IN THE SUPREME COURT OF THE STATE OF FLORIDA



**CASE NUMBER: SC12-677**

LOWER TRIBUNAL CASE NUMBER: 1996 CF 2147

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**JERMAINE LEBRON,**

Appellant,

v.

**STATE OF FLORIDA**

**Appellee.**

# INITIAL BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT.

This proceeding involves the appeal of the Circuit Court's denial of Mr. Lebron's Motion to Vacate Judgments of Conviction and Sentence. The motion was brought pursuant to Fla. R. Crim. Pro. 3.851.

Jermaine Lebron will be referred to as "Mr. Lebron".

Citations to the record on appeal from the 1998 appeal will be designated as1998ROA, citations to the record on appeal of the2002 appeal will be designated as 2002ROA; and citations to the record on appeal of the 2005 appeal will be designated as 2005ROA, followed by the Volume number-VOL, followed by the appropriate page number- p.. Citations to the record from the post-conviction evidentiary hearing will be designated as PCH followed by the Volume number-VOL, followed by the appropriate page number-p..

## STANDARD OF REVIEW.

ARGUMENTS-I-II. Appellate courts review a circuit court's resolution of ineffective assistance of counsel claims under Strickland is a mixed standard of review because both the performance and the prejudice of the Strickland test present mixed questions of law and fact. Schor v. State, 883 So.2d 766 (Fla. 2001). Although appellate courts are to give the trial court's factual findings deference, trial court decisions must be supported by competent, substantial evidence in order for an appellate court to give same. See: Schor; also see Oceanic International

Corp. v. Lantana Boatyard, 402 So.2d 507 (Fla. 4th DCA) When an appellate court is convinced that an express or inferential findings of the trial court is without support of any substantial evidence, is clearly against the weight of the evidence, or that the trial court has misapplied the law to the established facts, then the decision is clearly erroneous and the appellate court will reverse because the trial court is failed to give legal effect to the evidence in its entirety."

## CASE SUMMARY.

This appeal arises over the denial of Mr. Lebron's Motion to Vacate Judgments of Conviction and Sentence by the trial court in the Ninth Judicial Circuit, in and for Osceola County, Florida on March 13, 2012.

This Court has previously reviewed Mr. Lebron's conviction and sentence in Lebron v. State, 799 So.2d 997 (Fla. 2001) in which this Court affirmed Mr. Lebron's conviction, but remanded for a new penalty phase and in Lebron v. State, 894 So. 2d 849 (Fla. 2005) where in this Court again remanded for a new penalty phase.

Mr. Lebron was charged by Indictment dated October 28, 1996, with the first-degree murder of Larry Neal Oliver, that occurred between November 24, and December 2, 1995. (1998 ROA VOL I p. 1-2). Mr. Lebron's first guilt phase trial began on October 6, 1997 and continued until October 14, 1997. (1998 ROA VOL VII p.7- VOLXVI p.1507). That trial ended in a mistrial due to a hung jury. (1998

ROA VOL XVII p.1534). Mr. Lebron's second guilt phase trial began on February 16, 1998 and continued until February 25, 1998 when the jury returned a verdict of guilty, making a special finding that Mr. Oliver was killed by someone other than Mr. Lebron and that Mr. Lebron did not have a firearm in his personal possession at the time the murder occurred. The jury recommended a sentence of death by a 7-5 vote. Mr. Lebron was sentenced to death on July 10, 1998. (1998 ROA VOL XXVIII). This Court affirmed those convictions, but remanded for a new penalty phase preceding. See: Lebron v. State, 79 So.2d 997 (Fla. 2001). A new penalty phase was conducted on December 27, 2005 and Mr. Lebron was again sentenced to Death.(2005 ROA VOL V p.290-403). On direct appeal, the Florida Supreme Court affirmed Mr. Lebron sentence of death. Lebron v. State, 982 So.2d 649 (Fla. 2008).

## STATEMENT OF THE ISSUES.

I. Whether the trial court erred in finding that Mr. Lebron failed to establish deficient performance by trial counsel and prejudice at the guilt phase of his capital trial in violation of the Fourth, Sixth, and Fourteenth Amendments of the United States Constitution and his corresponding rights under the Florida Constitution.

II. Whether the trial court erred in finding that Mr. Lebron failed to establish deficient performance by trial counsel and prejudice at the penalty phase of his capital trial in violation of the Fourth, Sixth, and Fourteenth Amendments to the

United States Constitution and his corresponding rights under the Florida Constitution.

## SUMMARY OF THE ARGUMENT.

**I. THE TRIAL COURT ERRED IN FINDING THAT MR. LEBRON FAILED TO ESTABLISH DEFICIENT PERFORMANCE BY TRIAL COUNSEL AND PREJUDICE AT THE GUILT PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE FOURTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION. FURTHER, MR. LEBRON'S CONVICTIONS ARE MATERIALLY UNRELIABLE DUE TO TRIAL COUNSEL'S DEFICIENT PERFORMANCE.**

Trial counsel rendered deficient performance by failing to properly file a motion to suppress evidence. Shortly after the homicide, law enforcement officers in New York were informed that a number of suspects in the crime, including Mr. Lebron, may be in the area. New York Detective Rodriguez located a vehicle in which Mr. Lebron was a front seat passenger and Howard Kendall was in the driver seat with Stacie Kirk in the back seat. Rodriguez called for additional officers and all three individuals were ordered out of the vehicle. After Mr. Lebron and Mr. Kendall were placed under arrest and taken into custody, the vehicle was searched. The search of the vehicle yielded a day planner with an identification card for Larry Neal Oliver located under the console, under the dash, between the two front seats. In addition, four shotgun shells were found in the closed center console of the vehicle. The vehicle was searched without a search warrant.

A justification for the warrantless search of the vehicle must rest upon the search incident to arrest exception to the Fourth Amendment. Mr. Lebron was ordered from the vehicle and taken into custody by a large number of police officers. It was only after the occupants were secured that a search of the vehicle was conducted. Such a search's may only be conducted of the area within the immediate control of the person being arrested. Clearly the search of the vehicle was unlawful under the law existing in 1995.

## II. THE TRIAL COURT ERRED IN FINDING THAT MR. LEBRON FAILED TO ESTABLISH DEFICIENT PERFORMANCE BY TRIAL COUNSEL AND PREJUDICE AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE FOURTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION.

Trial counsel did not put on any mental health mitigation at the penalty phase of Mr. Lebron's trial. Trial counsel apparently elected not to conduct a full and complete mental health evaluation of Mr. Lebron after his mental health expert told trial counsel, after interviewing Mr. Lebron, that Mr. Lebron displayed the coldest antisocial personality disorder he (Dr. Dee) had ever seen. Dr. Dee informed trial counsel, after evaluating Mr. Lebron, that Mr. Lebron had significant neurological impairments, and IQ of 83, memory impairments, psychological impairments, significant interpersonal communication limitations, a history of substance abuse and was the product of a poor home environment.

Despite having this information, trial counsel did not call Dr. Dee as a witness in any trial and never retained another qualified mental health expert to evaluate Mr. Lebron.

## ARGUMENT I.

## THE TRIAL COURT ERRED IN FINDING THAT MR. LEBRON FAILED TO ESTABLISH DEFICIENT PERFORMANCE BY TRIAL COUNSEL AND PREJUDICE AT THE GUILT PHASE OF HIS CAPITAL TRIAL IN VIOLATIONOF THE FOURTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION. FURTHER, MR. LEBRON'S CONVICTIONS ARE MATERIALLY UNRELIABLE DUE TO TRIAL COUNSEL'S DEFICIENT PERFORMANCE.

This argument is evidenced by the following:

Trial counsel's representation of Mr. Lebron fell below the objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668 (1984). It is unquestioned that under the prevailing professional norms at the time of Mr. Lebron's trial, trial counsel had an "...obligation to conduct a thorough investigation..." of Mr. Lebron's' case, including both the guilt phase and penalty phase issues. The Sixth Amendment imposes on counsel a duty to investigate because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after a through investigation of all options. Strickland at 680.

**A. Failure to File a Motion to Suppress Evidence Based Upon the Illegal Search of the Vehicle Mr. Lebron Occupied When Arrested In New York.**

Trial counsel rendered deficient performance by failing to properly file a motion to suppress evidence. Fourth Amendment claims are cognizable as an ineffective assistance of counsel claim. Kimmelman v. Morrison, 477 U.S. 365 (1986). In order to demonstrate prejudice under such a claim, there must be a showing that the Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence.

Shortly after the homicide, police officers in New York were informed that a number of suspects in the crime, including Mr. Lebron, were located in the area. On December 5, 1995, Detective Martin Rodriguez of the New York City Police Department received a call from Florida authorities about the possible location of the suspects and the vehicle they were believed to be traveling in. (1998R0A Vol. XV, p.1352-3). As Detective Rodriguez approached the vehicle along with other officers, he saw that Howard Kendall was in the driver's seat, Mr. Lebron was in the front passenger seat, and Stacie Kirk was in the back seat. (1998 ROA VOL. XV, p1354). After Detective Rodriguez called for back-up, the three individuals were ordered out of the vehicle. (1998 ROA VOL. XV, p.1355). All of them complied, and Mr. Lebron and Mr. Kendall were immediately placed under arrest.

(1998 ROA VOL. XV, p.1355). After Mr. Lebron and Mr. Kendall were placed under arrest and taken into custody, the vehicle was searched. (1998 ROA Vol. XV, p.1356). The search of the vehicle revealed a day planner with an identification card for Larry Neal Oliver located under the console, under the dash, between the two front seats. (1998 ROA VOL XV, p.1356-57). In addition, four shotgun shells were found in the closed center console of the vehicle. (1998 ROA VOL. XVI, p.1361).

Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions. Katz v. U.S. 389 U.S. 347 at 357 (1967). The general requirement that a search warrant be obtained is not lightly to be dispensed with, and the burden is on those seeking [an] exception [from the requirement] to show the need for it. United States v. Jeffers, 342 U.S. 48 (1951) Among the exceptions to the warrant requirement is a search incident to a lawful arrest. Weeks v. U.S., 232 U.S. 383 at 392 (1914). This exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations. Chimel v. California, 395 U.S. 752 at 763 (1969) and United States v. Robinson, 414 U.S. 218 at 230-234 (1973). The search incident to arrest may only include "...the arrestee's person and the area within his immediate control." See: Chimel, at 763. The area within an arrestee's immediate

control has been construed "to mean the area from within which he might gain possession of a weapon or destructible evidence."

The presence of a search warrant serves a high function and is not a mere formality. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative. Chimel at 761, citing McDonald v. United States, 335 U.S. 452 at 455-466 (1948).

If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search incident to arrest exception are absent and the rule in Chimel does not apply. This has been the law since at least 1964 when the United States Supreme Court, in Preston v. United States, 376 U.S. 364 (1964) rejected the government's position that a search of a vehicle interior was lawful under the Fourth Amendment despite the

government's argument that the search had been incidental to a valid arrest. The Preston Court reasoned that the rule allowing a contemporaneous search is justified by the need to seize weapons and other things that may be used to assault the officer or effect an escape, as well as the need to prevent the destruction of evidence of the crime-things that might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. Preston at 367.

