the other evidence that Mr. Gibson offered was neutral in character, and, in fact, corroborated Mr. Deparvine's statements about his meeting with the Van Dusens that afternoon.

ISSUE 2

DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO EFFECTIVELY INVESTIGATE FINGERPRINTS ON THE SULLIVAN ID AND USE THAT KNOWLEDGE AT TRIAL.

At trial, fingerprint analyst Mary Ellen Holmberg testified that the fingerprint found on Henry Sullivan's Florida ID card did not belong to the Defendant, Henry Sullivan, Justin Sullivan, David Reid or Greg Cornell. ROA 33A/2475-77.

Defense counsel had earlier cross-examined Steven Young, a crime scene technician, who had testified that he had observed Detective Sepulveda and another deputy handling Henry Sullivan's Florida ID at the scene of the abandoned Jeep. ROA 29/2016-20.

Defense counsel was ineffective when he failed to demand the State compare the fingerprint on the ID card with the fingerprints of Detective Sepulveda and the other deputies at the crime scene, or to demand leave to conduct an independent defense comparison. If such comparisons had been done then the identity of the deputy would have been revealed, discrediting the handling of the evidence and leaving open the fact that several prints remained on the card which could have belonged to the real killer.

The investigation prior to the evidentiary hearing disclosed that the unidentified fingerprint of value on Mr. Sullivan's ID card belonged to Deputy Poore. PCR 19/3441 (Defense Postconviction Exhibit 3, report identifying Poore). A photograph provided in discovery showed a thumb planted squarely on the ID card before it had been dusted for prints. Fingerprint expert Kim Cashwell[2] testified at the evidentiary hearing that the print of value was Deputy Poore's left index finger, PCR 31/203. As for the print which did not have comparison value, some "areas appeared to be ridge detail on top of ridge detail ... . I wouldn't necessarily describe any of them as smudges, but just evidence of fingerprint edge to edge of a finger having made contact with the card." PCR 31/205. Multiple ridge details would be stacked one on the other by being handled in the same area

---

[2] Ms. Cashwell replaced Ms. Holmberg at the Sheriff's Office and testified in her role as the replacement expert.

more than once. PCR 31/205. There was also some ridge detail around the latent print of value which was not of value for comparison. PCR 31/207. It would appear that the thumb shown planted on the ID in the evidence photo could well have destroyed the value of the multiple ridge details underneath the deputy's print.

Mr. Skye reviewed State Trial Exhibit 54, a picture of Henry Sullivan's ID card. Exhibit 54 shows a thumb holding the card on the lower left hand corner. PCR 17/1855. He recalled seeing the ID card preparing for the trial, but does not recall specifically whether he saw Exhibit 54. PCR 33/454-56.

Mr. Skye reviewed Evidentiary Hearing Defense Exhibit 6, a handwritten report by Deputy Poore, PCR 19/3463-64, and Evidentiary Hearing Defense Exhibit 5, PCR 19/3461, a copy of a supplemental report by Detective Sepulveda. He concluded that Deputy Poore had told detective Sepulveda that she had picked up the ID only on the edges. PCR 33/456-57.

Mr. Skye said "I don't know that I would have been particularly interested in demonstrating that it was the deputy, that would have perhaps prove that they did a shoddy investigation or they didn't handle that card properly. But it's not clear to me how proving that that was Detective Poore's fingerprint helps Mr. Deparvine." PCR 33/461.

Mr. Skye said that Deputy Poore's fingerprint would contribute to a challenge based on a lack of proper evidence collection. PCR 33/465. However, Mr. Skye was adamant that he believed it was more important to have an unknown print rather than to have evidence that they didn't do a good investigation. Mr. Skye said that the unusable print had no value at all. "An unusable print is just nothing. It doesn't take you anywhere except that somebody touched it. Here we have a print that we can identify, we just don't know who it is. But we know it's not Mr. Deparvine's. Which to me seems to be the best and most important use of that at the time." PCR 33/463-64. Mr. Skye did not recall any discussions with other members of the team about the potential significance of the reports by Detective Sepulveda and Deputy Poore. PCR 33/469.

Mr. Skye attempted to excuse the State's contamination of the ID card by claiming that contamination depended on whether the improper technique occurred before or after the card had been dusted for prints. Mr. Skye was shown the actual card at the hearing and conceded there were dark smudges on the card that are probably fingerprint powder. He reviewed State's Trial Exhibit 54, the picture of the card being held with the thumb planted squarely on it, which did not show evidence of fingerprint powder. Mr. Skye was forced to concede that the photo with the thumb was made before fingerprinting, "In all likelihood." Mr. Skye conceded seeing the pictures of the card showing fingerprint powder "At

trial, at least," but said he might not have seen them before trial. However, he admitted he had access to the card to view. PCR 33/498-600.

The newly discovered evidence shows that had Mr. Skye pursued the evidence he had – the thumb in the evidentiary photo and the reports by Deputy Poore and Detective Sepulveda – he would have discovered critical evidence raising substantial questions about the reliability of the evidence collection and the veracity of the investigators. The forensics were sloppy – an index finger contaminated the ID card, the thumb may well have destroyed critical evidence buried under the multiple ridge details stacked one on the other on the lift of no value, and Deputy Cashwell (Kim's husband), who gathered the blood swabs, was not called to collect that evidence until weeks after the murders.

Perhaps more critical is the fact the someone at the crime scene did not tell the truth. Deputy Poore's report does not say she held the ID only by the edges. Detective Sepulveda's report says she picked it up by the edges. Either Deputy Poore misrepresented to Detective Sepulveda, or Detective Sepulveda tried to cover a gross breach of protocol. With the trustworthiness of the investigation breached, the defense would have had a lot more leverage in convincing the jury that Mr. Deparvine was an innocent man.

Further, the Poore and Sepulveda reports concealed the destruction or contamination of evidence. This violates of the State's obligation under *Brady v.*

Maryland, 373 U.S. 83, 87 (1963), to disclose favorable evidence to the accused whether requested by the accused or not. The *Brady* violation extends to the concealment of the presence of Deputy Poore's index finger print on the ID – her fingerprints were in the exclusive custody of the Hillsborough County Sheriff's Office.

The failure of the State also resulted in a violation of *Giglio v. United States*, 405 U.S. 150 (1972). A *Giglio* violation occurs when (1) the State presents or fails to correct false testimony, (2) the State knows the testimony is false, and (3) the false evidence is material. *See Guzman v. State*, 941 So. 2d 1045, 1050 (Fla. 2006). In this case, the State's expert testified that there was no match to the lift of value. The State knew or should have known of the match within its own office, both because all personnel at the crime scene should have been compared, and certainly the deputy revealed by the reports as actually picking up the ID should have been compared.

ISSUE 3

DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO COMPETENTLY INVESTIGATE AND THEN CALL WENDY DACOSTA AS A DEFENSE WITNESS.

Wendy Dacosta lives across the street from Artistic Doors on Old Memorial Highway, where the victims' Jeep had been left. PCR 32/299. The State's theory of the case was that the killer left the truck in that area and drove with the victims

in their Jeep to a driveway more than a mile away where he killed them. The killer drove the Jeep back to Artistic Doors and departed in the victims' red truck. Critical to the State's theory was the assumption that the killer drove away in the victim's truck. Ms. Dacosta rebutted that assumption. Based on erroneous assumptions resulting from inadequate investigation, defense counsel decided to not call her.

However, counsel changed his story at the evidentiary hearing. Skye said that Ms. Dacosta had not seen the victim's truck, but rather another red truck, and he included this in his justification for not using Ms. Dacosta. PCR 33/431-33. The circuit court failed to account for counsel's evidentiary hearing testimony which contradicted the basis for rejecting Dacosta's testimony in the memo.

Ms. Dacosta testified that she left for her job at 7:25 a.m. on November 26, 2003, less than an hour before the victims were found. PCR 32/300. She remembered seeing the victims' Jeep in the Artistic Doors parking lot because it was so early. She also remembered a red truck because the road is not well traveled and it was unusual to see any vehicle driving in that area at that early hour. PCR 32/316-17.

As she turned onto the road the truck, a vintage red Chevrolet truck similar to the Van Dusens', pulled out from the driveway of the Chinese restaurant next to Artistic Doors. PCR 32/301-04. There was only a tree and a narrow grass strip

between the Artistic Doors driveway and parking lot and the driveway and parking lot for the restaurant. Ms. Dacosta saw the truck in the parking lot was maybe two or three car lengths from where the Jeep was parked. PCR 32/313-14.

Ms. Dacosta caught a glimpse of the front of the truck as it came down the drive. but she wasn't paying much attention. PCR 32/305. The truck pulled out in front of her and accelerated quickly, in a hurry, but did not squeal tires or lay rubber. PCR 32/308. It looked like a man was driving the truck, with short hair like a crew cut, and she thought the man might be white because his hair wasn't black. PCR 32/309. She drove behind the truck until she turned right to proceed to work.

At the evidentiary hearing, Ms. Dacosta looked at pictures of the victims' red truck which had been introduced at trial, State Trial Exhibits 1 and 5. PCR 10/1765 & 1773. Her initial reaction was that it was not the same truck she had seen. PCR 32/306. The truck in the State exhibits was the same kind of truck but it was not the truck she saw. State Trial Exhibit 5, showing the tailgate of the truck, did not look like the truck that she saw. She remembered the tailgate more than anything, and it was different than the Van Dusens' truck tailgate. PCR 32/306-07.

Exhibit 5 also showed a black tonneau cover over the bed of the victims' truck, but there was no such cover on the truck she saw. PCR 32/307. The truck was the same color, age, and style as the truck in the State's exhibits, in very good

condition with a nice paint job, but not the truck in the State's exhibits. PCR 32/306-10.

She talked to the police shortly after the homicides, but the truck sighting never came up. PCR 32/309-10. That was the last time she talked to anyone about the case until somebody she thought might have been a public defender spoke to her the following summer, in 2004. PCR 32/300. She told that investigator about seeing the truck. PCR 32/301. The defense investigator wrote:

> Spoke with her at her residence. She lives across the street from Artistic Doors. She stated she left her home around 725-730am. While getting into her car, she noticed the Jeep parked across the street at Artistic Doors and wondered if one of the employees had purchased a new car. As she took a left out of her driveway and began to drive down Memorial Hwy, she believed she saw the tailgate of the 1971 red Chevy truck in front of her driving down Memorial. I showed her a picture of the vehicle in question. She stated the tailgate was red with silver stripes on top and bottom, with Chevrolet written in silver in the middle. She reported she believed it was the same truck in question. She did not see who was driving since she made a right on Double Branch Rd. Wendy did not give this information to the police since they had not asked any questions about a red truck the day they spoke with her.

State Postconviction Exhibit 11, PCR 17/3059.

Ms. Dacosta testified that no one contacted her after the investigator contact until she was served her subpoena for the postconviction evidentiary hearing. She was in town in July and August of 2005, and would have been available to testify at trial. She would have been happy to speak to anybody in July and August of 2005 about the case. PCR 32/311-12.

Mr. Skye said at the postconviction hearing that the problem he had at the time of trial with Ms. Dacosta's testimony was that the red truck Dacosta saw had silver stripes on the back bumper or the tailgate, and he did not believe that the Van Dusen truck had such silver stripes. He viewed State's Trial Exhibit 5 and confirmed that there were no silver stripes on the rear of the victims' truck. PCR 33/431-32. Skye conceded the defense never got back with Dacosta to clear up the discrepancy. PCR 34/597. Of course, his pretrial memo said the exact opposite – he believed Dacosta would identify the victims' truck.