Neither the possibility of access to a weapon nor the likelihood of discovering offense-related evidence authorized the search in this case. Unlike in Belton, which involved a single officer confronted with four unsecured arrestees, the officers in this case outnumbered the three arrestees, all of whom had been handcuffed and secured before Detective Rodriguez searched Mr. Lebron's car. Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.

In this case, there was no warrant to search the vehicle occupied by Mr. Lebron and others when they were arrested. Therefore, a justification for the search must rely upon the search incident to arrest exception to the Fourth Amendment. In

this case, as established by the trial testimony of Detective Rodriguez, Mr. Lebron and the other people in the vehicle were ordered from the vehicle and taken into custody by a large number of law enforcement officers. It was only after the car occupants had been secured that a search of the vehicle was conducted. (1998 ROA VOL XV, p.1356). Such a search, under Chimel, may only be conducted of the area within the immediate control of the person being arrested. This area is defined as the area from which he might gain possession of a weapon or destructible evidence. A search or seizure without a warrant as incident to a lawful arrest has always been considered a strictly limited right. It has grown out of the inherent necessities of the situation at the time of the arrest. Trupiano v. United States, 334 U.S. 699 (1948) *But there must be something more in the way of necessity than a lawful arrest* (emphasis added) Trupiano at 705, 708.

As Mr. Lebron and the other vehicle occupants were already in custody, no part of the vehicle was under their control and certainly was not accessible to the arrestees. The search incident to arrest exception does not apply in this case and trial counsel rendered deficient performance by failing to move to suppress the fruits of that illegal search, including items found in the vehicle and any statements made by Mr. Lebron or others concerning the search of the vehicle and items found therein.

Counsel's deficient performance prejudiced Mr. Lebron in that the results of the search of the vehicle were introduced at Mr. Lebron's trial because counsel failed to file a motion to suppress. These evidentiary items included a day planner identified as belonging to the victim, Larry Neal Oliver, shotgun shells identified as being similar to those used in the crime, and statements by various people, including Mr. Lebron, in relation to those items. All of these items of evidence were used by the State in connecting Mr. Lebron to this crime and securing a conviction against him.

It is important to note that Mr. Lebron was only convicted of felony murder and was acquitted of being a principal to premeditated murder with a specific jury finding that he was not the person who shot the victim. These verdicts mean that, while the jury did not believe that Mr. Lebron was the actual killer of Mr. Oliver, it did believe he was connected to the robbery and surrounding events of that evening. Therefore, any evidence that connected Mr. Lebron to the robbery of the victim and that location is especially important to the state's conviction of Mr. Lebron under a theory of felony murder. The shotgun shells and day planner were the only physical evidence tying Mr. Lebron to the crime scene and robbery and their introduction went to the heart of his conviction. Their improper admission clearly prejudiced Mr. Lebron, and the failure to move to suppress it was ineffective assistance of counsel.

**B. Failure to Call Robert Spears and/or Charlotte Spears as Witnesses at Trial.**

Mr. Lebron alleges that during discovery, counsel received a police report from the Orange County Sheriff's Office indicating that between the time of the homicide and the discovery of the victim's body and truck, Robert and Charlotte Spears reported seeing the victim's truck being driven eastbound on Interstate 4 toward Daytona Beach. The Spears noted the vanity plate and connected it to information available in the press about the same truck and its missing owner. They saw two white males in the cab with a possible third individual riding in the bed. Mr. Lebron contends this potential information was critical because it directly contradicted the stories of the State's witnesses about the location of the victim's truck during this time period. The witnesses testified that no one moved the truck from their home until its disposition, whereas in Mr. Lebron's statement to law enforcement, he asserted that he never saw the truck despite his presence at the witnesses' house.

Although Mr. Lebron did not call Mr. Slovis to testify at the evidentiary hearing, he did call Mr. Norgard, who testified he had no recollection of Robert or Charlotte Spears, but believed he and Mr. Slovis did everything they needed to do to present a defense. (PCH VOL XXXVIII, p.3712) If a potential witness had provided any substantive testimony, he would have had the deposition transcribed. Clearly, Mr. Norgard's testimony regarding depositions

and transcripts conflicts with Mr. Slovis' complaining during trial that he did not have transcripts of the first guilt phase trial and did not have deposition transcripts for some of the witnesses. (1998ROA VOL XVII,). Additionally, the trial judge, after hearing Mr. Slovis' complaints, apparently reviewed the court file and informed Mr. Slovis that no transcripts had ever been ordered of the previous trial. (1998ROA VOL XVIII) Mr. Lebron testified at the evidentiary hearing that Mr. Slovis did not have the prior trial testimony transcripts and those transcripts were in the possession or Mr. Norgard. (PCH VOL XXXVIII P. 3798)

While Mr. Lebron did not present any testimony at the evidentiary hearing to support a finding that Robert and Charlotte Spears were available to testify or what their testimony would consist of, it is abundantly clear that Mr. Norgard's recollection regarding several important aspects of the trial preparation is suspect at best and that preparation includes the investigation and follow up of witnesses Robert and Charlotte Spears.

**C. Failure to Properly Conduct Jury Selection, Including the Improper Questioning and Dismissal of an African-American Juror, the Failure to Ensure Law Properly Explained to Jury, and Failure to Move to Strike Panel of Jurors or Effectively Rehabilitate the Panel.**

Trial counsel rendered deficient performance by failing to properly conduct jury selection. Trial counsel Slovis had not participated in a death penalty case

before, and did not have the proper qualifications to do so. Mr. Slovis was aware of the limitations of his experience, and even stated that he was "incompetent" to pick a jury in this type of case and did "not know any of the questions to ask." (1998R0A VOL XVIII, p.10-11). In fact, Mr. Slovis had never participated in a death penalty case anywhere in the United States and had never participated in any continuing legal education programs for training seminars regarding death penalty cases. (PCH VOL XXXVIII p.3707). It should be noted that Robert Norgard, a death qualified Florida attorney, did not participate in the penalty phase trial.

During jury selection, trial counsel rendered deficient performance in several ways, First, he failed to properly object to the striking of one of only two prospective African-American jurors for an improper purpose. Second, counsel failed to ensure prospective jurors were informed that the decision on the death penalty was ultimately up to them and in no situation would they be required to vote for death if following the law. Finally, counsel failed to either move to strike a panel of jurors tainted by prospective juror statements or to attempt to rehabilitate the panel after the comments in question were made.

During jury selection, a prospective juror named Henry Simmons was questioned by the Court and counsel regarding the death penalty and availability. Mr. Simmons stated that he could vote for life or death, but that he had to take the

bus to get to the courthouse. Because of this, he considered it a financial burden to have to travel to the courthouse on a daily basis for an extended period. (1998R0A VOL XVIII, p.195-8). The Court then excused Mr. Simmons based on his financial hardship. (1998R0A VOL XVIII p.200). Counsel objected to the excusal and pointed out to the trial court that this left only one African American in the potential jury pool. However, counsel did not ask any questions of Mr. Simmons to determine the extent of his financial hardship, what funds he did have available, or ask him if the standard juror compensation would be sufficient to cover his transportation expenses. In addition, counsel failed to move for the trial court to provide bus fare to the prospective juror, contact jury services to see what arrangements could be made, or ask the court to order the sheriff's office to transport Mr. Simmons to and from court.

Counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversary testing process. Strickland, 466 U.S. 688 (1984). The Constitution forbids striking even a single prospective juror for a discriminatory purpose. Snyder v. Louisiana, 128 S.Ct. 1203 at 1208 (2008). Florida courts have generally provided parties greater protection than federal courts in protecting discriminatory jury selection practices. Slappy v. State, 522 So. 2d 18 at 20-21 (Fla. 1996) and Busby v. State, 894 So2d 88 (Fla. 2004).

In this case, counsel allowed one of only two African-American prospective

jurors to be struck. This was especially important since the Defendant in this case is a minority, while the majority of state witnesses in this case were not. Peremptory challenges cannot be used in a discriminatory manner to exclude potential jurors based on race, ethnicity, or gender. Busby, 894 So.2d at 99.

Counsel should have made proper inquiries of the juror to ensure he was not improperly struck for hardship. Mr. Simmons's stated hardship was that it cost him four or five dollars to take the bus to court. (1998R0A VOL XVIII p.199). However, Mr. Slovis never inquired of Mr. Simmons about the extent and nature of his financial hardship, inquired as to what funds Mr. Simmons had available to him, or to ask him if the standard jury compensation of $15 for the first three days, and $30 per day thereafter, was sufficient to cover any transportation expenses. See: Fla. Stat. 40.24. In addition, Mr. Slovis failed to move the court to provide bus fare to the prospective juror, contact jury services to see what arrangements could be made, or move for other transportation arrangements, such as having the sheriff's office transport Mr. Simmons to and from court. All of these failures constituted deficient performance by trial counsel. As the Florida Supreme Court has stated:

> The need to protect against bias is particularly pressing in the selection of a jury, first, because the parties before the court are entitled to be judged by a fair cross section of the community, and second, because our citizens cannot be precluded improperly from jury service. Indeed, jury duty constitutes the most direct way citizens participate in the application of our laws. See: State v. Slappy, 522 So.2d 18 at 20 (Fla. 1988).

Over the years, the procedure for determining whether impermissible prejudice occurred has evolved. The Florida Supreme Court finally settled on the procedure set forth in Melbourne v. State, 679 So.2d 679 (Fla. 1996) at 764. This Court set forth clear guidelines that if a party objects to the opposing party's use of a peremptory challenge on such grounds, the objecting party must:

> a) make a timely objection on that basis;
>
> b) show that the venireperson is a member of a distinct racial group, and;
>
> c) request that the court ask the striking party its reason for the strike.
>
> If these initial requirements are met, the court must ask the proponent of the strike to explain the reason for the strike.

Also see: State v. Smith, 59 So3d 1107 (Fla. 2011).

Counsel's failure to ensure that one of only two prospective African-American jurors, in a case with a minority defendant, was given a sufficient opportunity to serve on the jury, was deficient performance which prejudiced Mr. Lebron since he was not ensured a jury composed of a fair cross-section of the community.

Trial counsel was also admittedly unprepared and unqualified for picking a jury in a death penalty case and was unable to ensure that prospective jurors were properly informed as to the law governing the penalty phase. Specifically, counsel did not ensure that the prospective jurors were properly informed that, under the

law, they are never required to vote for death. "[A] jury is neither compelled nor required to recommend death where aggravating circumstances outweigh mitigating factors." Henyard v. State, 689 So.2d 239 at 249-50 (Fla. 1996); see also Gregg v. Georgia, 428 U.S. 153, (1976)(holding that a jury can dispense mercy, even where the death penalty is deserved). Instead, in this case, the prospective jurors were repeatedly informed that, if the aggravators outweigh the mitigators, one of the following is true:

> It's the law that you impose death (e.g., 1998R0A VOL XVIII, p.63).
>
> It's proper to impose death (e.g., 1998ROA VOL XVIII, p.71, 78, 118, and 150).
>
> It's incumbent on juror to vote for death (e.g., 1998R0A VOL XIX, p.271, 306, 336).
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> Juror duty-bound to vote for death (e.g., 1998R0A VOL. XIX, p.290, 350).

During each of these instances, trial counsel did not object and failed to ensure that the prospective jurors were properly informed of the law as to the penalty phase. This failure constituted deficient performance under Heyward and Gregg as the uncorrected statements by the trial court were incorrect statements of law.

In Darling v. State, 966 So2d 366 (Fla.2007) during voir dire, in response to a statement by the prosecutor that, "under some circumstances to follow the law,

the [sic] death is the appropriate vote you should make," venireperson Adams responded that "it sounds like I would either vote for the death penalty or I would break the law. I don't think I should be put in that position." As the prosecutor began to repeat his statement implying that the law sometimes required the death penalty, defense counsel objected on the basis that the prosecutor was misstating the law. At that point, the trial court sustained the objection, informed the jury that the penalty phase only occurs if it first unanimously finds the defendant guilty beyond a reasonable doubt, and noted with regard to the penalty phase that the jury will hear evidence and would be given a series of factors to weigh and the jury's decision would be whether the mitigating factors outweigh the aggravating factors and then to recommend to the court whether the sentence should be a sentence of death or a sentence of life in prison. That decision does not have to be a unanimous decision, and the vote is not binding on the judge, although it is [sic] carries great weight.

The Darling court gave both parties the opportunity to object to this characterization of the penalty phase, and neither party objected. The prosecutor subsequently stated:

> In order to be a juror in any kind of case you have to take an oath in the beginning to follow the law, wherever it leads you. In a case of this type, the law might lead as you analyze it to vote for death. Question for you is, could you take an oath to follow the law,

knowing that it might result in your voting to impose the death penalty?

Darling trial counsel did not object further at this point. Neither did Mr. Lebron's trial counsel object later during voir dire when the prosecutor, in response to a statement by venireperson Ramos that she could not vote for the death penalty, asked: "Could you take an oath to follow the law if it meant that you might be compelled to vote to impose death, if that's what the law called for?"

Darling states a basis for a finding of deficiency of trial counsel with regard to these prosecutorial comments. The Florida Supreme Court has repeatedly held that comments to the effect that if the aggravators outweigh the mitigators, a recommendation of a death sentence is mandatory, misstates the law. See: Franqui v. State, 804 So.2d 1185 at 1192-93 (Fla.2004); Brooks v. State, 762 So.2d 879 at 903 (Fla.2000); Henyard at 250; and Garron v. State, 528 So.2d 353 at 559 (Fla.1988). Therefore, trial counsel was deficient in failing to object to the two prosecutorial statements that death is sometimes required by the law, which followed the initial objection and the court's curative instruction. Darling at 385. Although declining to find that Darling had failed to prove prejudice, the Court noted that the cumulative effect of the misstatements of the law could lead to prejudice to the defendant. Darling at 386.

Finally, Slovis rendered deficient performance by failing to move to strike a jury panel, or properly rehabilitate the panel, after comments were made by a prospective juror. A former police officer from Ohio, Thomas Rombach, was a member of one of the panels of prospective jurors. Mr. Rombach stated during jury selection, in front of other prospective jurors, that "it would be a little hard to believe" that an officer is not entirely telling the truth, and stated repeatedly that he would give more credit to a police officer's testimony. (1998R0A VOL XX, p.528-9, 531-2). Mr. Rombach explained that because of the systems and procedures in place, the fact that an officer has a supervisor checking his or her work, and the fact an officer has notes and records, means it would be hard to believe the law enforcement officer wasn't being truthful. (1998R0A VOL XX, p.528-32). Counsel moved to strike the juror, but did not cite Florida case law showing the problem with this prospective juror, did not move to strike the panel based on these comments, and did not rehabilitate the rest of the jury panel in any way after these comments were made. (1998R0A VOL. XX, p.533-4.).

In Polite v. State, 754 So.2d 859 (Fla. 3 DCA 2000), the court ruled that the "trial court's failure to excuse jurors ... for cause based upon their preconceived belief, that a police officer's testimony [is] automatically worthy of more credibility that a civilian witness, constituted reversible error." This position is consistent with other Florida courts that have addressed the issue. See: Henry v.

State, 756 So.2d 170 (Fla. 4th DCA 2000)("ambivalent answers indicating [a prospective juror] might give greater weight to a police officer's testimony" require dismissal of juror); Clemons v. State, 770 So.2d 296 at 297 (Fla. 1st DCA 2000) (prospective juror's answers about giving greater weight to a police officer's testimony raised reasonable doubt about his ability to be impartial). A challenge for cause should ordinarily be granted where a juror demonstrates a strong bias for or against the credibility of the evidence of one side or another. See: Davis v. State, 656 So.2d 560 (Fla. 4th DCA 1995) (error not to excuse juror for cause in domestic violence case who stated that he would tend to be sympathetic to and give benefit of doubt to woman); Coney v. State, 643 So.2d 654 (Fla. 3d DCA 1994) (error not to excuse juror who demonstrated that she had a preconceived belief that a victim in particular case would only tell the truth); Duncan v. State, 588 So.2d 50 (Fla. 3d DCA 1991) (state properly confessed error where two jurors admitted their bias in favor of the credibility of police officers); Mann v. State, 571 So.2d 551 (Fla. 3d DCA 1990) (state properly confessed error where trial court failed to excuse juror for cause who indicated that she would give greater weight to what the police say). This is based upon the well-established principle that "[a] juror is not impartial when one side must overcome a preconceived opinion in order to prevail." See Hamilton v. State, 547 So.2d 630 at 633 (Fla. 1989)(quoting Hill v. State, 477 So.2d 553 at 556 (Fla.1985)).

Trial counsel's unfamiliarity with Florida law, and death penalty law and procedures caused him to perform deficiently in that he was unable to bring this law to the court's attention in support of his motion to strike, and counsel compounded the error by failing to move to strike the panel or to rehabilitate the remaining prospective jurors on this issue in any way.

These failures by trial counsel to conduct an adequate voir dire and ensure that the jurors were correctly informed of the law constituted deficient performance. These failures individually and cumulatively prejudiced Mr. Lebron in that he was not judged by a properly selected jury of his peers representing a cross-section of the community, correctly instructed on the law and not tainted by improper comments. But for this deficient performance, there is a reasonable probability that Mr. Lebron would have received a life sentence, especially when the 7-5 advisory sentence of death is factored in. Jurors willing to serve, and willing to follow the law on the death penalty, were prevented from serving as members of the jury due to counsel's deficient performance. This prejudice is further illustrated by the fact that the actual jury expressed confusion as to the jury instructions and their duties as jurors through a series of juror questions submitted to the court during deliberations. (1998ROA VOL. XXVI, p.1791- 1798).

**D. Failure to Move for Mistrial Based on the State's Improper Opening Statement Referring to Prejudicial Witnesses and Evidence that Were Not Presented at Trial, and in Referring to Collateral Crimes**

Trial counsel rendered deficient performance by failing to move for a mistrial based upon the State's improper opening statement and subsequent failure to present evidence described in the State's opening. In its opening statement, the prosecuting attorney referred to both physical evidence and testimonial evidence that would support its prosecution of Mr. Lebron and be a basis for a conviction of the charged crimes. The State referred to both physical evidence and testimonial evidence that was never introduced at trial. This included multiple photographs (1998R0A VOL XX, p.550, 559) and assertions that the testimony of witnesses Jessina Ortiz, Carmen Berrios and Martin Bullard would show evidence of Mr. Lebron engaging in criminal behavior by tampering with witnesses. These omissions were of particular importance because the State told the jury in opening statements that:

> You're going to hear testimony from a young lady by the name of Jessina Ortiz and her mother Carmen Berrios who will tell you while Jermaine Lebron was in jail waiting prosecution for this crime he actually tried to bribe Jessina Ortiz with 20,000 dollars to lie for him, to give him a phony alibi, and during the course of those conversations admitted to them that, yes, in fact, he did this crime, he killed this young man. Jessina Ortiz will tell you, once she came forward to the police to tell the police what Jermaine wanted her to do... Jermaine Lebron called her from jail, threatened her, said, whatever happens to me is going to happen to you and your family. But the way Jermaine Lebron would do this is kind of interesting, you'll hear it from Jessina Ortiz and a fellow named Martin Bullard...

> Martin Bullard will tell you on the very day Jessina Ortiz got the threatening phone call on her life, yes, Jermaine Lebron did call me and I did put a call through to him... Jermaine Lebron was trying to threaten the witness against him from jail, to reach out from jail to threaten a witness. (1998R0A VOL XX, p. 575-7).

It is improper for the prosecuting attorney in opening statement to suggest that there is non-record evidence supporting its theory of prosecution. Jackson v. State, 818 So.2d 539 (Fla. 2d DCA 2002). In Jackson, a case involving the stop of the defendant's car, the prosecutor told the jury in opening statement that the evidence would show the passenger indicated to the officer that the defendant had contraband concealed in his groin area. The State did not call the passenger to testify, nor did the officer testify about any statements or gestures by the passenger.

The Jackson court found prejudicial error in the combination of the prosecutor's suggestion in opening statement that additional evidence would corroborate the officer's testimony and the State's failure to place those facts in evidence. Thus, the alleged corroborating evidence was never subjected to cross-examination by the defense and evaluation by the jury. Jackson, at 542 (concluding that the error was not harmless because the case boiled down to a credibility contest between the defendant and the police officers).

In Maddox v. State, 827 So.2d 380 (Fla. 3d DCA 2002), the Third District reversed a conviction because the prosecutor alleged in opening that the defendant had made an incriminating statement to a police officer but the officer never

testified. The court held, citing Jackson, that the "foregoing facts prejudiced Maddox because the State basically suggested that there was other evidence in support of its case, but then failed to offer it and subject it to cross-examination by Maddox and evaluation by the jury." Maddox, at 381.

The error is not harmless where the credibility of the defendant versus other witnesses is at the heart of the case. The State's suggestion that there was other evidence in support of its case, coupled with its failure to offer it and thereby subject it to cross- examination by the defense and evaluation by the jury, prejudiced the Mr. Lebron. Jackson, supra, and Vorhees v. State, 699 So.2d 602 (Fla. 1997). In addition, since no evidence of these alleged other crimes was introduced, this opening constituted the erroneous admission of collateral crimes evidence. Such an admission of improper evidence is presumptively harmful because of the danger that the jury will take the defendant's bad character or propensity to commit crime as evidence of guilt of the crime charged. Castro v. State, 547 So.2d 111 (Fla. 1989); Peek v. State, 488 So.2d 52 (Fla. 1986); Straight v. State, 397 So.2d 903 (Fla. 1981).

In Mr. Lebron's case, the State referenced specific witnesses and items of evidence that were not subsequently introduced at trial. Counsel rendered deficient performance by failing to bring this error to the trial court's attention and move for a mistrial. Since this evidence went to Mr. Lebron's credibility, and thus was a

central component of this case, this error was not harmless. The prejudicial nature of the comments was further enhanced by the fact that it referred to other alleged crimes committed by Mr. Lebron, and as such constituted improper collateral crimes evidence. This evidence and testimony, not subjected to cross-examination, was introduced to the jury, and its inclusion prejudiced Mr. Lebron. Therefore, counsel was ineffective for failing to move for the required mistrial once the State failed to call these witnesses or introduce this evidence.