Mr. Skye said he was confident, at the time of the evidentiary hearing, that Ms. Dacosta had not seen the Van Dusens' truck. Mr. Deparvine told him the Van Dusen truck was parked behind his apartment. Mr. Skye did not recall telling Mr. Deparvine that the jury would believe Ms. Dacosta had actually seen the Van Dusens' truck, although his memo reflects that.. Mr. Deparvine's employment records placed him at work 15 miles west at the time Ms. Dacosta saw the truck. He also knew phone records established that Mr. Deparvine used his phone in his apartment at 5:35 a.m. in the morning to check his voice mail. PCR 33/432-34.

Mr. Skye said at the postconviction hearing that he did not call Ms. Dacosta because: it was not the Van Dusens' truck (contrary to hisd pretrial memo); the timing was wrong, or bad, as to whether it would have been the second red truck that Mr. Deparvine talked about; and "It struck me as something that would not

enhance my credibility with the jury." PCR 33/434. See the argument in the Gibson claim addressing the fact that defense credibility was not critical, and had been compromised by an unprepared witness.

He said he did not recall that Ms. Dacosta saw the truck in close proximity to the Jeep. PCR 33/434. He did not ask for any further details or investigation from investigator Anderson. PCR 33/435.

Mr. Skye initially did not recall any conversation he had with Mr. Deparvine to explain why he would not call Ms. Dacosta. PCR 33/433-34. Most importantly, Mr. Skye said "it wasn't the other red truck that Mr. Deparvine said that he said that he saw." PCR 33/435-36. Mr. Skye gave no reason for his conclusion that the truck Ms. Dacosta saw categorically could not have been the second red truck Mr. Deparvine saw.

Mr. Skye said he would not have told Mr. Deparvine that he didn't want to call Ms. Dacosta because he feared the jury might think that it was Mr. Deparvine driving the victims' truck. This would be "because Ms. Dacosta described the truck differently than Mr. Van Dusen's truck." PCR 33/436.

Unfortunately for Mr. Deparvine, Mr. Skye's newfound understanding that Dacosta did not see the victims' truck was not reflected in the bad advice he gave Mr. Deparvine pretrial. He gave the ineffective advice in a discussion he did not initially recall. It took the State's cross examination to bring out the many

discrepancies between what Skye said happened in his initial testimony, and what really happened.

In cross examination, Mr. Skye reviewed investigator Anderson's report and conceded it indicated that Ms. Dacosta specifically identified the victim's truck as the one she had seen. PCR 34/557. Mr. Skye then read into the record, at the State's behest, the portion of the memo about a meeting with Mr. Deparvine, State Postconviction Exhibit 12. PCR 17/3064-73. Skye told Mr. Deparvine he would not call Ms. Dacosta because she could identify the truck as being the Van Dusens' vehicle. PCR 34/558. Skye advised against calling Dacosta because she had identified the truck as belonging to the victims. However, the defense investigator had only shown Dacosta a side view of the truck. Skye knew at the time he declined to call Dacosta that only the side view had been shown to Dacosta. Because of inadequate investigation, he did not know that Dacosta saw the truck, one which was similar but was not the victims', within yards of the victims' Jeep.

If the defense had shown Dacosta the readily-available tailgate view or conducted an adequate interview, they would have known Dacosta was an excellent witness to corroborate Mr. Deparvine.

If Skye could not recall what he memorialized in written memos to the file, and, in fact, testified contrary to those memos at the hearing to provide

rationalizations for his ineffective assistance, then all of his testimony is unreliable. The recollections in Skye's memos did not even originate with him. The investigator took the notes at client meetings, not Skye. PCR 35/663.

Skye's testimony was *post hoc* justification, not an accurate recollections of his state of mind for trial. Further, his recollection, even after being refreshed from his memos, varied depending on what was necessary to support his position of competent representation. PCR 34/581-83 (disavowing his memo finding Gibson's testimony important, then retracting the disavowal).

During the session reported in Skye's memo, Mr. Deparvine asked the investigator what picture she had shown Dacosta. The investigator produced a single side view of the truck. The side view did not show the discrepancy between the tailgate on the Van Dusen truck and the tailgate described by Ms. Dacosta. PCR 35/666. Mr. Deparvine wanted the defense to show Ms. Dacosta more representative pictures of the truck, i.e. the tailgate.

Mr. Deparvine said that Mr. Skye grew agitated when he persisted in discussing the relevance of Ms. Dacosta's observations:

> Q How did he become agitated?
> A Well, because I'm questioning the report. He's saying, you know, she's gonna get on there and say you're driving Rick Van Dusen's truck and you're supposed to be at your job.

PCR 35/664.

Skye threw out another objection to Dacosta, that there were lots of trucks on the road. Mr. Deparvine told Skye that there were few trucks of that vintage on the road, the color narrowed it further, and it was seen near one of the crime scenes less than an hour before the bodies were found. PCR 35/668-69.

Mr. Deparvine believed he had to testify to explain how his blood got on the Jeep steering wheel. He believed he would then have the opportunity to tell the jury about the second red truck. At this point, Skye told him he would call Dacosta if Mr. Deparvine testified about seeing the second red truck. Mr. Deparvine believed Dacosta was going to be called until the defense rested without doing so. At that point, when Mr. Deparvine questioned Skye, Skye informed him Dacosta was not testifying. PCR 35/670.

The circuit court found that defense counsel's memo rejecting use of Ms. Dacosta's testimony indicated a strategic decision. PCR 9/1664. However, Skye's conclusion was based on the assumption made after insufficient investigation that Dacosta would identify the truck as the Van Dusens'. State Exh. 12, PCR 17/3066-67 at 3-4 (misidentified in Final Order, 9/1663, as Exhibit 11).

The circuit court found Skye to be very credible to conclude that the decision not to call Dacosta was strategic. PCR 9/1664. However, the court failed to account for Skye's contradictory rationales:

- Skye testified Ms. Dacosta had seen another red truck, not the victims'. PCR 33/431. But his memo said she wasn't called because she would identify the

Van Dusen truck. Only when confronted with Dacosta's new evidence in postconviction did he change his story and say the decision was based on the fact she did not see the Van Dusens truck. PCR 33/434. His explanation for how he could have told Mr. Deparvine the danger was that she would identify the Van Dusen truck is disingenuous and fails to resolve the post hoc rationalization with what Mr. Deparvine was told:

> Q Did you tell Mr. Deparvine one of the reasons you again, did you tell him one of the reasons you didn't want to call Dacosta is because the jury might think it was Mr. Deparvine driving that truck, driving the victim's truck? Or driving the truck that was the object of this?
>
> A Maybe, I guess I might have said that. Yeah, if they didn't believe him that he had bought the truck and it was sitting behind his apartment complex, I don't I would have told him that simply because Ms. Dacosta described the truck differently than Mr. Van Dusen's truck. So it doesn't make sense, but I guess we might have had that discussion.

PCR 33/436.

- Skye thought Dacosta saw the truck anywhere near the victim's Jeep. PCR 33/434. To the contrary, his investigator reported that Dacosta saw the truck in front of her as she pulled out of her driveway directly across from where the Jeep was parked. State's Postconviction Exhibit 11, PCR 17/3059. Had counsel competently followed up before trial, the defense would have learned that she saw the truck pulling out of the Chinese restaurant parking lot across the street from her driveway, only two or three car lengths from the Jeep. PCR 32/313-14; State Trial Exhibit 96, noted at PCR 19/Index as being enlarged aerial photos, a physical exhibit not transmitted in the record; Defense Postconviction Exhibit 4, PCR 19/3443 (map).

The court found that "even if Ms. Dacosta had testified about the similar red truck driving by at least 2 hours" after the Jeep was parked, there was no reasonable probability the outcome would have been different." PCR 9/1664. However, the truck was not casually "driving by." The truck was leaving the crime scene – pulling out of a driveway near the end of a little-traveled dead end road

next to where the Jeep was parked, PCR 32/309, from a business likely not open at that hour, and accelerated rapidly. PCR 32/308.

Several other characteristics of Ms. Dacosta's testimony support the defense case:

- The victims' truck and the one seen by Ms. Dacosta were remarkable due to their rarity – three decade old Chevrolet trucks, red, in very good condition. Detective Hoover testified at the evidentiary hearing that investigators found no reports of a second red truck. PCR 31/299. But this does not negate the existence of the second red truck. If the absence of red truck sightings negates the existence of a second red truck, then the absence of red truck sightings also negates the theory that the Van Dusens' red truck was ever in the area.
- Mr. Deparvine's immediately disclosed the second red truck, increasing credibility. Detective Hoover testified that Mr. Deparvine told him about the second truck in the first interview conducted, on Thanksgiving Day, November 27, 2003. PCR 31/224-25.
- Ms. Dacosta's sighting corroborates Mr. Deparvine. As a result, The existence of the second red truck calls into question the accuracy of Ms. Ferris' recollection of what her daughter told her (challenged later in this brief).
- Ms. Dacosta's testimony would have thrown doubt on the quality of law enforcement's investigation. Ms. Dacosta lived directly across the street and yet she was never re-interviewed when Detective Hoover said police investigated Mr. Deparvine's report of the second truck. Detective Hoover also said that law enforcement did not issue a press press release to lok for the second red truck, even though a release had issued for the Van Dusen truck. He said this was because the focus was on the Van Dusen truck. PCR 31/227-28. The defense could have argued that the investigation went astray when it focused prematurely on Mr. Deparvine and failed to follow up on the evidence he gave them.

The downside feared by Skye, that the jury would think Dacosta saw Mr. Deparvine leaving the scene, did not exist. Skye did not know this because the defense failed to follow up when Mr. Deparvine pointed out that Dacosta has only

seen a side view of the victims' truck, when it was the tailgate she would have seen while following the truck. Once the downside was eliminated the value of her testimony is undiminished and contributes to reasonable doubt. The defense team diminished Mr. Deparvine's observation of the second red truck and did nothing to develop a witness who turned out to be compelling at the evidentiary hearing.

Had the jury heard Ms. Dacosta's testimony (and supporting testimony such as Detective Hoover's), there is a reasonable probability that the jury would have acquitted Mr. Deparvine. Trial counsel was ineffective when he chose not to call Ms. Dacosta because of his unfounded and mistaken belief that Ms. Dacosta never saw the second red truck anywhere near the Van Dusen Jeep, and his unreasonable and uninformed belief that Ms. Dacosta would say the truck was the Van Dusen truck.

ISSUE 4

DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO EFFECTIVELY ARGUE FOR JUDGMENT OF ACQUITTAL ON THE "ARMED CARJACKING" CHARGE IN THE MOTION AFTER THE STATE'S CASE-IN-CHIEF.

At the close of the state's case, the court granted a JOA on armed kidnaping charges. ROA 37A/ 3019-10.

Defense counsel argued in a motion for a JOA on the car-jacking charge that the evidence showed that the 1971 truck was not at the scene of the homicides and

that there was no evidence as to how or when Defendant came into possession of the truck. The prosecutor argued both sides of the coin: that the truck was the subject of the alleged carjacking, ROA 37/3089, 2096, and that it was the Jeep Cherokee ROA 37/3091 ("the actual..the actual taking of the jeep is the actual carjacking."). The indictment did not indicate which vehicle was the object of the armed carjacking charge. ROA 1/72-73.