**E. Failure to Properly Impeach Witnesses for the State Through the Use of Prior Inconsistent Statements, Former Testimony and Convictions for Felonies and/or Crimes of Dishonesty**

Trial counsel rendered deficient performance by failing to properly impeach witnesses for the State. Trial counsel Slovis repeatedly made clear throughout the early portions of the trial record that he did not have the transcripts of the first guilt phase trial available to him for possible impeachment of witnesses, and also did not have deposition transcripts for some of the witnesses. (1998R0A VOL XVIII, p.11-12). Mr. Lebron also testified that Slovis lacked the material necessary to cross examine and impeach the State's witnesses. (PCH VOL XXXVIII , P. 3798) Slovis was subsequently informed by the trial court that no transcripts had ever been ordered of the first trial. (1998R0A VOL XVIII, p.21). Later in the proceedings, Slovis informed the court that no transcripts could be obtained during the trial because the court reporter was busy with the second guilt phase trial.

(1998R0A VOL XXI, p.632). Counsel also did not have copies of all the State witnesses' prior convictions, specifically convictions for felonies and crimes of dishonesty for Danita Sullivan and Charissa Wilburn. Finally, trial counsel never obtained or reviewed the transcripts of the plea colloquy of Charissa Wilburn, and thus was unable to impeach her with it during her trial testimony. (1998R0A VOL XXII, p.926-7). This transcript could have been used to impeach her, especially as to the sequence of events around the homicide and discussions about going to the police and using the victim's credit card.

The number of instances when trial counsel could have impeached the state's witnesses with transcripts from the first trial are voluminous, and include the following:

> Mark Tocci's testimony about Lebron's statement that he was going to "jack" victim (1998 ROA VOL XXI, p.656).
>
> Mark Tocci's testimony about Lebron pointing a gun at victim's head (1998 ROA VOLXXI, p.669).
>
> Mark Tocci's testimony about activities when he first arrived at the house (1998 ROA VOL XXI, p.664).
>
> Mark Tocci's testimony about Lebron's statements after the shooting (1998 ROA VOL XXI, p.673).

Mark Tocci's testimony about use of the victim's credit card at Hooter's (1998 ROA VOL XXI, p.688-9).

Mark Tocci's testimony about phone calls to Jermaine and the house (1998 ROA VOL XXI, p.690).

Mark Tocci's testimony about drug use (1998 ROA VOL XXI, p.707).

Mark Tocci's testimony about the motivation for going to the police and sequence of these events (1998 ROA VOL XXI-XXII, p.765, 876-7).

Charissa Wilburn's testimony about Lebron's statements in the car after the victim agreed to follow them back to the house (1998 ROA VOL XXII, p.856).

Danny Summer's testimony about who was with him at Mary's father's house (1998 ROA VOL XXII, p.962).

Danny Summer's testimony about seeing news reports about the victim on television (1998 ROA VOL XXIII, p. 1022).

Danny Summer's testimony about what he said during the attack on the victim (1998 ROA VOL XXIII, p.1054).

As a result of trial counsel's failure to have all the transcripts, depositions, and records of prior convictions available, he was unable to attack the credibility of the State's witnesses and to point out discrepancies. He was also unable to show that some of the State's witnesses were providing different testimony from the previous trial, and in some cases, from their prior police statements or depositions.

Since the State's case relied entirely upon the testimony and credibility of its witnesses who implicated Mr. Lebron in the crime, counsel's failure to impeach these witnesses in the variety of available means was extremely prejudicial to Mr. Lebron.

**F. Failure to Move for Mistrial Based on the Introduction of Improper Other Crimes Evidence.**

Trial counsel rendered deficient performance by failing to timely object to the testimony of a State witness about other alleged criminal acts committed by Mr. Lebron. During the testimony of Mark Tocci, a testifying co-defendant, the following exchange occurred between the witness and State's attorney:

> Q: Did he ever brag to you about things he may have done in the past?
>
> A: Just stealing a car. He went to jail, Orange County.
>
> Mr. Slovis: Move to strike.
>
> Court: Motion to strike will be granted. Jury is instructed to disregard the last comment.
>
> Q: Did you take him seriously whenever he would say stuff about crime, when he would do crimes, things of that sort, at that point?
>
> A: No. (1998R0A VOL XXI, p.658-9).

Trial counsel objected to the first comment, but failed to object to the related and

objectionable follow-up question. In addition, counsel did not timely move for a mistrial based upon these prejudicial comments. (1998R0A VOL XXI, p.658-9). Counsel ultimately recognized this error and did move for a mistrial on this issue, but the court ruled it was untimely as follows:

> As to the particular question whatever acts he had done or bragged about, there was no objection to that particular question. The answer that flowed from that question was not objected to. If you had interposed an objection to that particular question I would have sustained that objection, because it was a general question that could have called for [an] inadmissible answer, therefore your request for mistrial will be denied. (1998ROA Vol. XXI, p.701).

It has long been held in Florida that references to prior criminal justice system contacts are prejudicial in that they undermine the presumption of innocence to which the defendant is entitled. In such situations, courts have routinely ordered mistrials. In Jackson v. State, 627 So2d 70 (Fla. 5th DCA 1993), the court held that the mere mention of the fact that the defendant fit the description of an individual who had been arrested on another case required a new trial.

In Schofield v. State, 2D10-29186, July 1, 2011 Defendant sought to shift responsibility for the murder by introducing evidence of Scott's (a witness that testified against Defendant) prior physical fights with his former girlfriend and others and his reputation for violence, purportedly to show that Scott could have murdered the victim . However, this evidence was relevant only to show Scott's

alleged bad acts and violent propensities, neither of which are admissible for impeachment purposes. See § 90.404(2)(a), Fla. Stat. (2010) (prohibiting the admission of evidence of prior bad acts when the only relevance is to prove propensity to commit crimes). Further, none of the evidence of Scott's past violence against his former girlfriend is relevant to prove that Scott murdered Michelle. Therefore, this evidence would not be admissible and thus could not, as a matter of law, have been of such a nature that it would probably produce an acquittal on retrial.

The erroneous admission of collateral crimes evidence *is presumptively harmful* (emphasis added) because of the danger that the jury will take the defendant's bad character or propensity to commit crime as evidence of guilt of the crime charged. Jackson, at 71, citing Castro v. State, 547 So.2d 111 (Fla. 1989); Peek v. State, 488 So.2d 52 (Fla. 1986); Straight v. State, 397 So.2d 903 (Fla.1981). Testimony about various kinds of alleged criminal activity has been found to be improper. See: Henry v. State, 574 So.2d 73 (Fla. 1991) (evidence of defendant's murder of wife's son from a previous marriage irrelevant and inadmissible to explain wife's murder); Czubak v. State, 570 So.2d 925 (Fla. 1990) (evidence that defendant was escaped convict irrelevant to any material fact at issue in murder trial and thus inadmissible); Jackson v. State, 451 So.2d 458 (Fla.1984) (testimony of state's witness that defendant had pointed a gun at him and in such situations, a

curative instruction has been deemed insufficient in eliminating the extreme prejudice caused by the improper admission. Harris v. State, 427 So.2d 234at 235 (Fla. 3d DCA 1983); Post v. State, 315 So. 2d 230 (Fla. 2d DCA 1975).

In Mr. Lebron's trial, the testimony was particularly harmful in that it impermissibly undermined the credibility of Mr. Lebron, which the state had put at issue by introducing his taped statement to law enforcement. More importantly, because the testimony at issue referenced the theft of a vehicle, the prejudice of this statement directly related to the facts of this homicide prosecution. Count II of Mr. Lebron' s indictment charged him with committing a robbery, with the property being taken including "a Chevrolet truck, the property of Larry Neal Oliver, Jr." Mr. Lebron was convicted of felony murder based upon this underlying robbery charge. Therefore, this testimony is not only presumptively prejudicial, but highly prejudicial on the facts of this case in that it was unproven criminal conduct with an underlying allegation of vehicle theft similar to one of the crimes Mr. Lebron was prosecuted for. As such, trial counsel was clearly ineffective in failing to move for a mistrial in light of the prejudicial testimony.

**G. Failure to Subpoena and Call as a Witness Roswell Summers in Rebuttal to the Testimony of Danny Summers, or use Former Testimony.**

In the first guilt phase trial, the State called Roswell Summers, who testified that his son, witness Danny Summers, initially told him about

witnessing a murder at Church Street Station, but later said that he witnessed a shooting at a house. During the second guilt phase trial, the State called Danny Summers as a witness, but did not call Roswell Summers. Mr. Lebron claims counsel was deficient for failing to (1) subpoena and call Roswell Summers as a witness; (2) file a motion to establish the unavailability of the witness and introduce his former testimony; and (3) understand the proper procedure so as to ensure counsel could properly impeach the State's witness through the testimony of other witnesses. Danny was the only eyewitness who was not also charged with and convicted of a crime, and his credibility was essential to the State's case.

Mr. Norgard testified at the evidentiary hearing that he did not know why the defense did not use Roswell to impeach Danny during the retrial. He admitted it was pure speculation on his part, in large part because he did not participate in the guilt phase trial, but surmised that it was a sound tactical decision. If Mr. Slovis had called Roswell Summers as a witness during the retrial, the defense would have lost the right to give the first and last closing argument. (PEH VOL XXXVIII, P.3747 L.23-25, P.3348) Mr. Lebron did not present any testimony at the evidentiary hearing regarding whether Roswell Summers was available to testify at the 1998 retrial. The trial court concluded that Roswell Summers' testimony would have been neither exculpatory or

impeaching and that Mr. Lebron failed to overcome the presumption that under the circumstances, counsel's decision not to call this witness constituted sound trial strategy, and fails to establish either deficient performance or prejudice. It is hard to imagine that failing to call a witness' father to impeach his son, the only eyewitness to the homicide that was not indicted, with prior inconsistent statements regarding the location of the homicide, is a sound tactical decision.

**H. Failure to Object to the Speculative and Hearsay Testimony of Martin Rodriguez.**

Trial counsel rendered deficient performance by failing to object to the improper testimony of Detective Martin Rodriguez. At trial, the State asked Detective Rodriguez about his search for the shotgun allegedly belonging to Mr. Lebron and suspected of being the murder weapon in this case, as follows:

> Q: While you tried to search every place you legally could, it's very possible that shotgun is up somewhere in New York to this day?
>
> A: As far as I'm concerned, it probably still is. (1998R0A VOL XXIV, p.1371).

This testimony was both speculative in nature and based upon hearsay, as Detective Rodriguez based his belief on the location of the gun on hearsay statements made to him by Stacie Kirk, and those statements that were not corroborated by any evidence. The testimony clearly violates of the rules of

evidence and counsel should have objected to it and moved to have it stricken from the record. In addition, counsel for Mr. Lebron should have objected to any testimony about the possible location of the shotgun at issue, knowing that there was no evidence at all as to its possible location. With this knowledge, the prosecutor did not have a good faith basis to ask any questions about its location, and trial counsel should have stayed away from the subject as well. Counsel therefore rendered deficient performance by allowing this subject to be a point of questioning at all with Detective Rodriguez.

Counsel's deficient performance in allowing the admission of this clearly improper evidence prejudiced Mr. Lebron in that it supported the state's version of events that Mr. Lebron was the key player in the robbery and homicide of the victim and subsequently fled to New York with evidence of the crime, including the murder weapon. Admission of this testimony allowed the jury to speculate on Mr. Lebron's possible disposal of the murder weapon, and it was prejudicial for it to be admitted.

## I. Defendant's Convictions Must Be Reversed Due To The Cumulative Effect Of The Guilt Phase Errors.

Should this Honorable Court find that the issues raised by Defendant constitute harmless error, Defendant would tender that the cumulative effect of the guilt phase errors renders Defendant's convictions unfair under Art. I, §§9 and 16, Florida Constitution, and the 5th, 6th, 8th and 14th Amendments, U.S. Constitution.

See Jones v. State, 569 So.2d 1234 (Fla. 1990); and Lusk v. State, 531 So.2d 1377 (Fla. 2d DCA 1988).

## ARGUMENT II

## THE TRIAL COURT ERRED IN FINDING THAT MR. LEBRON FAILED TO ESTABLISH DEFICIENT PERFORMANCE BY TRIAL COUNSEL AND PREJUDICE AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE FOURTH ,SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTUTION AND HIS CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION.

This argument is evidenced by the following:

All other allegations and factual matters contained elsewhere in this motion are fully incorporated therein by specific reference. Trial counsel's representation of Mr. Lebron fell below acceptable professional standards in several respects. These failures, set forth below, severely prejudiced Mr. Lebron and but for counsel's errors, there is a reasonable probability that the outcome of the penalty proceedings would have been different, especially considering the 7-5 vote to recommend death.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversary testing process., Strickland, at 688. Specifically, counsel has a duty to investigate in order to make the adversarial testing process work in the particular case. Strickland, at 690. An

ineffective assistance of counsel claim has two components: a petitioner must show that counsel's performance was deficient and that the deficiency prejudiced the defendant. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness". Strickland, at 668, 678-688. Prejudice is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, at 694. In Wiggins v. Smith, 539 U.S. 510 (2003), the United States Supreme Court held "Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." Wiggins, at 539. "[S]trategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigations are reasonable precisely to the extent that reasonable professional judgment supports the limitations on investigation. In other words, counsel has a duty to conduct a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances Wiggins, at 521.

Throughout the Court's analysis in Wiggins of what constitutes effective assistance of counsel, it turned to the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Guidelines"). See Wiggins, at 536-37. Under the ABA Guidelines, trial counsel in a capital case "...should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel and Death Penalty Cases 11. 11.4.1 p.93 (1989) and Wiggins, at 524.

Under the ABA Guidelines, there are specific requirements that should be met from the initial appointment on a case through its conclusion. Guideline 11.4.1(c) states, "the investigation for preparation of the sentencing phase should be conducted regardless of any additional assertion by the client that mitigation is not done or offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and any evidence to rebut any aggravating evidence that may be introduced by the prosecutor." In order to comply with the standard, counsel is obligated to begin investigating both phases of a capital case from the beginning. See: ABA Guideline 11.4.1 (c).

Counsel's highest duty is to investigate and prepare. Where counsel does not fulfill that duty, defendant is denied a fair adversarial testing process in the

proceedings and results are rendered unreliable. No tactical motive can be ascribed to an attorney who's omissions were based on ignorance, (Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991),( or old the failure to properly investigate or prepare, (Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991)), (Kimmellman v. Morrison, 447 U.S. 365 (1986)). Reasonable strategic decision is based on informed judgment. "[T]he principle concern... is not whether counsel should have presented a mitigation case. Rather, [the] focus [should be] on whether the investigation supporting counsel's decision not to introduce mitigating evidence... was itself reasonable." Wiggins, at 523-524. In making this assessment, the court "must consider not only the quantum of evidence already known to counsel, but whether the known evidence would lead a reasonable attorney to investigate further." Wiggins, at 527.

In Rompilla v. Beard, 545 U.S. 374, 125 S. Ct 2456 (2005), United States Supreme Court held counsel rendered deficient performance by counsel's failure to review Rompilla's prior convictions, failure to obtain school records, failure to obtain records of Rompilla's prior incarceration, and failure to gather evidence of a history of substance abuse. Rompilla, at 2463. The Rompilla Court found that "this is not a case in which defense counsel simply ignored their obligation to find mitigating evidence, and their workload as a busy public defender did not keep him from making a number of efforts...". Rompilla, at 2462. In Haliym v. Mitchell,

492 F.3d 680 (6th Cir. 2007) the court found that trial counsel rendered deficient performance when they "failed to discover important mitigating information that is reasonably available and suggested by information already in their possession." Haliym, at 718.

In Mr. Lebron's case, trial counsel's failure to investigate and present mitigation was deficient performance and deprived the jury of important and accurate sentencing information that is an indispensable prerequisite to a reasonable determination of whether a defendant shall live or die by a jury of people who may have never made a sentencing decision before. In Mr. Lebron's penalty phase preceding, substantial mitigating evidence went undiscovered and was not presented for the consideration of the sentencing jury or judge. Had this substantial mitigating evidence been presented to the jury and the sentencing judge, it is very likely, especially in view of the 7-5 recommendation of death by the jury, that Mr. Lebron would have received a life sentence.

**A. Failure to Conduct a Reasonably Competent Mitigation Investigation and Failure to Present Mitigation about Mr. Lebron's Background and History.**

Mr. Lebron's attorneys performed deficiently by failing to conduct a reasonably competent mitigation investigation. They failed to use a mitigation specialist or an investigator to obtain a comprehensive social history, biological history, or psychological history on Mr. Lebron. Counsel failed to contact family

members and friends who had knowledge about Mr. Lebron. Counsel further failed to consult with counselors and mental health experts who had dealt with and treated Mr. Lebron and his family in the past. Finally, counsel failed to properly consult with mental health and neurological experts, such as psychologists, psychiatrists, neuropsychologists, and neurologists regarding any available mental health mitigation available for presentation at the phase.

Trial counsel also failed to conduct a reasonably competent investigation into Mr. Lebron's family background. Their contact was limited to consultation with Mr. Lebron and his mother. Counsel failed to inquire of Mr. Lebron's foster parents, step parents, and family friends who observed the younger Mr. Lebron and his environment while he was growing up. Despite knowing of serious global health problems among Mr. Lebron's family, counsel failed to make any inquiries into these issues, failed to attempt to obtain any records in this regard, and failed to secure the services of any experts to help investigate and develop such issues.

Further, trial counsel did not conduct a reasonably responsible investigation into Mr. Lebron's activities and acquaintances from the time he left the juvenile system until time of the homicide. Specifically, counsel failed to locate and inquire of Mr. Lebron's numerous friends and acquaintances during this period and failed to determine what they could testify to regarding Mr. Lebron's ongoing issues identified during his childhood. Counsel also failed to inquire of these individuals

to determine the extent of Mr. Lebron's substance abuse during this period of his life.

Had counsel obtained records and contacted witnesses, they would have found testimonial and documentary evidence that would have been able to be presented in would have established the following mitigation:

> Mr. Lebron suffers from neurological impairments that affect his cognitive abilities including his critical decision-making skills, judgment, and reasoning (PCH VOL XXXII p.3602 L.17-25; p.3603; p.3604; p.3605);
>
> Mr. Lebron suffers from major psychiatric illnesses including bipolar disorder (PCH VOL XXXVII p.3605); attention deficit disorder (PCH VOL XXXVII p. 3606; p.3607); reactive attachment disorder (PCH VOL XXXVIII p. 3605; p.3606); intermittent explosive disorder (PCH VOL XXXVII p.3607-3609); paranoid personality disorder (PCH VOL XXXVII p.3610); borderline personality disorder (PCH VOL XXXVIII p 3610-3612; p.3606);
>
> Mr. Lebron suffered from an extreme mental and emotional disturbance at the time the homicide was committed (PCH VOL XXXVII p 3622,);
>
> Mr. Lebron suffered from significant adverse development while growing up including:
>
> > Family-related adverse developmental factors to include generational family dysfunction, heredity predisposition for alcohol and drug abuse and drug abuse and dependence, and hereditary predisposition to psychological disorder and personality pathology. (PCH VOL XXXV, p3312);

Adverse developmental factors-neurodevelopmental to include prenatal alcohol and drug exposure; lack of prenatal care and birth complications; attention deficit hyperactivity disorder learning disability; childhood speech and language disorder; head injury with loss of consciousness, childhood anoxia (oxygen being cut off to the brain); inhalant abuse (like sniffing glue); deficient intelligence childhood; neuropsychological deficits; and youthfulness. (PCH VOL XXXV p.3312-3313);

Adverse developmental factor-parenting to include teenage mother; mother's deficient intelligence; alcohol and drug abuse by parents; father's abandonment; functional abandonment by mother as a baby; amputation of primary attachment; deficient maternal bonding to Jermaine; instability of care and relationships in childhood; mother's physical and verbal abuse of Jermaine; maternal emotional neglect; inadequate supervision and guidance; mother's participation in prostitution, exotic dancing, and the sex industry; and sexually traumatic exposures. (PCH VOL XXXV p.3313);

Adverse developmental factor-community to include corruptive community, and neighborhood violence. (PCH VOL XXXV p3313);

Adverse developmental factor-disturbed trajectory including emotionally disturbed from childhood, childhood onset of alcohol and/or drug dependence, and cocaine abuse and dependence. (PCH VOL XXXV p3313-3314);

Mr. Lebron suffered from frontal lobe impairment (PCH VOL XXXVII p.3621).

Friends, associates and family members could have testified to the above issues at trial, and were readily available to do so. These individuals include, but

are not limited to, the following: Bridget Lauraira, Naomi Somerstein, Debra Schnoll, Tony Ortiz, Dr. Ken Dee, Caroline Weil, Richard Benedict, Carol Ehlich, Mr. Lebron's foster parents Raymond and Rosa, Victor Rios, Tawana Shoots, Ruthie Fernandez, Mary Ruth, Stacie Kirk, and Lisa Costello.

In addition, trial counsel for Mr. Lebron rendered deficient performance by failing to produce expert testimony from a psychologist, neuropsychologist, and/or other mental health and neurological experts. These experts could have testified about Mr. Lebron's brain-damage (PCH VOL XXXVII p.3595;3597). , adverse development (PCH VOL XXXV P3312-3314), mental illness and substance abuse, frontal lobe impairment (PCH VOL XXXVII p. 3599; p.3602; p.3604). These experts could have testified about the effect these issues had on Lebron's underlying value system, moral development, perception of life options in natural choices, ability to exercise sound judgment, and impulse control (PCH VOLXXVII p.3603). Specifically, these experts could have testified to the fact that Mr. Lebron's deficiencies were ongoing throughout his childhood up to the time of the homicide and that those deficiencies and issues had a significant effect on his thoughts, judgments, and actions at the time of the homicide. Trial counsel testified at the evidentiary hearing on Mr. Lebron's Motion to Vacate Judgments of Conviction and Sentence testified that Dr. Dee had "...described Mr. Lebron as the coldest antisocial personality disorder he had ever seen."(PCH VOL XXXVIII p.