The judge, understandably confused, asked the prosecutor to clarify and the prosecutor hypothesized that the Defendant had to carjack the jeep to steal the Chevy pickup truck. ROA Vo. 37 3100. The Court denied the JOA, presumably relying upon Section 812. 133(3)(b), Fla. Stat. (2003), which provides:

> An act shall be deemed 'in the course of the taking' if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property if it and the act of taking constitute a continuous series of acts or events. (Emphasis added)

A. The State Misrepresented the Timeline of Events

Defense counsel failed to argue that the prosecutor misrepresented the timeline of events in the JOA argument. The prosecutor had argued that the Defendant and Mr. Van Dusen parked the truck near Artistic Doors, got into the Jeep with Karla Van Dusen and drove 1.3 miles to a secluded driveway where the Defendant killed the Van Dusens. The Defendant then drove the Jeep back to the truck and drove the truck home. ROA 37/3097-3102.

It is undisputed that the Van Dusens arrived in Hillsborough County at approximately 6:45 p.m. The medical examiner said the time of death was several hours later, after 10 p.m. ROA 29/1992. Any continuity of action or events was broken by the lengthy hiatus.

B. The 2001 Jeep Cherokee Was Not the Object of the Armed Carjacking" Charge

The prosecutor argued that the Jeep Cherokee was the object of the armed carjacking charge in the indictment. ROA 37/3091, 3100. Defense counsel was ineffective when he failed to argue that the prosecutor had elected the truck, not the Jeep, as the object of the carjacking, before and at trial, and that the truck could not have been carjacked under the statute.

The prosecutor made it clear that the subject of the carjacking count was the truck at a pretrial hearing:

> In arriving at whatever verdict the jury reaches - - the first bridge they've got to cross and inherent in their verdict is the paramount issue of how Mr. Deparvine got or received custody of the red classic pickup truck of the Van Dusens. That's also comprised in a count of the indictment alleging carjacking.
>
> The state's theory of the case and the state's proof will support it's argument that Mr. Deparvine obtained this forcibly against their consent during the carjacking at or near the time of the Van Dusens' homicide.

ROA 17/432, 435, 438 (emphasis added).

The State should have been held to its prior representations and election of the truck as the object of the carjacking. Had that been the case, the court would have been compelled to enter a judgment of acquittal.

Further, Defendant has a constitutional right to know what he is charged with before trial. The federal constitutional protections of the appropriate provisions of the 4th, 5th, 6th, 8th, and 14th Amendment and fundamental protections of fairness and due process compel the conclusion that the State and the Court denied the defendant his rights when the State switched vehicles in mid-trial.

Finally, without the transcript of the Grand Jury proceedings, it is impossible to know which vehicle the grand jury intended to indict for. Postconviction counsel unsuccessfully sought a copy of the grand jury transcript, PCR 6/904-33. Absent the transcript, it will never be known whether Mr. Deparvine was convicted for carjacking a vehicle the Grand Jury dud not indict for.

Defense counsel was deficient for failing to bring any of these abrogations of fact and constitutional protections to the attention of the Court. Had counsel done so, the Court would have been compelled to acquit on the carjacking charge.

C. The Van Dusens Did Not Have Control over the 1971 Chevrolet Pickup Truck at the Time of Their Deaths

Section 812.133(1), Fla. Stat. (2003), requires that the "taking" must be from "the person or custody of another." Defense counsel was ineffective when he failed

to argue that the Van Dusens no longer had custody of the truck when they were killed – by the State's theory, the truck was over a mile away from the murder scene. Further, if, arguendo, the Defendant committed the homicides, absent errors and omissions by the defense counsel urged in the postconviction motion there would have been no evidence disputing Mr. Deparvine's ownership of the truck at the time of the murders.

D. There Was No Carjacking Because the Jeep Cherokee Was Not the Motive for the Murders

After the prosecutor switched the object of the armed carjacking charge from the truck to the Jeep, defense counsel was ineffective when he failed to argue that there was not a carjacking because the taking of the Jeep Cherokee was not the motive for the murders.

Under Florida law, the taking of property after a murder is not a robbery (and hence not a carjacking) when the "taking" was not the motive for the murder. *Mahn v. State*, 714 So.2d 391 (Fla. 1998); *Gore v. State*, 784 So.2d 418, 430 (Fla. 2001); *Rogers v. State*, 783 So.2d 980, 990 (Fla. 2001).

The State argued that the taking of the Jeep Cherokee was not the motive for the murders, rather it was to"facilitate the theft of their pickup truck" ROA 14/2527, and to "leave alive no witness that could rebut his claim of lawful ownership." ROA 14/2526.

E. Trial Counsel Failure to Challenge the Erroneous Charge Was Based on an Unreasonable and Outdated Legal Theory.

Mr. Skye testified that Mr. Deparvine was concerned that the indictment did not specify which of the two vehicles was the object of the carjacking. Mr. Skye wrote a letter explaining that he had no doubt that the Jeep was the object of the carjacking, and that he was not unhappy with the fact that the jury instructions were vague and failed to specify which vehicle. PCR 33/470-71.

Mr. Skye said if he filed a motion for a bill of particulars or anything else to identify the vehicle which was car-jacked, the State would see problems that Mr. Skye saw with the homicide counts. The State would then cure the error with a new indictment and the defense would lose the issue of the faulty homicide counts. PCR 33/473.

The error Mr. Skye found was that the homicide charges "failed to allege either that the murder was committed with premeditation or that there was a first-degree felony, a predicate felony upon which one could base a conviction for first-degree murder." PCR 33/473-74.

Skye said he did a day or a day and a half of research on the issue. PCR 33/474. His decision was based on older cases such as *Denham v. State*, 22 Fla. 664 (Fla. 1886). Skye said he was aware of the far more recent authority that citation to the offense statutory number cured insufficiencies in the charge. However, he relied upon

cases that said death is different and cases that said you could not sentence somebody to death without alleging first-degree murder. He said "I didn't think then and I don't think now that the indictment" alleged first-degree murder. PCR 33/475.

Mr. Skye said he had a serious disagreement with the appellate attorney about how that issue should have been argued on appeal. Mr. Skye said it should have been argued that essential elements for a death penalty first-degree murder case where omitted from the indictment, such that the indictment charged only manslaughter or maybe second degree murder. PCR 33/476.

Mr. Skye also admitted he knew that technical errors in the indictment were waived if not raised before trial. However, he reiterated his belief that death was different, and matters which might be considered technical errors in other cases did not necessarily constitute technical error in a death penalty case. PCR 33/476-77.

Mr. Skye said that his rationale for believing the indictment was defective was embodied in his oral motion for judgment of acquittal at trial. His argument was that there was insufficient evidence to support a conviction for carjacking regardless of which vehicle was considered. He said that when he walked away from the ruling on the judgment of acquittal, his belief was that the judge was denying acquittal as to the Jeep based on the fact that Mr. Pruner's argument had focused on the Jeep. PCR 33/480-82.

Mr. Skye also recalled the argument in a pretrial motion in limine, ROA 3/432. At that hearing, the prosecution designated the truck as the object of the carjacking. However, he did not recall the State's pretrial commitment to the truck while he was making his argument in the motion for judgment of acquittal. PCR 33/483.

Mr. Skye agreed that the issue could have been argued differently, and that he could have argued that the truck could not have been car-jacked because the Van Dusens were a mile away from the truck when they were killed and not in possession. He claimed he had essentially argued that point. PCR 33/483-84. Skye did not make the argument and was ineffective for his failure to do so. Mr. Skye said he did not argue that the truck could not have been stolen or car-jacked because of the Bill of Sale because it was part of a fraudulent taking. PCR 33/483-84.

Mr. Deparvine testified that Mr. Skye told him that the truck could not have been the object of the carjacking because no forensic evidence was found in the truck, and the victims had been killed in the Jeep. Every representation Mr. Skye made to him about the object of the car-jacking was that the Jeep was the vehicle at issue. PCR 35/686.

Mr. Deparvine was denied the protections of the applicable elements of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and the equivalent Florida protections. The State's theory of the case flip-flopped depending on which vehicle served its purposes at the moment. Because the grand

jury transcript was not released, it is unknown which vehicle the State elected for the indictment.

At the Motion in Limine, it was the truck. At the trial, it was the Jeep. At the Motion for Judgment of Acquittal, it was the Jeep. For the jury, it was argued it was the truck. Mr. Deparvine was convicted for car-jacking a vehicle, but no one knows which one.

Defense counsel's failure was unreasonable under prevailing professional norms. Had counsel acted competently, there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt, in light of the totality of the evidence. *Strickland.* Further, had counsel preserved the issue, this Court's ruling in the direct appeal on the car/truck discrepancy would have been different, resulting in relief.

ISSUE 5

DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO IMPEACH PAUL LANIER.

A. Defense Counsel Was Ineffective When He Failed to Present Evidence Rebutting and Impeaching Paul Lanier on His Claim That He Followed the Defendant and Rick Van Dusen Back to the House.

Anticipating the Defendant was going to assert that his blood got on the Jeep Cherokee steering wheel when he drove it back to the house, the State called Paul Lanier as a witness. Lanier testified that he was at the Van Dusens' home on Tuesday,

November 25, 2003, ROA 34/2721. He had also been to the Van Dusens' home about a week previously. ROA 34/2724. Lanier said he had been driving around and had spotted the 1971 Chevrolet pickup truck going down the street. He followed Rick Van Dusen and a person he identified as defendant back to the Van Dusens' home. The Defendant was driving and Rick Van Dusen was the passenger. ROA 34/2725-27.

Defense counsel called Detective Hoover as a rebuttal witness. Detective Hoover testified that when he interviewed Paul Lanier on Wednesday, November 26, 2003, Paul Lanier told him that he had been at the Van Dusens' home on Sunday, November 23, 2003. Furthermore, Paul Lanier never mentioned anything to him about being at the Van Dusens' home on either Tuesday, November 18, 2003, or Tuesday, November 25, 2003. ROA 37B/3193-94.

The jury could reasonably conclude that since Lanier testified that he observed both the Defendant and Mr. Van Dusen returning to the house in the Chevy pickup truck, Defendant's testimony about running out of gas and driving the Jeep Cherokee back to the house was false.

At the evidentiary hearing, Detective Hoover testified that Lanier showed up at the victims' home the evening their bodies had been found. Mr. Lanier told Hoover he had been at the house two days before, Sunday evening, talking about buying the truck. While he was there, he saw a white male, 40 to 45 years of age, 6 feet, 200

pounds, with a full beard, wearing blue jeans, a Chevy baseball cap, and aviator glasses. Mr. Lanier did not tell Hoover of any other visits. Lanier did not tell Hoover anything about following the truck or seeing the truck being driven back to the house. PCR 31/220-23.

Mr. Skye said that Mr. Deparvine told him that he had gone on a test drive with Mr. Van Dusen the Sunday before Thanksgiving. They ran out of gas, Mr. Deparvine cut his finger on the carburetor reopening a wound from work, and then Mr. Deparvine drove the Jeep back to the house. PCR 33/439-40. Mr. Skye said Mr. Deparvine had told him in their first interview that he had cut his finger while getting the truck started. Mr. Skye said he said "Okay, fine, whatever." PCR 34/567. Mr. Deparvine later told him he had forgotten to tell him that he had driven the Jeep back to the house. PCR 34/567-68.

Skye also recalled that Mr. Lanier said in his deposition for the first time that he had seen Mr. Van Dusen driving the truck back to the house on an apparent test drive. He said that Lanier claimed he told that to Detective Hoover but Detective Hoover wasn't writing anything down. He also recalled that Lanier had said in deposition that Ms. Fisher was not with him when he saw the test drive. PCR 33/442-43.

Skye knew that Mr. Lanier's companion, Assunta Fisher, testified in her deposition that she and Mr. Lanier saw the truck sitting in front of the Van Dusen

home and that Mr. Lanier wanted to look so they stopped and talked about the truck. He also recalled that she said she saw someone who looked like Mr. Deparvine. She did not see Mr. Van Dusen driving the truck on a test drive with someone who looked like Mr. Deparvine in the passenger seat. PCR 33/443.

Mr. Lanier's story changed at the evidentiary hearing. Lanier said the first time he saw the Van Dusens was the Sunday before Thanksgiving, when he and Assunta Fisher were out house hunting. He talked to Mr. Van Dusen about the truck but made no offer. PCR 32/334-37. He said the second time he saw the truck was the Tuesday the Van Dusens died, when he and Ms. Fisher were driving to their own home. They saw the truck headed towards the Van Dusen home with Mr. Deparvine at the wheel.. They pulled up to the Van Dusen house and Mr. Van Dusen said he had sold the truck to Mr. Deparvine. Mr. Deparvine left, and shortly thereafter Mr. Van Dusen and his wife left to deliver the truck. PCR 32/340-44. Of particular note is that for the first time, Mr. Lanier testified that Mr. Deparvine was driving the truck. PCR 32/338.

Ms. Fisher did not testify at trial. At the evidentiary hearing she refreshed her memory from her deposition and testified consistently with the deposition. She and Lanier had been looking for houses the Sunday before Thanksgiving when they saw the truck and Lanier stopped. She never saw the truck being driven. PCR 32/361-65. Ms. Fisher said they next stopped at the house the night of the murders and said good bye to the Van Dusens as they prepared to deliver the truck to the buyer. PCR 32/365-

67. Her story directly contradicts Mr. Lanier's as to when Lanier and Mr. Van Dusen discussed buying the truck, and as to the fact they pulled up to the Van Dusen home Tuesday evening without seeing the truck being driven.

The trial court found it significant that Ms. Fisher said, when asked if she saw the truck driven "No. Not that I remember," PCR 32/362, Order, PCR 9/1670 "Fisher did not unequivocally deny that she saw the truck driven, but only that she did not recall it." However, Fisher had refreshed her memory from the deposition taken much closer in time to the murders and nothing suggested anything other than what she testified to – they stopped while looking for houses and the truck was at the house, never seen driven.

Mr. Skye failed to utilize the evidence he had to establish that Mr. Lanier could not have seen Mr. Deparvine riding as a passenger in the truck as it returned to the Van Dusen home. If he had seen someone returning to the house in the passenger seat on Tuesday, November 18, 2003, a date Lanier came up with at trial, the description did not match Mr. Deparvine, and, regardless, the incident when Mr. Deparvine drove the Jeep occurred on Sunday, November 23, 2003. He could not have seen Mr. Deparvine riding as a passenger November 23 - Ms. Fisher was with him and she only saw the truck parked at the Van Dusen home. Instead, the possibility was left open that the jury believed the State's closing argument, that Mr. Deparvine had never driven the Jeep, and had ridden back with Mr. Van Dusen driving the truck.

B. Defense counsel was ineffective when he failed to present evidence that Paul Lanier never made a $13,000.00 offer for the truck.

At trial, Lanier testified that he offered Mr. Van Dusen $13,000.00 for the truck and told him that he "wouldn't have no problem paying it, but I probably need a week or so." ROA 34/2729. The State offered this testimony to show that Rick Van Dusen would not have sold the truck to Defendant for $6,500.00 when Lanier was offering him $13,000.00 for it.

Mr. Lanier never made an offer to buy the truck for $13,000. Mr. Lanier testified at the evidentiary hearing that when he asked Mr. Van Dusen about the truck on his first visit, Mr. Van Dusen told him he wanted $12,000 for the truck. Mr. Lanier said he told Mr. Van Dusen he would love to have the truck for his little boy. Mr. Van Dusen asked Mr. Lanier to make an offer for the truck, and Mr. Lanier said $10,000 would be nice. Mr. Van Dusen did not accept the offer. PCR 32/336.

Mr. Skye missed the opportunity to impeach Mr. Lanier when he testified at trial that he made a firm $13,000 offer to Mr. Van Dusen and told him he would have no trouble raising the funds. In the pretrial deposition Mr. Skye took, Lanier was far more equivocal about when or if he could get the funds, which, again, would suggest that Mr. Van Dusen would have been more likely to accept Mr. Deparvine's lower but sure offer. Further, Assunta Fisher in deposition and at the evidentiary hearing testified that she and Lanier were at the Van Dusens' house before 5:20 p.m. Tuesday

the 25th. This would have impeached Lanier on his testimony that he was there with the Van Dusens after 5:30 pm, further weakening his testimony. Skye also failed to impeach Lanier with Detective Hoover's report and testimony.

C. Defense Counsel Was Ineffective When He Failed to Present Evidence and Argument That Paul Lanier Was Actually at the Van Dusens' Home on Both Tuesday, November 18, 2003, and Sunday, November 23, 2003.

True to his pattern, Mr. Lanier testified to a new scenario at the evidentiary hearing. He said he visited the Van Dusens' house twice. The first time was when he was with Assunta Fisher looking for houses for sale. The next time was on the Tuesday before Thanksgiving when he and Assunta were returning to their home after picking up the children from school. He saw the truck being driven north from the Fort De Soto area. This time, Mr. Van Dusen was sitting in the passenger seat and someone else was driving the truck. Lanier says he told Ms. Fisher he thought Mr. Van Dusen was going to sell it.

Mr. Van Dusen told Lanier that the man who was there was going to buy the truck. Lanier took one last look at the truck and figured it wasn't meant for him since he didn't have the money. He and Assunta walked away. As they left, Lanier noticed that a gold Maxima was parked there with an upside down license tag and an outdated sticker. Lanier said he saw the potential buyer get in the Maxima and leave. Mr. Van Dusen told them he was going to sell the car and deliver it. Lanier said he offered to

go with Mr. Van Dusen to Mr. Van Dusen said he and his wife would take care of it. PCR 32/341-43..

Mr. Lanier said he told the police about seeing the truck being driven while he was driving with Ms. Fisher. Lanier says he also told detectives about the visit on Sunday. He also said that Mr. Deparvine was not at the house when he visited on Sunday. Neither of the detectives who spoke with him asked him if he had made any other visits to the house. Mr. Lanier reiterated that he had only been to the house twice. PCR 32/344-47.

Mr. Deparvine testified that he told Mr. Skye at trial it was good for the case when Mr. Lanier testified that he saw someone riding with Mr. Van Dusen in the truck on the Tuesday, November 18, 2003, a week before the murders. It was good for several reasons: Mr. Lanier described someone who did not resemble Mr. Deparvine as the rider on that Tuesday; it was possible Mr. Van Dusen was in town on Tuesday the 18th because his brother had testified that Mr. Van Dusen did not arrive in Raleigh until the 19th, so that anyone who saw Mr. Van Dusen on the 20th in St. Petersburg would be lying; and that if Mr. Lanier had offered $13,000 on the Sunday before Thanksgiving, November 23, 2003, the day Mr. Deparvine struck the deal at half the price, the jury might have trouble believing that scenario – but, if Lanier had made the offer on the 18th and asked for time to come up with the money, when he failed to produce the money the jury would be more likely to believe that Mr.

Van Dusen would accept the bird-in-the-hand cash offer made by Mr. Deparvine. PCR 35/677-80.

At trial, Mr. Skye proceeded to eliminate the November 18 scenario in cross examination, destroying a useful advantage in the case. PCR 35/681.

Mr. Lanier's statements have been inconsistent at every turn. The defense should have let the November 18, 2003, date stand, as it did not inculpate Mr. Deparvine. Instead, cross examination left the State free to argue in closing that Lanier saw Mr. Deparvine riding as a passenger in the truck on Sunday the 23rd of November 2003.

The value of Mr. Lanier's testimony at the evidentiary hearing is only to destroy any shred of credibility. Obviously, his statement that Mr. Van Dusen was the passenger, and the other man was the driver, corroborates Mr. Deparvine. PCR 32/338. That testimony negated the inculpatory testimony at trial.

Trial counsel had many ways to impeach Mr. Lanier at trial – his own prior inconsistent statement in deposition, his prior inconsistent statement to Detective Hoover, and Assunta Fisher's consistent testimony which was inconsistent with both of Mr. Lanier's pretrial statements.

D. Defense Counsel Was Ineffective When He Failed to Call Assunta Fisher to Refute Paul Lanier's Claim That the Van Dusens Were Still Home as Late as 6:00 P.m. on Tuesday, Evening, November 25, 2003.

Assunta Fisher remembered that the last time she saw the Van Dusens was about 20 after five in the afternoon. She testified that was the time because she and Mr. Lanier had to leave to pick up a child from childcare. PCR 32/363-64. Her testimony would have impeached Lanier on his testimony that he was there with the Van Dusens after 5:30 pm, further weakening any testimony he gave which might be deemed inculpatory.

E. Defense Counsel Was Ineffective When He Failed to Adequately Impeach Paul Lanier's for His False Representation of His Educational Background.

In his deposition, Paul Lanier testified that he graduated from the University of South Florida with a Bachelor of Arts Degree. Defense counsel obtained a letter from University of South Florida registrar showing that Paul Lanier never attended, let alone graduated. PCR 17/3089 (Defense Trial Exh. 4).

At trial, Lanier testified that he graduated from the University of South Florida. When confronted with the documentation from the university that he had never attended or graduated, he still claimed to have graduated from USF. The jury never had the benefit of learning of the perjury, however, because, when defense counsel attempted to impeach Paul Lanier with the university documentation by proffering the document the trial court refused to take judicial notice. As a result, the defense was unable to make the perjury known to the jury by informing it of the USF documentation, or by publishing it to the jury. ROA 34/2743-44.

Mr. Skye didn't think there was a problem to get it admitted, and had not done any research for the trial. He recalled he was able to submit the document into evidence as self authenticating, along with some other documents, at the beginning of the defense case. However, the document was not identified to the jury nor was it published. He couldn't remember any reason why he did not publish it to the jury: PCR 33/446-49. "And there was not any particular reason that I didn't publish it in a fashion you're describing except that there are other things to do. I can't tell you anything more. No particular strategy not doing it, but simply other things to do." *Id.* at 448. Contrary to the trial record, Mr. Skye testified that he thought the jury had specifically been told that the USF letter was being admitted at that point. *Id,* at 449. Mr. Skye did not argue the USF letter in his closing "because there was simply in my judgment at that time other important things to talk about and I only had the time that I had." *Id.* at 449. Skye did not make the jury aware of the impeaching document or argue its effect in closing.