3721) Because of Dr. Dee's characterization of Mr. Lebron's personality disorder, trial counsel determined that "...[in]no way would I expose Mr. Lebron to a compelled mental health exam."(PCH VOL XXX VIII p. 3727). Trial counsel made a strategic decision not to present any mental health mitigation evidence at Mr. Lebron's penalty phase trial. It is important to note the absence of any testing results, notes or reports of either trial counsel or Dr. Dee confirming that Mr. Lebron was indeed the coldest antisocial personality disorder that Dr. Dee had ever seen.

While antisocial personality disorder may be viewed negatively by a jury, the record does not establish that Dr. Dee ever made this diagnosis, therefore the fear that a jury would hear that Mr. Lebron had antisocial personality disorder cannot be viewed as a valid strategic reason to forego the powerful testimony of a mental health expert. The deficient performance by Mr. Lebron's trial counsel in failing to present available evidence in support of numerous statutory and non-statutory mitigators cannot be considered strategic simply because the jury may have heard some negative information about Mr. Lebron during the penalty phase.

In Sears v. Upton, 130 S.Ct. 3259 (2010) the United States Supreme Court discussed that where the evidence presented in post-conviction also showed some adverse information, this adverse information doers not rule out prejudice:

> "[T]he fact that along with this new mitigation evidence there was also some adverse evidence is unsurprising... given that counsel's

> initial mitigation investigation was constitutionally inadequate. Competent counsel should have been able to turn some of the adverse evidence into a positive-perhaps in support of a cognitive efficiency mitigation theory. In particular, evidence of Sears' grandiose self-conception and evidence of his magical thinking... [and] "profound personality disorder...". This evidence may not have made Sears more likeable to the jury, but it might well have helped jury understand Sears and his tremendous acts-especially in light of his purportedly stable upbringing. Sears, at 3264-64.

Like Sears, counsel for Mr. Lebron should have been able to tie any negative information about Mr. Lebron, including any antisocial traits, into a cohesive mitigation theory.

It is well settled that the above identified issues are valid mitigation. Power v. State, 866 So.2d 952 at 959 (Fla. 2004) (family and personal history or validly considered mitigation); Hurst v. State, 819 So.2d 689 at699 (Fla. 2002)( significant weight mitigation where defendant asserts a troubled background family history of instability, poverty, or abuse,); Ragsdale v. State, 798So.2d 713 at718-19 (Fla. 2001) and Rose v. State, 675 So.2d 567 at 571(Fla. 1996)(citing Porter v. Singletary, 14 F.3d 554, at 557 (11th Cir. 1994) (prejudice established when counsel failed to investigate and present evidence of brain damage and mental illness); Parker v. State, 643So.2d 1032, at1035(Fla. 1994)( long-term drug use and alcohol abuse is recently considered valid mitigation); Holsworth v. State, 522 So. 2d 348, at 354(Fla. 1988)( childhood trauma recognizes mitigating factor). This line cases are based upon Lockette v. Ohio, 438 U.S. 584 at 604 (1978), where the

Supreme Court held that a jury must not be precluded from considering any aspect of a defendant's character or record in any of the circumstances of the offense that defendant proffers as a basis for a sentence less than death.

Because Mr. Lebron's attorneys failed to conduct a reasonably competent investigation of Mr. Lebron's background, they failed present reasonably available mitigation to the jury. Had trial counsel investigated and discovered this mitigation and further developed it through investigation, a more comprehensive and complete presentation of mitigating evidence at the penalty phase, there exists a reasonable probability that Mr. Lebron would have received a life sentence, especially in view of the 7-5 jury recommendation for the imposition of death.

**B. Failure to Conduct a Reasonably Competent Mitigation Investigation and Present Evidence of Mr. Lebron's Drug Use of the Weeks and Months Before the Homicide.**

Trial counsel rendered deficient performance by failing to conduct a reasonably comprehensive investigation into Mr. Lebron substance abuse and abuse the weeks and months before the homicide. Trial counsel was well aware of the facts of Mr. Lebron' substance abuse during this period but did not follow-up on this evidence or present any of it to the jury. This evidence known to trial counsel includes, but is not limited to, the following: Jocelyn Ortiz's deposition in which Mr. Lebron's mother states that when she saw him approximately one year before the crime she could tell immediately that he was on drugs (Deposition of

Jocelyn Ortiz, 9/25/97, space P. 76 – 8); the testimony of nearly all of the state's lay witnesses about drug use including Mark Tocci (1998 ROA VOLXII, p. 707-8), Danny Summers (1998 ROA VOLXIV. p. 1033), Duane Sapp (1998 ROA VOLXIV, p.1110, 1232-6), Mary Lineberger (1998 ROA VOXV, p. 1263, 1278-9), Stacie Kirk (1998 ROA VOL. XVI, p. 1385-6), Brandi Gribben (1998 ROA VOLXVI, p.1457),and Danita Sullivan (1998 ROA VOL. XVI, p. 1480, 1492, 1507-7); the evidence log of the crime scene by the CST, showing the presence of illegal substances; and the self-reports from Mr. Lebron.

In addition to failing to present this evidence of substance abuse to the jury, trial counsel failed to investigate and locate additional evidence of Mr. Lebron's substance abuse during this time. If counsel had conducted a reasonably competent investigation, they would have been able to locate additional witnesses who could have testified about Mr. Lebron substance abuse. These witnesses include, but are not limited to, Victor Rios Tawana Shoots, Ruthie Fernandez, Miriam Ruth, Christina Charbonnier, Alisha Walker, Stacie Kirk, and Lisa Costello.

Trial counsel testified at the evidentiary hearing on Mr. Lebron's Motion to Vacate Judgments of Conviction and Sentence that Dr. Dee had "...described Mr. Lebron as the coldest antisocial personality disorder he had ever seen."(PCH VOL XXXVIII p. 3721) Because of Dr. Dee's characterization of Mr. Lebron's personality disorder, trial counsel testified "...[in]no way would I expose Mr.

Lebron to a compelled mental health exam."(PCH VOL XXXVIII p. 3727). Trial counsel made a strategic decision not to present any mental health mitigation evidence at Mr. Lebron's penalty phase trial. It is important to note the absence of any testing results, notes or reports of either trial counsel or Dr. Dee confirming that Mr. Lebron was indeed the coldest antisocial personality disorder that Dr. Dee had ever seen.

While antisocial personality disorder may be viewed negatively by a jury, the record does not establish that Dr. Dee ever made this diagnosis, therefore the fear that a jury would hear that Mr. Lebron had antisocial personality disorder cannot be viewed as a valid strategic reason to forego the powerful testimony of a mental health expert. The deficient performance by Mr. Lebron's trial counsel in failing to present available evidence in support of numerous statutory and non-statutory mitigators cannot be considered strategic simply because the jury may have heard some negative information about Mr. Lebron during the penalty phase.

In Sears v. Upton, 130 S.Ct. 3259 (2010) the United States Supreme Court the Court discussed that where the evidence presented in post-conviction also showed some adverse information, this adverse information doers not rule out prejudice:

> [T]he fact that along with this new mitigation evidence there was also some adverse evidence is unsurprising... given that counsel's initial mitigation investigation was constitutionally inadequate. Competent counsel should have been able to turn some of the adverse evidence

> into a positive-perhaps in support of a cognitive efficiency mitigation theory. In particular, evidence of Sears' grandiose self-conception and evidence of his magical thinking... [and] "profound personality disorder...". This evidence may not have made Sears more likeable to the jury, but it might well have helped jury understand Sears and his tremendous acts-especially in light of his purportedly stable upbringing. Sears, at 3264-64.

Like Sears, counsel for Mr. Lebron should have been able to tie any negative information about Mr. Lebron, including any antisocial traits, into a cohesive mitigation theory.

Trial counsel's rendering of deficient performance in investigating and presenting mitigation evidence and testimony prejudiced Mr. Lebron in that insufficient evidence was presented about his substance abuse and use during the time period leading up to the homicide. The jury must not be precluded from considering any aspect of a defendant's character or record in any of the circumstances of the offense that the defendant proffers as a basis for its consideration of death. Lockett v. Ohio, 438 U. S. 586 at 604 (1978). Long-term drug use and alcohol abuse has been considered by this Court as valid mitigation. Parker v. State, 643 So. 2d 1031 at 1035 (Fla.1994).

**C. Failure to Conduct a Reasonably Competent Investigation and Present Evidence of Incomplete Brain Development at the Time of the Crime.**

Trial counsel rendered deficient performance by failing to conduct reasonably competent investigation in Mr. Lebron's case and readily available relevant scientific evidence about incomplete brain about development.

On May 25th, 2004, the National Institutes of Health, Bethesda Maryland, published a breakthrough study on the development of the brain. The study, published in the proceedings of the National Academy of Sciences of the United States of America, detailed findings that proved that portions of the brain did not fully develop until an individual is proximately 25 years old. The study, entitled "Dynamic Mapping of Cortical Development During Childhood and Early Adulthood" authored by Gauthier and others, was the result of an international effort led by the NIII's Institute of Mental Health in the Diversity of California Los Angeles laboratory of Neuro- Imaging. The research establishes that the region of the brain that inhibits risky behavior and volitional control is not fully formed until age 25.

The evidence is of such a nature that it should have been presented at Mr. Lebron's penalty phase trial, which did not commence until August 16, 2005. This evidence warrants a reweighing of Mr. Lebron's statutory mitigators, particularly the age mitigator, and aggravation in light of the evidence presented at trial. This scientific evidence is relevant to punishment phase jury deliberations because Jermaine Lebron was only 21 years old at the time of the homicide and, with the

scientific evidence tending to show that his brain is not fully developed and his emotional maturity level was less than previously believed (PCH VOL XXXVI p.3436-p.3437), the weight given to the age statutory mitigator should be reconsidered. Fla. Statute 921.141 (6) (g). This evidence tends to reduce the weight to be given to the aggravators the jury and the trial court found.

Trial counsel testified at the evidentiary hearing on Mr. Lebron's Motion to Vacate Judgments of Conviction and Sentence testified that Dr. Dee had "...described Mr. Lebron as the coldest antisocial personality disorder he had ever seen."(PCH VOL XXXVIII p. 3721) Because of Dr. Dee's characterization of Mr. Lebron's personality disorder, trial counsel testified "...[in]no way would I expose Mr. Lebron to a compelled mental health exam."(PCH VOL XXXVIII p. 3727). Trial counsel made a strategic decision not to present any mental health mitigation evidence at Mr. Lebron's penalty phase trial. It is important to note the absence of any testing results, notes or reports of either trial counsel or Dr. Dee confirming that Mr. Lebron was indeed the coldest antisocial personality disorder that Dr. Dee had ever seen.