Mr. Deparvine testified he was completely unaware that the USF registration letter impeaching Mr. Lanier was admitted until the postconviction proceedings. PCR 35/683-84.

The USF letter was the most valuable of all the Lanier impeachment tools. The State was able to explain away the discrepancies in his testimony as innocent faulty recollections. Lying about a college degree is an entirely different form of lying – one

does not forget whether one attended college and got a degree. The registrar's letter is an unassailable confirmation of the lie. But the jury was not made aware of this evidence – it got shoved into the pile of evidence without comment to the jury, without publishing to the jury, without argument to the jury. If Mr. Deparvine, the person with the most to lose, was unaware the letter was introduced, it is even more unlikely the jury would have known.

ISSUE 6

DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO PRESENT EVIDENCE AND ARGUMENT THAT RICK VAN DUSEN DID NOT TURN DOWN A $15,000.00 BID AT AUCTION AND WHEN HE FAILED TO CHALLENGE STUART MYERS ON HIS TESTIMONY THAT RICK VAN DUSEN SET A RESERVE PRICE OF $17,000.00.

At trial, the State introduced documents from an auto auction showing Mr. Van Dusen consigned his truck for auction in March, 2003. According to the documents, the Chevy pickup truck did not sell because Rick Van Dusen set a reserve price of $17,000.00 and the highest bid was $15,000.00. ROA 33B/598-99. The State used the evidence in closing to argue that Mr. Van Dusen would not have accepted Mr. Deparvine's $6.500 purchase offer because he had turned down a $15,000 offer at the auction.

Mr. Skye testified that he would not have objected to the State's closing argument. He thought it was "simply a matter of speech whether or not he rejected the

offer or refused anything less than $17,000..."He had no recollection of making a specific tactical decision to ignore the issue. PCR 33/490-92.

The shading of meaning affected the jury's perceptions. The State shifted the proof from Mr. Van Dusen setting a high value on his truck for auction which resulted in a ministerial closing of the bidding, to a perception framed in terms as if he rejected a cash-in-hand offer.

Mr. Skye also recalled that the auction consignment agreement showed a $1700 reserve. He believed it was a typo. He could have argued that the typographical error showed the unreliability of the documents the State was attempting to introduce, but he thought it was so obviously a typo that he didn't think the judge would listen. PCR 33/487.

Attacking the reliability of the records should have resulted in the records being deemed inadmissible. A discrepancy in documents about a reserve price the State relies upon to refute the claim that Mr. Van Dusen would sell his truck for $6,500, is an important evidentiary matter. The business records were prima facie unreliable and should not have been admitted.

ISSUE 7

NEWLY DISCOVERED EVIDENCE CONCERNING THE MARKET VALUE OF THE 1971 CHEVROLET PICKUP TRUCK REQUIRES A NEW TRIAL.

The State argued that Rick Van Dusen would never have sold his Chevy pickup truck to Defendant for$6,500.00. The State introduced an appraisal showing the pickup truck was worth $15,500.00, ROA 33A/2521, the auction bid for $15,000.00, ROA 33B/2598-99, and various newspaper ads that Rick Van Dusen had run. ROA 35/2793-97.

Law enforcement took possession of the truck Thanksgiving Day 2003. In August 2004, the estate of Richard Van Dusen initiated proceedings to regain possession of the truck.

At trial in July 2005, a State witness testified that the 1971 Chevrolet pickup truck was worth $15,500.00 in July 2004, and that he would pay $15,000.00 for the truck at the time of his testimony. ROA 33A/2513-21. A defense expert valued the truck at $7,500.00. ROA 39/3490.

On October 18, 2005, less than three months after trial, the estate sold the truck for $6,000.00, after the jury trial. This price was $500.00 less than what Defendant had paid for it and $9,000.00 less than what the state expert had testified it was worth at the time of trial.

The sale price of $6,000 supports the defense evidence at trial and rebuts the state's artificially inflated price. The truck was worth about $6,000, a fact Mr. Van Dusen came to realize and a fact his estate abided by as well.

Michelle Kroger was Richard Van Dusen's daughter and their estate administrator. PCR 35/717. When the sheriff's office turned the truck over to her, a family member towed the truck to a shop where he worked in Pinellas County. The repairs needed to restore the truck to saleable condition cost less than $500.The truck did not need to be painted and, after it was detailed, it did not appear to be in any way remarkably changed in appearance in comparison to how it looked before the murders. PCR 35/724-26.

The car was parked beside U.S. 19 asking $10,000. Ms. Kroger rejected the first offer, for $9,000, because the buyer wanted to make payments. The second offer was made by a man who said "all he had was $6,000 and he wanted the truck. And because I wanted to get rid of it," she accepted the offer. Ms. Kroger said she sold it for $6,000 because her father's estate was worth $400,000, so they didn't need the money, they just wanted to get rid of it. PCR 35/720.

The evidence of the true value of the truck, and the strikingly similar behavior of the estate and Mr. Van Dusen would probably have resulted in acquittal at trial. The value of the truck was a central portion of the evidence at trial, with competing expert testimony. The value issue was extensively argued by the State in closing.

A jury hearing this testimony would have grounds to agree with the defense expert that the $15,000 appraisal was untenable, and that a value in the $6,000 range, reflected in two cash sales, was the fair market value. A jury would also conclude that

Ms. Kroger's behavior, mirroring her father's, showed that Mr. Van Dusen accepted the $6,5000 offer to move on to more important things. Instead, the State allowed the disposal of a critical piece of evidence seized in this case in derogation of Mr. Deparvine's due process rights.

A serious issue was also presented by the impropriety of the state releasing a central piece of evidence in the case, the truck, with no notice whatsoever to the defense, in violation of the rules and procedures governing the release of evidence.

The State violated Mr. Deparvine's fundamental federal right to due process when the Sheriff's Office released the truck to the family. Mr. Deparvine was a party to a civil replevin action filed by the estate but there is no record of notice to Mr. Deparvine that the object of the replevin action was disposed of without a ruling by the Court.

The more serious issue is that the State released the truck in violation of the trial court's inherent exclusive jurisdiction over the truck under the principle of in custodia legis. This Court addressed the principle in a case where a party sought recovery of money held by a chief of police as evidence in a pending criminal prosecution. This Court held that the criminal court had exclusive jurisdiction to entertain the replevin action, and the civil court should not have entertained the action:

> It is our view that the Criminal Court of Record of Dade County has inherent authority and jurisdiction to determine the disposition of the subject money confiscated temporarily for evidentiary purposes. We do not believe the civil courts should be permitted, as here attempted, to cross over and intrude in criminal matters pending within the jurisdiction of the criminal courts. **It would seriously conflict with and hamper criminal processes if evidence or contraband seized for criminal trials or purposes could be made the subject of recovery proceedings in the civil courts through procedures bypassing the criminal courts.**
>
> . . . .
>
> So that there may be no mistake of our view, we hold that the subject money held by the Chief of Police of the City of Miami is held by him in custodia legis for the Criminal Court of Record of Dade County to be used in the prosecution of Simmons under the information triable in the Criminal Court of Record, unless and until the Criminal Court of Record concludes otherwise, subject to appellate or supervisory review.

Garmire v. Red Lake, 265 So.2d 2, 4-5 (Fla. 1972).

The State acted beyond its authority in releasing evidence which had been seized by the Sheriff's Office and held in "in custodia legis in a criminal court for evidentiary or other purposes." Had the defense been given notice, it would have discovered the new evidence of the market value of the truck ($6,000) well before the *Spencer* hearing and in time to bring the matter to the attention of the Court. A new trial should have been ordered upon discovery of the new evidence refuting the State's case as to the value of the truck, a critical issue at the trial.

The Sheriff's Office release of the truck with no judicial proceeding was clearly in violation of the requirements of the law recognized by the court in *Garmire*.

Because *Garmire* recognizes that the evidence is part of the criminal action, the due process violation is not civil in nature – a right recognized by *Garmire* to have the evidence being held by the State in custodia legis for the court be protected by the court subject to notice and hearing was a due process protection against overstepping by the State in a criminal proceeding.

To the extent that defense counsel might be faulted for failing to conduct its own monitoring of the status of the truck, trial counsel was ineffective in failing to have undertaken the task. However, it appears that had the defense undertaken the task, the Sheriff's Office's unilateral disposal of the truck without notice or hearing suggests that the effort would have been futile.

The circuit court ruled that the due process claim was raised for the first time in the closing argument and refused to address it. However, the postconviction motion included due process as one of the constitutional protections Mr. Deparvine was seeking. The motion, and the reply to the State's response to the motion, PCR 5/847, expressly urges the impropriety of the State's improvident disposal of critical evidence without notice or hearing. The facts were fully developed in the pleadings and inthe evidentiary hearing, and the State had a full opportunity to respond.

The due process element was also essential in establishing the first prong of the standard for newly discovered evidence, that the evidence could not have been discovered by due diligence:

> To obtain a new trial based on newly discovered evidence, a defendant must establish two things: **First, the defendant must establish that the evidence was not known by the trial court, the party, or counsel at the time of trial and that the defendant or defense counsel could not have known of it by the use of diligence.** Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *See Jones v. State*, 709 So.2d 512, 521 (Fla.1998).

Hurst v. State, 18 So.2d 975, 992 (Fla. 2009) (emphasis added).

The failure of the State to provide due process, on which diligent counsel could reasonably rely, establishes due diligence. It is inconceivable that the State and circuit court could have failed to interpret the claim as incorporating a due process claim:

> The State's argument that the claim must fail because the sale price would have been discovered with due diligence before sentencing (but months after the guilty verdicts and recommendation of death in early August 2005) raises a fact issue which requires an evidentiary hearing. . . . The truck was retained by the Sheriffs Office until after the trial verdicts in August 2005, and then, without notice to Mr. Deparvine, the sheriffs office allowed the estate to take possession and the estate sold the vehicle, again without notice. Trial counsel was not involved in the separate civil proceeding and had no cause to ascertain the possession and ownership status of the vehicle.
>
> If, indeed, it can be argued that the new evidence could have been discovered with due diligence, then trial counsel was ineffective for failing to exercise such due diligence.

PCR 5/847. The due process claim was fairly raised in the motion and fully briefed in the closing argument. The State recognized the challenge to the propriety of its actions and had every opportunity to present evidence and argument in rebuttal.

ISSUE 8

DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO CHALLENGE BILLIE FERRIS ON THE ACCURACY OF HER RECOLLECTION OF KARLA VAN DUSEN'S STATEMENTS.

The cornerstone of the state's case was a long telephone conversation between Karla Van Dusen and her mother, Billie Ferris, the evening of November 25, 2003, between 5:54 p.m. and 6:20 p.m. Cell phone records indicate that the call began in the area of Defendant's apartment in downtown St. Petersburg and ended en route to the northern end of Pinellas County.

Defense counsel was ineffective when he failed to develop and argue facts which would have raised a reasonable doubt of the accuracy of Ms. Ferris' recollection.

Defense counsel filed a pretrial Motion In Limine to suppress certain statements that Karla Van Dusen allegedly made during that phone conversation:

> "she was driving in a vehicle," and that she was "following Rick and the guy who bought Rick's truck in order to get the truck paperwork done," because "this guy knew a person who could get the truck paperwork done for them tonight"; that "Rick was satisfied with the selling price he got for the truck and that the guy had paid them cash .. that they did drop the price of the truck a couple of thousand dollars, but Rick was happy to finally be selling the truck," and that "if the man who bought the truck was black . . Karla would have mentioned that during their conversation"; (page 629 of State's Discovery).

ROA 1/112 (Defendant's Motion In Limine).

Ms. Ferris made these statements to Detective Hoover. Detective Hoover testified that his report was accurate. At the postconviction hearing, Hoover said his

contemporaneously-made notes of the phone call to Ms. Ferris reflected that Ms. Ferris told him that Carla Van Dusen told her that Rick was satisfied with the selling price that he got for the truck and the guy paid in cash. PCR 31/218.

On December 2, 2004, the trial court denied a defense motion in limine as to these particular statements, finding that they fell within the "spontaneous statement" exception to the hearsay rule. ROA Vol. 2 251-58.

At trial, after Ms. Ferris testified that she was "following Rick and the guy that bought the truck," the State asked, not how the buyer had paid for the truck he had already bought, but "Did Karla Van Dusen tell you how the guy was going to pay for the truck that night?" Only then did Ms. Ferris imply that the sale was not completed when she testified in response "She said he's got cash." ROA Vol. 29 1869.

Defense counsel was ineffective when he failed to challenge Billie Ferris on the accuracy of her recollection of this particular statement at trial or to impeach her with the testimony and report of Detective Hoover. Counsel was also ineffective for failing to object to the state's leading question which shifted Ms. Ferris' testimony that the sale was complete to a sale not yet consummated.

With Karla Van Dusen saying that the sale of the truck was a completed cash transaction, consistent with the notarized Bill of Sale, it would have been undisputed that ownership had been transferred. This would have rebutted the state's theory that

Defendant killed the Van Dusens because he coveted their Chevy pickup truck but did not have the funds to purchase it.

Impeaching Ms. Ferris on this fact would give the jury cause to question 72-year-old Billie Ferris' memory pertaining to the remainder of Karla Van Dusen's alleged statement, i.e., whether Karla Van Dusen had said that she ".. was following Rick and the guy who bought the truck," or whether she actually discussed following someone who was selling a truck after completing the sale to Mr. Deparvine, consistent with the Defense case, ROA Vol. 38 3338. This difference in wording would have been even more suspect with the alibi testimony of Daryl Gibson, also argued in this brief.

Defense counsel could also have presented evidence and argument that Billie Ferris had suffered a stroke after speaking to Detective Hoover but before the trial. In a deposition taken after the State sought to depose her to perpetuate testimony because of the stroke, she testified she had suffered a stroke three months before the trial. PCR 17/3019. Although she claimed the stroke had not affected her memory, the jury should have been allowed to consider the fact, in light of various memory lapses demonstrated in her cross examination, ROA Vol. 29 1872, 1874, 1878.

Mr. Deparvine testified at the evidentiary hearing that he tried to get Mr. Skye to understand the significance of Billie Ferris' first statement that the truck had been sold and the buyer paid cash. The first statement could have been made while Mrs.

Van Dusen followed Mr. Deparvine and her husband around the block to park behind the apartment to complete the paperwork for the sale of the truck. PCR 35/691-92. The fact that the sale was completed behind the apartment was also important to support Mr. Deparvine's position that he had no motive to steal the truck because he already owned it. Instead, Mr. Skye "blew it off." PCR 35/687.

Ms. Ferris' statement closest in time to the event would have been the most accurate (a point the State made at the evidentiary hearing to counter Mr. Lanier's inconsistent testimony at the evidentiary hearing). Had Mr. Skye clarified this point with Ms. Ferris, the jury would have been properly informed that Karla Van Dusen had said the deal was done and paid for.

During the State's cross-examination, Mr. Skye testified he did not want to appear to be an ogre by attacking a tragic survivor. He said he did not think he could convince the jury she was lying. He claimed that he thought he had adequately impeached her about her "misremembering" certain things, but he did not want to aggressively cross-examine her because it would make him look like "The meany, a bully, a bad guy" beating up on a sympathetic old lady. PCR 33/521.

Skye created a straw man. He did not have to aggressively attack Mrs. Ferris. Skye was an experienced trial attorney who certainly knew how to handle a witness without appearing to attack her. It was not necessary to attack Ms. Ferris as a liar. No one has ever suggested she was a liar. The only suggestion is that Ms. Ferris stated,

when the facts were most fresh in her mind, that her daughter told her the sale was completed, the buyer paid cash, and she was following them in a truck at a time consistent with driving to the rear of the apartment building. Refreshing her memory with Detective Hoover's report would have sufficed.

Instead, Skye failed to refresh her memory, and therefore cannot be excused by his self-serving recollection that "I impeached her as best I could." PCR 33/521. His best did not include refreshing her recollection with Detective Hoover's report, or with putting Detective Hoover on the stand to testify about her prior statement.

Skye claimed he put Hoover on to "impeach her to the extent that we could with any prior inconsistent statements she made on the witness stand," PCR 33/405. To the contrary, Skye only addressed a minor discrepancy:

> Q. All right. Now, during that telephone conversation, did -- among other things, did Mrs. Ferris tell you that Rick -- concerning the sale of the truck, that Rick had to drop the price of the truck by a couple of thousand dollars?
> A. Yes.

ROA 37/3191. Skye did not bring out that Ms. Ferris' initial statement to Hoover was that the sale was completed.

ISSUE 9

DEFENSE COUNSEL WAS INEFFECTIVE IN DEALING WITH THE ERRONEOUS ADMISSION OF HEARSAY TESTIMONY BY BILLIE FERRIS, FAILING TO PRESERVE HARMFUL ERROR OR EMPHASIZE THE EXCULPATORY ELEMENTS OF THE TESTIMONY WHICH WAS ALLOWED.

The timing of the phone calls and the content of the conversation between Ms. Ferris and her daughter was critical to understand the sequence of events exonerating Mr. Deparvine. Mr. Skye thinks he discussed with Mr. Deparvine the fact that the phone records appeared to show that Mrs. Van Dusen was talking to her mother at the time Mr. Deparvine said they were driving around the block to the parking lot behind his apartment. Mr. Skye phrased his recollection in a manner suggesting he did not believe Mr. Deparvine's recollection of events, i.e. driving around to the parking lot to complete the purchase of the truck. "[T]hey were supposedly driving around the block and going to the parking lot behind this apartment." PCR 33/407.

Mr. Skye told Mr. Deparvine he believed Karla had mentioned following the guy who bought the truck paid cash during the time that she was driving around the block to the parking area behind the apartment. He did not recall advising Mr. Deparvine he planned to argue that fact in the closing, nor did he recall specifically plan to do so. Mr. Skye said time for closing argument was limited and if he had planned to make that argument, he might not have done so because he believed other things were more important to talk about. PCR 33/408.

ISSUE 10

DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO FULLY DEVELOP EVIDENCE AND CROSS-EXAMINE STATE WITNESS PETER WILSON

A key piece of evidence in the state's case was several spots of blood found on the steering wheel of the Van Dusens' 2001 Jeep Cherokee that matched Defendant's DNA profile.

Mr. Deparvine told investigators and the jury that his blood got on the Jeep steering wheel on the Sunday prior to the homicides when he drove the Jeep back to the Van Dusens' home after the 1971 Chevrolet pickup truck had run out of gas during a test ride. To counter this, the State called Peter Wilson. Mr. Wilson, a co-worker of Rick Van Dusen's, testified that he spent a good portion of the afternoon before the murders riding with Rick Van Dusen in the Jeep. He did not recall seeing any stains on the steering wheel. ROA 32/2380. The implication from this testimony was that if there were no blood stains, then Defendant's blood could not have been deposited on the steering wheel the previous Sunday. Hence, Defendant's blood could only have gotten on there at the time of the homicides. Defense counsel declined the opportunity to cross-examine Peter Wilson. ROA Vol. 32/2385.

Defense counsel was ineffective when he failed to develop evidence and conduct an effective cross-examination to minimize or eliminate the inference that the blood got on the wheel during the murders.

Crime Scene Technician Chuck Sackman, ROA 30/2047, and Crime Scene Technician Ronald Cashwell, ROA 31/2272, testified before Peter Wilson. Sackman took photos of the interior of the Jeep including close-ups of the steering wheel (State

exhibit 57-72) ROA 30/2062. Blood was undeniably on the black leather steering wheel after the murders. It was not visible without the closeup attention of a crime scene technician who knew there was blood on the wheel (given the quantity of blood in the vicinity of the wheel). The Defendant's blood from the Sunday episode would not likely have been visible to a casual observer who was not looking for blood.

Detective Cashwell testified that not all of the stains on the steering wheel were visible from the passenger side (where Wilson sat) unless a flashlight was used. PCR 32/296. "[S]ome of them were visible. The ones that were really small, you had to get with a flashlight to actually see. Q. So even up close at reading length, you had to use the flashlight to see? A. Correct." PCR 32/287.

Clarifying Mr. Wilson's lack of opportunity to see the blood spots would have been supported by Deputy Cashwell's testimony that it was impossible to see the small blood spots without getting real close and using a flashlight. Trial counsel should have developed both witnesses on this point. Instead, the jury was left to believe the State's argument that the steering wheel didn't have any blood on it before the murders because Mr. Wilson didn't see any.

Additionally, defense counsel could have drawn upon the trial testimony of Deputy Cashwell for the cross-examine of Mr. Wilson. Under cross-examination Deputy Cashwell testified that he noticed a "red substance" at every position on the steering wheel that he swabbed. He said that he swabbed each position "all the way

around," indicating that the blood or DNA could have come from any point on the steering wheel, driver's side, side, or dash side. He testified that he did not recall seeing any "red substance" on the side closest to the dashboard. But he added that "It would have been real hard from where I was standing outside the vehicle to look behind the steering wheel. " ROA 31/2289-90.

The bottom line is that Deputy Cashwell gathered the DNA evidence in a manner which meant it could have just as easily come from the dashboard side of the wheel as any other portion of the wheel. Deputy Cashwell never noted where he saw the blood stains. More importantly, he could not have seen any stains on the dash side of the wheel. Defense counsel should have argued to the jury that if Deputy Cashwell could not see the back of the wheel where Mr. Deparvine's blood stains were as likely to have been as any other part of the wheel, how could Mr. Wilson have possibly noted any stains from a more distant position in the passenger seat.

ISSUE 11

DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO CALL PAUL DOMBROWSKI AS A DEFENSE WITNESS CONCERNING DEFENDANT'S ROLEX WATCH.

Mr. Dombrowski observed Mr. Deparvine wearing an expensive watch during the time they both were incarcerated at Everglades Correctional Institution around the year 2000. Mr. Dombrowski said major drug dealers were held there, and money and jewelry was easily moved in and out of the prison with the help of guards and visitors.

Inmates often wore expensive jewelry, including expensive watches like the one Mr. Deparvine wore. Prison law clerks like himself and Mr. Deparvine had a lot of prestige among fellow prisoners, so Mr. Deparvine would have had no problem keeping the watch. PCR 31/146-52.