While antisocial personality disorder may be viewed negatively by a jury, the record does not establish that Dr. Dee ever made this diagnosis, therefore the fear that a jury would hear that Mr. Lebron had antisocial personality disorder cannot be viewed as a valid strategic reason to forego the powerful testimony of a

mental health expert. The deficient performance by Mr. Lebron's trial counsel in failing to present available evidence in support of numerous statutory and non-statutory mitigators cannot be considered strategic simply because the jury may have heard some negative information about Mr. Lebron during the penalty phase.

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Like Sears, counsel for Mr. Lebron should have been able to tie any negative information about Mr. Lebron, including any antisocial traits, into a cohesive mitigation theory.

In Greg V. Georgia, 428 U.S. 153 (1976), the United States Supreme Court noted that

> "[t]he death penalty is set to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." Greg, at 183.

To justify imposition of a death sentence, the prosecution must prove that certain characteristics of the offender will serve those purposes. To that end, the state may seek retribution only in relation to the crime for which the state seeks to impose the death penalty. Beam v. Paskett, 3 F.3d 1308 (9th Cir. 1993), citing Tison v. Arizona, 481 U.S. U.S. 137 at 149 (1987).

Regarding the decision to seek retribution, in Lockett v. Ohio, 438 U.S. 586 at 604(1978), the United States Supreme Court held that the sentencer cannot be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that a defendant proffers as a basis for a sentence less than death.

Counsel's deficient performance prejudiced Mr. Lebron since he was prevented from presenting evidence to be considered in mitigation and there is a reasonable probability, given the 7-5 jury recommendation of death, that Mr. Lebron would have received a life sentence has such mitigation been presented. Trial counsel rendered ineffective assistance of counsel and Mr. Lebron should be granted a new penalty phase trial.

**D. Failure to Percent Positive Prisoner Evidence.**

Trial counsel rendered deficient performance by failing to percent positive prisoner evidence. The jury must not be precluded from considering any aspect of

a defendant's character or record and of any of the circumstances of the offense that defendant proffers as a basis for a sentence less than death. Lockett, at 604. "[E]vidence that the defendant would not pose a danger if spared, but incarcerated, must be considered potentially mitigating." Skipper v. South Carolina, 476 U S 1 at 5 (1986).

Substantial correctional and research data were available in 2005 that could have been particularized to Mr. Lebron and provided to the sentencing jury and court in establishing that he was likely to have a positive adjustment to life without parole in the Florida Department of Corrections. Among the factors and particularized data that could have been presented to the jury through the use of an expert are:

> *Age:* In 2005, Mr. Lebron was 31 years old. Age is one of the most powerful predictors of prison misconduct violence, with inmates who are over age 30 having only a fraction of the incidents of such misconduct as parent inmates in their teens or early 20s.
>
> *Jail and prison adjustment pre-2005:* Mr. Lebron was confined to the Rikers correctional facility in New York for a number of months following his arrest in December, 1995. He was subsequently housed in the Osceola County Jail for approximately one year. He was briefly sent to the Citrus County Jail but was returned Osceola for his pending trial amid a rumor of escape conspiracy. Mr. Lebron has been in the custody of the Department of Corrections since his first conviction and sentencing on this case. During this 14 year tenure of jail and prison confinement, Mr. Lebron is not been disciplined for assaultive misconduct and has received few disciplinary write-ups. This pattern of compliant adjustment to jail regulations and authority demonstrated since 2005 to his having a nonviolent adjustment to

prison. Regarding the alleged escape conspiracy during 1997-98, a convicted capital offender would be assigned to a secure perimeter facility at the Department of Corrections facility. An inmate thought to be a disproportionate risk of escape would have additional internal security measures applied to him. Such internal and external security conditions essentially render irrelevant any escape motivation in inmate may entertain.

*Correctional appraisal:* During his pretrial confinement at Rikers and in the Osceola County Jail, Mr. Lebron was generally housed in the general population of jail, where he had unshackled contact with staff and other inmates for 13+ hours each day. The determination of correctional personnel, with full knowledge of the pending charges against Mr. Lebron, determined that he could be safely housed with other inmates and such determination demonstrates that he was not a disproportionate risk of violence to staff or inmates.

*High school diploma*: Mr. Lebron earned a high school diploma while in the Orange County Jail. Inmates who have a high school diploma have been observed to have a markedly lower risk of assaultive misconduct prison. Prior to Mr. Lebron's 2005 trial, data on the assaultive misconduct of inmates in a high-security prison over an 11 year period of time existed and was well known. This data shows that inmates having a GED or high school diploma were half as likely to be involved in assaultive conduct.

*Long-term inmate:* Sentenced to a life term, Mr. Lebron will obviously be a long-term prison inmate. Studies have shown that inmates facing more than five years of confinement (47% of whom are murders) have lower rates of disciplinary infractions than did short-term inmates. In other words, inmates convicted of more serious offenses facing long prison sentences displayed better prison adjustment than short-term less serious offenders. Specifically, one of the primary tenets of prison structure is that this behavior results in further curtailment of privilege and additional loss of freedom of movement. The reality of this inmate management system is that there is always something to be gained by behaving – a reality that is not

> lost on long-term inmates who recognize they've spent much of their lives in prison. The research suggests because Mr. Lebron would be a long-term inmate, he would have a lower likelihood of disciplinary difficulties despite the seriousness of the crime.
>
> *Capital offender*: Extensive data was available in 2005 demonstrating that the majority of capital offender serving life terms in prison were never sanctioned for serious institutional violence.Analysis of a defendant's past behavior pattern in a similar setting and the individualized application of group statistical data are the two approaches that are most reliable in assessing likelihood of violent behavior in a prison context. Behavior pattern analysis that is specific to context is critically important because prison represents a fundamentally different context from community – and prison violence does not predictably follow from pre-confinement violence or a capital offense of conviction.

Trial counsel failed to present any testimony of positive prisoner conduct addressing the likelihood of Mr. Lebron engaging in future violence in prison if given a life sentence. Trial counsel "...never seriously considered putting on positive prisoner evidence"(PCH VOL XXXVIII p.3724).

Counsel rendered deficient performance by failing to evaluate Mr. Lebron in this area, review the relevant studies, and in failing to present necessary testimony, including expert testimony, on this topic. This failure constituted deficient performance. A failure to present this evidence prejudiced Mr. Lebron in that he was prevented from presenting valid mitigating evidence as required by Lockett and Skipper. Mr. Lebron should be granted a new penalty phase trial.

**E. Failure to Present Expert Testimony as to Mr. Lebron Mental Illness and Cognitive Brain Dysfunction.**

The Sixth Amendment requires a competent mental health assistance to ensure fundamental fairness and reliability in the adversarial process. Ragsdale v. State, 798 So. 2d 713 (Fla. 2001). Meaningful assistance of counsel in capital cases requires counsel pursue and investigate all reasonably available mitigating evidence including brain damage and mental illness. Fraser v. Huffman, 343 F.3d 780 (6th Cir. 2003). Counsel's failure to pursue mental health mitigation despite "red flags" amounts to deficient performance. A competency and sanity evaluation as superficial as the one performed for [the defendant] obviously cannot substitute for a thorough mitigation evaluation." Arbelaez v. State, 898 So. 2d 25 at 34 (Fla. 2005).

Counsel failed to ensure that Mr. Lebron received a reasonably competent mental health and neurological evaluation and failed to call to testify reasonably qualified experts who could testify as to the extent of Mr. Lebron brain damage and mental illness, despite the "red flags" indicating such issues. Counsel retained the services of Dr. Henry Dee prior to the commencement of Mr. Lebron's first guilt phase trial and Mr. Dee evaluated Mr. Lebron in August, 1997. Dr. Dee informed counsel after his evaluation of Mr. Lebron that defendant had significant neurological impairments, and IQ of 83, memory impairments, psychological

impairments, significant interpersonal communication limitations, history of substance abuse, and was the product of a portal environment. Trial counsel subsequently filed a Notice of Intent to Present Expert Testimony of Mental Mitigation in September, 1997 (1998 ROA VOL I, p. 68). In this Notice, counsel stated that Dr. Dee could testify to a number of factors in mitigation, including neurological impairment, psychological impairment, substance abuse, and

Despite being aware of this information prior to any of Mr. Lebron's trials, trial counsel did not present any expert or other testimony in mitigation in relation to these issues. Specifically counsel did not call Dr. Dee as a witness in any trial or proceeding, and never retained another qualified expert to evaluate Mr. Lebron and present testimony as to mitigation in these areas. Trial counsel likewise failed to have Dr. Dee contact family members or other potential witnesses to provide a comprehensive understanding of Mr. Lebron's family and background, to have him review of the relevant documents, and failed to have any additional or follow-up testing performed on Mr. Lebron.

Had Mr. Lebron's trial attorneys conducted a reasonably competent investigation, they would have been able to present evidence of Mr. Lebron has functional brain impairment, with possible actual brain pathology with an underlying neurological conditions. They could have presented evidence that Mr. Lebron's history in neuropsychological deficits are consistent with frontal lobe

impairment, including difficulty in coming up with solutions to problems, and try alternative approaches when original approach doesn't work. These problems mean that his critical decision-making skills, judgment, and reasoning are all impaired. Counsel could have and should have moved the court for brain imaging, including a PET scan, to confirm the presence of brain abnormalities.

Expert testimony could have also been produced at trial to establish that Mr. Lebron has processing speed problems, including problems with information processing and performance under stress and pressure (PCH VOL XXXVII p.3603-3604). Likewise, it could have been shown that Mr. Lebron has learning disabilities, and that his executive functioning is significantly impaired, which is evidence of impairment in a higher order cognitive functioning. Additionally, expert testing, evaluation and testimony would have shown Mr. Lebron has long-standing problems with attention and concentration, has demonstrated poor planning ability skills (PCH VOL XXXVII p.3606), and has difficulty adequately expressing his frustrations and concerns verbally. Mr. Lebron's deficits in these areas, especially planning and organization, are exceptionally important to challenge the state's theory that Mr. Lebron was the mastermind and planner of the group.

Trial counsel testified at the evidentiary hearing on Mr. Lebron's Motion to Vacate Judgments of Conviction and Sentence testified that Dr. Dee had

"...described Mr. Lebron as the coldest antisocial personality disorder he had ever seen."(PCH VOL XXXVIII p. 3721) Because of Dr. Dee's characterization of Mr. Lebron's personality disorder, trial counsel testified "...[in]no way would I expose Mr. Lebron to a compelled mental health exam."(PCH VOL XXXVIII p. 3727). Trial counsel made a strategic decision not to present any mental health mitigation evidence at Mr. Lebron's penalty phase trial. It is important to note the absence of any testing results, notes or reports of either trial counsel or Dr. Dee confirming that Mr. Lebron was indeed the coldest antisocial personality disorder that Dr. Dee had ever seen.

While antisocial personality disorder may be viewed negatively by a jury, the record does not establish that Dr. Dee ever made this diagnosis, therefore the fear that a jury would hear that Mr. Lebron had antisocial personality disorder cannot be viewed as a valid strategic reason to forego the powerful testimony of a mental health expert. The deficient performance by Mr. Lebron's trial counsel in failing to present available evidence in support of numerous statutory and non-statutory mitigators cannot be considered strategic simply because the jury may have heard some negative information about Mr. Lebron during the penalty phase.