Mr. Skye claimed Mr. Dombrowski conceded he would be a bad witness when he decided not to call him, in part because Mr. Dombrowski would not admit to how many prior convictions he had. PCR 33/550. Mr. Dombrowski never made such a concession to Skye. He always believed he would be a good witness. He had no problem testifying about his prior convictions. It was simply that he was never sure of the exact number, even at the time of the evidentiary hearing. PCR 33/159-61. He told Skye he couldn't testify as to how many prior convictions he had, and that some of them were in litigation at the time. He could readily testify that he had several or quite a few felony convictions, and he was always ready to give an exact number, qualified as being to the best of his knowledge, if told to do so. PCR 33/172. Mr. Skye never offered to give Mr. Dombrowski a list of his prior convictions to assist him in determining the precise number or advise him how to check for himself. PCR 33/181. Mr. Dombrowski said letters seeking more information about the case, which Skye testified impeached him, merely sought information so he could, as an experienced jailhouse law clerk, do some legal research on his own to try to help Mr.

Deparvine. PCR 33/178-79. There is no rule of law or evidence that would have required Skye to have turned over the letter to the State.

Nicholas Klein was also incarcerated at Everglades with Deparvine and Dombrowski, and was also a law clerk. He saw Mr. Deparvine wear a gold colored watch every day. Mr. Deparvine said it was given to him for legal work. PCR 33/185. He said law clerks often bartered services for jewelry and other things. A limit to the value of jewelry at the prison was laxly enforced because more expensive jewelry had been grandfathered in when the value limit was imposed. PCR 33/186-88. The fact that expensive jewelry was contraband tended to reduce its value, such that Mr. Klein received a $1500 medallion to satisfy a $250 debt. PCR 33/198.

Mr. Skye testified that Mr. Dombrowski told him that he remembered Mr. Deparvine had a nice watch. He said Dombrowski told him that people were allowed to wear watches at Everglades. Mr. Skye did not know that there was a grandfathering in of expensive jewelry. Mr. Skye did not inquire of or learn that a large number of drug dealing defendants were incarcerated at Everglades at that time, and that many inmates wore expensive gold chains and other jewelry. PCR 33/426.

Mr. Skye interviewed Mr. Dombrowski the evening before the defense began its case. It was at the end of that meeting that he decided not to call Mr. Dombrowski. He said Mr. Dombrowski agreed with him that he would have been a "horrible witness." PCR 33/426-29.

Regarding the purported concern that Dombrowski's letter asking for information about the case could impeach him, Skye conceded that the letter had nothing to do with the watch issue. Mr. Skye read into the record the remainder of Mr. Dombrowski's letter requesting the information, wherein he informed the defense of his eight years studying Florida criminal law, his access to the law library, and offered to use his knowledge and access to the library to be "of any assistance." PCR 35/591-92.

Skye had spoken to Mr. Dombrowski on another occasion and recorded his recollections in a memo introduced as State Exhibit 9. In that meeting, Mr. Skye delved into Mr. Dombrowski's prior convictions, that he recalled Mr. Dombrowski saying that he would be able to say "several or quite a few," but that he could not settle on an exact number. PCR 34/546-49. Nowhere did Skye testify that Dombrowski said he would lie, only that he was reluctant to settle on an exact number.

Mr. Skye testified that he had several concerns about calling Mr. Dombrowski: he was residing in prison; he would probably appear in prison clothing; his demeanor during the pretrial interview; his vague recollection about the watch (it was "a nice watch" but Dombrowski did not say to Mr. Skye that it was a Rolex); and what Mr. Skye characterized as an anticipation that "he wasn't even going to be forthcoming

in an honest fashion with respect to the number of prior convictions he had." T426-27.

Mr. Skye conceded that he could have clothed Mr. Dombrowski in street clothing for the trial. PCR 34/595. And he knew that Dombrowski could not settle on an exact number of prior convictions, but that he could truthfully testify that there were "quite a few."

Mr. Deparvine testified that the defense never informed him of the interview their investigator conducted with the widow of William Jamieson, the inmate who gave him the Rolex watch. He never had the opportunity to explain to counsel that inmates often claimed poverty to friends and family to get them to pay into their canteen accounts, which would explain why Mrs. Jamieson did not know about the watch. Mr. Jamieson, dying from cancer and confined to a wheelchair, used street drugs in prison to help with the cancer pain. He also was able to serve as a drug courier in the prison because guards did not search the wheelchair-bound. PCR 35/654-57.

Mr. Deparvine said he did not see defense investigator Anderson's report of her interview with Nicholas Klein (PCR 17/3076) until the postconviction proceedings. The Klein note reveals that Klein said Mr. Deparvine was often paid for his legal services, so much so that he got in trouble, that inmates had expensive watches and cash which were contraband and therefore not on inventories, that he would not be

surprised if Mr. Deparvine had been paid with a Rolex, but that "he did not remember ever seeing the client with a Rolex watch."

Mr. Deparvine testified that had he known the actual content of the interview he would have been able to suggest the follow up questions which would have elicited the testimony Klein gave at the evidentiary hearing consistent with the investigator's report. Also, the report only eliminated Klein identifying a Rolex watch, it did not eliminate Klein observing Mr. Deparvine in possession of an expensive watch of unknown brand. Further investigation would have revealed the unusual valuation of contraband in prison, which would have been valuable to inform Mr. Skye and the jury about prison culture and how it would have been possible to obtain and possess an expensive watch. PCR 35/658-61.

Mr. Deparvine testified that Mr. Skye told him that if he took the stand he would call Ms. Dacosta and Mr. Dombrowski. Instead, when the State began its rebuttal, he learned Mr. Skye was not calling either witness. This occurred in a short whispered conversation at the defense table. T548. Mr. Deparvine testified as follows:

> .... Next thing Mr. Pruner's putting on his rebuttal witnesses, you know so -- and they start talking. Wait, wait, what's going on here? There is --
>
> Q This is a conversation you had with Mr. Skye?
>
> A We at the table. But see, Mr. Pruner's witness are already talking. And I said, you know, I said, hey, what about Dombrowski and Dacosta? Don't worry about it, the State hasn't proven their case. You know so I did not hear --
>
> Q So that was the entire communication you had from Mr. Skye as to the fact that he was not going the call those two witnesses?

A Yeah, they didn't prove their case. So I was blown off for the first time there.

PCR 35/647-48.

Mr. Deparvine was denied due process and the other protections of the applicable elements of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and the equivalent Florida protections. Defense counsel's failure was unreasonable under prevailing professional norms. Had counsel acted competently, there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt, in light of the totality of the evidence. *Strickland.*

ISSUE 12

DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO REQUEST A LIMITING JURY INSTRUCTION ADDRESSING THE VOLUNTARINESS OF THE VAN DUSENS' ASSOCIATION WITH DEFENDANT.

At the close of the state's case-in-chief, the court granted judgments of acquittal on two armed kidnaping charges. The only thing that defense counsel argued in closing about the two kidnaping charges was: "Well, there's no kidnaping anymore." ROA 40/3601. Because the jury was not present for the JOA argument and ruling, they had no idea what defense counsel was talking about. Under the unique circumstances of this case, because he had been acquitted of 'confining, abducting or imprisoning' the Van Dusens, defense counsel was ineffective when he

failed to seek a jury instruction or argue to the jury that there was no evidence the Defendant forced the Van Dusens to go to Hillsborough County and remain there for hours until their deaths. See *Ottersen v. State*, 862 So2d 30 (Fla. 2d DCA 2003) (failure to seek limiting instruction raisable in postconviction claim).

The absence of evidence of kidnaping lessens the impact of the state's scenarios, as the hours between the time of the arrival in Hillsborough County and the murders leaves an unexplained break in the sequence of events which should have compelled acquittal by the jury.

ISSUE 13

DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO CHALLENGE HENRY SULLIVAN'S CLAIM THAT HE LOST HIS FLORIDA ID CARD IN JUNE 2003.

Mr. Sullivan testified at the evidentiary hearing that his brother came to him within a couple of weeks after he got out of prison in the fall of 2002 to borrow money. One of his ID cards turned up missing after Justin's visit. The ID found next to the Jeep was issued 11/26/2002, which would be about the time his brother visited. PCR 33/278-81.

Mr. Skye did not recall investigating the date Justin Sullivan was released from prison. He did recall the police reports that Henry Sullivan told the police he noticed his identification and disappeared about the time his brother Justin came to visit.

However, he did not know when Justin Sullivan was released from prison. PCR 33/452-53.

Skillful utilization of the timing of the brother's visit would have contributed to a reasonable doubt that Mr. Deparvine was the only person likely to have come into possession of Henry Sullivan's lost ID card.

ISSUE 14

DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO PRESENT EVIDENCE AND ARGUMENT THAT THE DETECTIVES FAILED TO CONDUCT A PROPER INVESTIGATION

Trial counsel was ineffective for failing to develop the evidence and present to the jury the fact that the investigation was fatally flawed because detectives focused solely on him and failed to follow up on the other leads in the case.

Other Red Pickup Truck

Despite their use of the media to find Mr. Van Dusen's truck, ROA Vol. 31.2186, detectives failed to use the same tool to seek the second red pickup. There was no evidence that detectives searched Department of Motor Vehicle records for trucks of similar vintage and body style in the area. Detectives never issued a BOLO for such a truck. Detectives never discovered that Wendy Dacosta saw the second truck. This, despite the fact that the last thing that Detective Hoover said as he left the Defendant's apartment after the initial interview was

that now the detectives had to "go look for another red Chevy pickup truck." ROA 38/3360, investigators made no effective effort.

4 x 4 Jeep For Sale

According to Mr. Van Dusen, the driver of the second vintage red Chevy truck was selling a 4 x 4 Jeep that he wanted to look at. Mr. Van Dusen had indicated in his ad that he might take a 4 x 4 Jeep in trade. ROA 35/2796. There was no evidence detectives made any effort to locate the seller of the 4 x 4 Jeep. Detectives never canvassed at checkpoints, never questioned people advertising 4 x 4 Jeeps, and never cross-checked 4 x 4 Jeep seller information with DMV records.

Missing Money

A neighbor told detectives she heard Karla Van Dusen in her back yard in the early evening after the sale in downtown St. Petersburg. There was no money in the abandoned Jeep. There was no evidence the Van Dusens had deposited the $1,500.00 down payment, and Karla Van Dusen could have similarly secreted the $5,000.00 cash from the Tuesday sale. Reasonable investigators would have conducted a search of the victims' home specifically to look for the missing cash.

Post Arrest Interrogation

After his arrest seven weeks after the homicides, the interrogating detectives refused to tell Mr. Deparvine what evidence they had that justified his arrest. The

Defendant affirmed that he had told detectives on three occasions that he only sat in the backseat of the Van Dusens' Jeep Cherokee on Tuesday evening, November 25, 2003, during the purchase of the truck. When Defendant emphasized"Tuesday evening" in his answer, the detectives asked him if he had ever been anyplace else in the Jeep Cherokee at any other time. The Defendant reminded the detectives that he had told them about the test drive the Sunday before the murders. Detective Hoover had recorded this prior statement in his report. (State's Discovery, p. 624-26). The Defendant told the detectives he had driven the Jeep back to the house after they got the Chevy pickup started. The detectives did not tell the Defendant about his blood on the steering wheel. Instead, they pressed him on whether he had a traumatic experience in the Jeep Cherokee and how his blood could have gotten all over their crime scene, the Van Dusens' bodies, and on Rick Van Dusen's turned-out pants pocket. None of the scenarios the detectives pressed on the Defendant were, in fact, consistent with the facts.

Defense counsel was ineffective when he failed to adequately cross examine the detectives to clarify their failures in investigation. Counsel was ineffective for failing to argue the lack of evidence of investigation of these matters. Proper cross examination would have made such an argument even more compelling, when the investigators were put to the test about the leads they failed to pursue which could have exonerated the Defendant or raised a reasonable doubt. To cover for the

failure of investigation, it should have been argued that the State was motivated to attempt to prove the Defendant's guilt by challenging the sale of the Rolex and the sale price of the truck. Alone and in conjunction with the other ineffective acts and omissions alleged in this Motion, counsel's failure in this Claim would have raised the reasonable doubt necessary for acquittal.

ISSUE 15

THE LETHAL INJECTION OF MR. DEPARVINE UNDER THE STATE'S PROCEDURES VIOLATES HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE EXECUTION BY LETHAL INJECTION IS CRUEL AND OR UNUSUAL PUNISHMENT.

Florida's procedures, training and method of lethal injection are unconstitutional. This Court has decided *Lightbourne v. McCollum*, 969 So.2d 326 (Fla. 2007) and *Schwab v. State*, 969 So.2d 318 (Fla. 2007) to the contrary.

Mr. Deparvine alleges, based on Florida's unique history of botched executions, that the method of execution and the training and procedures create a substantial and objectively intolerable risk of harm. A reasonably feasible alternative is to follow the practices set out by veterinarians, either using a single barbiturate or another alternative which does not include the paralytic.

ISSUE 16

FDOC'S LETHAL INJECTION PROCEDURES, COUPLED WITH FLORIDA STATUTE 945.10 WHICH PROHIBITS MR. DEPARVINE FROM KNOWING THE IDENTITY OF SPECIFIED MEMBERS OF THE EXECUTION TEAM VIOLATES HIS CONSTITUTIONAL RIGHTS.

Mr. Deparvine recognizes this Court's decision in *Bryan v. State*, 753 So.2d 1244 (Fla. 2000), holding Fla. Stat. 945.10 to be constitutional. Nevertheless, Mr. Deparvine alleges that the Florida statutory provision which prohibits the disclosure of the identity of the members of the execution team and the executioners is unconstitutional and deprives him of Due Process of law, meaningful access to the courts and protection against cruel and unusual punishment under the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and of the corresponding provisions of the Florida Constitution.

ISSUE 17

THE RULES PROHIBITING MR. DEPARVINE'S LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT VIOLATES CONSTITUTIONAL PRINCIPLES.

Florida's rules prohibiting counsel from interviewing jurors violates equal protection and due process rights under the First, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. To the extent that trial counsel failed to make and preserve this claim, they failed to exercise reasonable legal

judgment and provided ineffective assistance of counsel, thereby causing prejudice to the defendant's trial and appeals. *Wellington v. Moore*, 314 F.3d 1256, 1260-61 (11th Cir. 2002); *Strickland.*

Florida lawyers, including criminal defense trial and postconviction counsel, cannot interview jurors on behalf of their clients outside the constraints created by Fla.R.Crim.P. 3.575 and Rule Regulating the Florida Bar 4-3.5(d)(4). To the extent defendants' counsel are treated differently from academics, journalists, other non-lawyers and lawyers not associated with a case who are not subject to the Rules Regulating the Florida Bar, there is a violation of defendants' rights to equal protection as the concept is enunciated in, *e.g.*, *Bush v. Gore*, 531 U.S. 98 (2000). *See* William J. Bowers and Wanda D. Foglia, "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing." *Criminal Law Bulletin* 39:51-86 (2003).

The Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 21 of the Florida Constitution, require that Mr. Deparvine receive a fair trial. However, Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar prevents Mr. Deparvine from determining whether he received a fair trial. Mr. Deparvine can only discover certain jury misconduct through juror interviews. To the extent it precludes undersigned counsel from investigating and presenting jury bias and misconduct that can only be discovered through interviews with jurors,

Rule 4-3.5(d)(4) of the Rules Regulating the Florida Bar is unconstitutional. Because the Rule denies Mr. Deparvine this opportunity to investigate and present a claim of juror misconduct, it infringes his rights to free speech, due process, access to the courts, and the equal protection concepts enunciated in cases such as *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). The reliability and integrity of Mr. Deparvine's capital sentence is thereby questionable.

ISSUE 18

FLORIDA STATUTE 921.141 IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE 8TH AND 14TH AMENDMENTS.

Mr. Deparvine's jury was unconstitutionally instructed by the Court that its role was merely "advisory." (ROA 6/1005). Because great weight is given the jury's recommendation, the jury is a sentencer in Florida. Here, however, the jury's sense of responsibility was diminished by the misleading comments and instructions regarding the jury's role. This diminution of the jury's sense of responsibility violated the Eighth Amendment. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985).

ISSUE 19

THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE 6TH, 8TH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Mr. Deparvine refers to relevant *dicta* in *State v. Steele*, 921 So.2d 538, (Fla. 2005):

> In *Ring [v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)], the Supreme Court held that in capital sentencing schemes where aggravating factors "operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Id.* at 609, 122 S.Ct. 2428 (*quoting Apprendi v. New Jersey*, 530 U.S. 466, 494 n. 19, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). The effect of that decision on Florida's capital sentencing scheme remains unclear. .. Since *Ring*, this Court has not yet forged a majority view about whether *Ring* applies in Florida; and if it does, what changes to Florida's sentencing scheme it requires. *See, e.g., Windom v. State*, 886 So.2d 915, 936-38 (Fla.2004) (Cantero, J., specially concurring) (explaining the post- Ring jurisprudence of the Court and the lack of consensus about whether *Ring* applies in Florida). *Cf. Johnson v. State*, 904 So.2d 400 (Fla.2005) (holding that *Ring* does not apply retroactively in Florida). That uncertainty has left trial judges groping for answers. 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.

Steele, 921 So.2d at 540 and 550 (Fla. 2005).

Mr. Deparvine acknowledges that, this Court held that because *Apprendi v. New Jersey*, 120 S.Ct. 2348, (2000), did not overrule *Walton v. Arizona*, the Florida death penalty scheme was not overruled. *Mills v. Moore*, 786 So.2d 532 (Fla. 2001). He further acknowledges such rulings on this claim as found in

Schriro v. Summerlin, 542 U.S. 348(2004) and *Johnson v. State*, 904 So.2d 400, 412 (Fla. 2005).

Mr. Deparvine maintains and argues that the Florida death penalty scheme is unconstitutional as applied in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Florida law. In 1999, the United States Supreme Court held that "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 243, n.6 (1999). Subsequently, in 2000, the Court held that the Fourteenth Amendment affords citizens the same protections under state law. *Apprendi v. New Jersey*, 120 S.Ct. 2348, 2355 (2000).

Florida capital defendants are not eligible for the death sentence simply upon conviction of first-degree murder. If the court sentenced Mr. Deparvine immediately after conviction, the court could only have imposed a life sentence. § 775.082 Fla. Stat. (1995). *Dixon*, 283 So.2d at 9.

Mr. Deparvine's indictment violated the Sixth and Fourteenth Amendments because it failed to charge the aggravating circumstances as elements of the offense for which the death penalty was a possible punishment. Under the

principles of common law, aggravators must be noticed. *Apprendi v. New Jersey*, 120 S.Ct. 2348, 2355 (2000) quoting Archbold, *Pleading and Evidence in Criminal Cases*, at 51.

Mr. Deparvine's death recommendations also violates the constitutional because it is impossible to determine whether a unanimous jury found any one aggravating circumstance.

Mr. Deparvine's death recommendations violated the minimum standards of constitutional common law jurisprudence because it is impossible to know whether the jurors unanimously found any one aggravating circumstance. Noteworthy is the apparent confusion on this aspect of jury findings as expressed in "Jury Question (1)" that was submitted to the Court during Mr. Deparvine's trial. (ROA V.6 p. 1011). Implicit in the state and federal government's requirements that a capital conviction must be obtained through a unanimous twelve person jury is the idea that "death is qualitatively different from a sentence of imprisonment, however long." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The Sixth, Fourteenth, and Eighth Amendments require more protection as the seriousness of the crime and severity of the sentence increase. *See Johnson v. Louisiana*, 406 U.S. 354, 364 (1972).

The Supreme Court of the United States held in *Ring v. Arizona,* 536 U.S. 584 (2002):

> If a legislature responded to such a decision by adding the element the Court held constitutionally required, surely the Sixth Amendment guarantee would apply to that element. There is no reason to differentiate capital crimes from all others in this regard. Arizona's suggestion that judicial authority over the finding of aggravating factors may be a better way to guarantee against the arbitrary imposition of the death penalty is unpersuasive.

Ring at 2431.

A new penalty phase is the remedy in this case because it is impossible to know whether the jurors unanimously found any one aggravating circumstance in support of the recommendations of death.

ISSUE 20

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED FOR FAILING TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY AND FOR VIOLATING THE GUARANTEE AGAINST CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND TO THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. TO THE EXTENT THIS CLAIM WAS NOT PROPERLY LITIGATED AT TRIAL OR ON APPEAL, MR. DEPARVINE RECEIVED PREJUDICIALLY INEFFECTIVE ASSISTANCE OF COUNSEL.

Florida's capital sentencing scheme denies Mr. Deparvine his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied. Florida's death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrows application of the

penalty to the worst offenders. *See Profitt v. Florida*, 428 U.S. 242 (1976). Florida's death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Eighth Amendment to the United States Constitution. *Richmond v. Lewis*, 113 S.Ct. 528 (1992).

To the extent trial counsel failed to properly preserve these issues, defense counsel rendered prejudicially deficient assistance. *See Murphy v. Puckett*, 893 F.2d 94 (5th Cir. 1990). Because of the arbitrary and capricious application of the death penalty under the current statutory scheme, the Florida death penalty statute as it exists and as it was applied in this case is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution and under Article 1 Section 17 of the Constitution of the State of Florida. Its application in Mr. Deparvine's case entitles him to relief.

ISSUE 21

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MR. DEPARVINE OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

All allegations and factual matters contained in this motion are fully incorporated herein by specific reference. The number and types of errors in Mr. Deparvine's guilt and penalty phases, when considered as a whole, virtually

dictated the sentence of death. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. As discussed in this motion and as will be proved at an evidentiary hearing, repeated instances of ineffective assistance of counsel and an unconstitutional process significantly tainted Mr. Deparvine's capital proceedings. These errors cannot be harmless. Under Florida case law, the cumulative effect of these errors denied Mr. Deparvine his fundamental rights under the Constitution of the United States and the Florida Constitution. *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986); *Ray v. State*, 403 So.2d 956 (Fla. 1981); *Taylor v. State*, 640 So.2d 1127 (Fla. 1st DCA 1994); *Stewart v. State*, 622 So.2d 51 (Fla. 5th DCA 1993); *Landry v. State*, 620 So.2d 1099 (Fla. 4th DCA 1993).

CONCLUSION

Based on the arguments and citations herein, this Court should reverse the order and remand to the circuit court to provide all appropriate and necessary relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by e-mail to: Steven Ake at **capapp@myfloridalegal.com** on October 8, 2012.

/s/ DAVID GEMMER

CERTIFICATE OF COMPLIANCE

This brief is typed in Times New Roman 14 point.

/s/ DAVID GEMMER

Counsel for Appellant