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Like Sears, counsel for Mr. Lebron should have been able to tie any negative information about Mr. Lebron, including any antisocial traits, into a cohesive mitigation theory.

As a result of the foregoing, a qualified mental health expert could testify that Mr. Lebron has both major psychiatric illness and cognitive brain dysfunction (PCH VOL XXXVII p.3605). This major psychiatric illness include bipolar disorder (PCH VOL XXXVII p.3605), attention deficit disorder (PCH VOL XXXVII p.3606), reactive attachment disorder (PCH VOL XXXVII p. 3605-p.3606), and intermittent explosive disorder (PCH VOL XXXVII p.3610. As a result, if counsel rendered effective assistance, expert testimony could have been presented to support the weighty statutory mitigator that Mr. Lebron acted under extreme emotional disturbance at the time of the homicide.

Trial counsel's deficient performance in investigating and present mitigating evidence and testimony prejudiced Mr. Lebron in that Mr. Lebron did not receive

the benefit of an adequate mental health examination and presentation of mitigating evidence as to the mental illness cognitive brain dysfunction to the jury and court. Counsel's deficient performance prejudiced Mr. Lebron's since counsel did not present valid mitigation evidence relating to his mental and neurological state, which has been found to be mitigating in nature. See: Ragsdale v. State, 798 So.2d 713 at 718-19 (Fla. 2001) and Rose v. State, 675 So.2d 567 at 571 (Fla. 1996) citing Porter v. Singletary, 14 F. 3d 554 at 557 (11th Cir. 1994) (prejudice established when counsel failed to investigate and present evidence of brain damage and mental illness.) In addition, trial counsel's deficient performance prejudiced Mr. Lebron in that he was unable to present expert testimony in support of the statutory mitigator that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

**F. Failure to Present Expert Testimony as to Mr. Lebron's Adverse Development.**

Trial counsel rendered deficient performance by failing to present expert testimony as to Mr. Lebron's adverse development. The Sixth Amendment requires competent mental health assistance to ensure fundamental fairness and reliability in the adversarial process. Ragsdale v. State, 798 So. 2d 713 (Fla. 2001). Meaningful assistance of counsel in capital cases requires counsel pursue and investigate all reasonably available mitigating evidence, including brain damage

and mental illness. Frazier v. Huffman, 343 F. 3d 780 (6th Cir. 2003). Counsel's failure to pursue mental health mitigation despite "red flags" amounts to deficient performance.

Counsel in this case chose to only to present testimony of Mr. Lebron's mother at the penalty phase, along with selected records from Mr. Lebron's childhood. Despite trial counsel's awareness of Mr. Lebron poor childhood, lack of proper parenting, time in foster care and institutions, counseling and problems in school, personal drug use and prenatal drug exposure, learning disabilities and behavioral problems, neuropsychological and psychological problems and deficits, family history of mental illness and substance abuse, absence of his father, and poor community in peer influences, trial counsel chose to only present the abbreviated testimony of Jocelyn Ortiz. As a result, the trial court found it sentencing memorandum that:

> "There is no evidence that the defendant was not mentally and emotionally mature."
>
> "[t]here was simply no evidence presented what effect the mothers use drugs had defendant."
>
> "[he] had been observed to express age appropriate interest... with no indication of organic damage."
>
> "the records do not show, however, that the defendant was acting at a level consistent with his chronological age at the time the murder was committed, or that his emotional or mental age is consistent with his chronological age."

> "there was no evidence presented that... [Lebron] is easily led by others or that he had shallow emotional attachments."
>
> "[T]here was no evidence presented what effect, if any, these circumstances had on defendant."
>
> "It is also quite evident that the defendant did not have the best mother, but he did have a mother who attempted to provide him with everything he needed and wanted. But most important of all, she used the system to provide him with social services through various agencies and schools."
>
> "[The court] must give these factors little weight because no evidence was presented which demonstrated link between the defendant's emotional problems, mental health problems, and the lack of a world-class mother and the facts surrounding the murder."

Had trial counsel conducted a proper investigation in this case and Mr. Lebron's background and ensured that Mr. Lebron had a proper mental health examination, counsel could have presented significant evidence as to Mr. Lebron's adverse development growing up.(PCH VOL XXV p.3312-p.3313). In addition, counsel could have presented expert testimony about the effect these issues had on Mr. Lebron's underlying value system, moral development, perception of life options, and nature choices, ability to exercise sound judgment, and impulse control. Specifically, a properly qualified expert could have testified to the fact that Mr. Lebron's deficiencies were on going on through his childhood up to the time of the homicide and that those deficiencies and issues had a significant effect on his

thoughts, judgments and actions at the time of the homicide.(PCH VOL XXXVI p.3509).

Substantial evidence was available regarding Mr. Lebron's adverse development. Had a reasonable investigation been conducted by counsel, a large variety of adverse development factors could have been presented through the use of a properly qualified expert, including;

> Generational family dysfunction: There is evidence of generational developmental adversity and relationship dysfunction in the lives of Mr. Lebron's extended family. The legacy of both maternal and paternal branches of Mr. Lebron's family system is one of inadequate family structure, out of wedlock children, children separated from one or both parents, and emotional detachment between family members;
>
> Hereditary predisposition for alcohol and drug abuse/dependence: Mr. Lebron's father Robert "Lefty" Alvarez, was reportedly a drug abuser. Mr. Lebron's mother, Ms. Ortiz, heavily abused drugs in the years surrounding Mr. Lebron' birth. She was in a long-term residential drug rehab at "Day Top for a Drug Free World" during Mr. Lebron's early childhood; (PCH VOL XXXVI p.3470-p3472).
>
> Prenatal alcohol and drug exposure: Ms. Ortiz acknowledged in her testimony that she abused drugs heavily prior to and while pregnant with Mr. Lebron. She reported on a medical questionnaire that she "used street drugs" during her pregnancy with Mr. Lebron. Her substance dependency was sufficiently severe that she spent the first three years of Mr. Lebron's life in a drug rehabilitation program(PCH VOL XXXVI p.3648; p.3469);
>
> Attention Deficit Hyperactivity Disorder: Attention Deficit Hyperactivity Disorder is a neurologically-based disorder involving a triad of symptoms: excessive motor activity (hyperactivity), inattention (attention-focusing and concentration deficits), and impulsivity. Mr. Lebron was diagnosed with the symptoms or this disorder throughout his childhood(PCH VOL XXXVI p.3423)

Learning disability: learning disability is characterized by psycho-educational achievement that is significantly discrepant-a standard deviation in standard scores from what would be expected from intellectual capability. Mr. Lebron was repeatedly diagnosed as having learning disabilities (PCH VOL XXVI p.3390);

Childhood speech and language disorder: Mr. Lebron suffered from a speech language disorder in childhood documented in childhood records stating he has "some articulation errors and difficulty with irregular plural forms." This disorder is substantiated by of the records, testing, and reports. (PCH VOL XXXVI p.3391-p.3393;

Head injury with loss of consciousness: Mr. Lebron was beaten and knocked unconscious at age 19. He was surrounded by a group of males who mistakenly thought he had stolen a vehicle belonging to one of them. Mr. Lebron was hit over the head with a bottle. He lost consciousness and awakened in the street approximately 10 minutes later(PCH VOL XXVI p.3394-p.3396);

Childhood anoxia: Mr. Lebron reported that while at summer camp as a child he played a "pass-out" game with his peers. This involved hyperventilating and then having a peer press the sides of his neck. He described this would induce unconsciousness which would last 1 to 2 minutes(PCH VOL XXXVI p.3401-p.3402);

Inhalant abuse: Mr. Lebron described that over the course of 4-5 months while it Pleasantville College, he sniffed glue approximately once a week. Each of these episodes of inhalant abuse would last several hours(PCH VOL XXVI p.3403-p.3407);

Deficient intelligence in childhood: Mr. Lebron's intellectual capability was assessed on several occasions during his childhood and early adolescence and was generally shown to be below average (PCH VOL XXXVI p.3407;p.3419);

Youthfulness: at the time of the capital offense, Mr. Lebron was age 21. This youthfulness is a critically important developmental factor in the tragic conduct that occurred. Adolescent immaturity in decision-making capability (PCH VOL XXXVI p.3420), self-control (PCH

VOL XXXVI p.3421), and independence of action as a clear neurodevelopmental basis (PCH VOL XXXVI p3429; p.3635);

Incarceration of father and associated abandonment: Mr. Lebron's father was incarcerated at the beginning of Mr. Lebron's life. Mr. Lebron had no contact with his father growing up, a significant abandonment of a major parental figure (PCH VOL XXXVI p.3472-p3475);

Functional abandonment by mother as a baby (PCH VOL XXXVI p.3476-p3477);

Amputation of primary attachment: shortly after Mr. Lebron's birth, Ms. Ortiz entered a drug rehabilitation program and Mr. Lebron was placed in foster care where he remained until age 3. Ms. Ortiz then resumed her parenting of him, although apparently still having periodic contact with the foster family. Of course, by the time Mr. Lebron had been in their care to age 3, this foster family had become his family, and these adults his parents. When Ms. Ortiz removed him from this home, Mr. Lebron suffered a profound amputation of the primary attachments of his life (PCH VOL XXX p.3452-p.3453);

Deficient maternal bonding to Mr. Lebron: Ms. Ortiz implemented a sustained separation of three years from her child, which points to her failing to establish the expected maternal bond to that child. Her subsequent detached and neglectful posture towards Mr. Lebron is further evidence that such a bond never form. Such a failure to bond to a child point to a personality pathology and associated problems establishing meaningful relationships, in the mother who facilitated the separation (PCH VOL XXXVI p.3453);

Instability of care and relationships in childhood: after returning to his mother's care, Mr. Lebron was subjected to ongoing instability of care in relationships. Ms. Ortiz appears to have abdicated her parental role to others as much possible. (PCH VOL XXXVI p.348 );

Mother's physical and verbal abuse: both self-reporting and external sources verify that Ms. Ortiz was physically abusive with Mr. Lebron, including beatings that left welts and bruises to his arms, face, head,

leg, and back. These beatings occurred several times, much more than the one incident reported at trial. Reports also show that Ms. Ortiz was verbally and emotionally abusive with Mr. Lebron as well (PCH VOL XXXVI p3453; p.3482-3484);

Maternal emotional rejection and neglect: Mr. Lebron's school records reflect a high rate of absenteeism in the elementary grades. This is particularly relevant to the issues of parental neglect as children of this age cannot be expected to get themselves to school and because Mr. Lebron suffered from no chronic childhood health conditions that would provide an alternative explanation. It is Ms. Ortiz' poor capacity to provide Mr. Lebron with maternal emotional nurturance and support was repeatedly described in Mr. Lebron's social services records as well (PCH VOL XXXVI p.3483; p3485-p.3486);

Inadequate supervision and guidance: Descriptions of the inadequate parental structure provided by Ms. Ortiz, as well as her inconsistent limit setting with Mr. Lebron were replete in his juvenile and social services records (PCH VOL XXXVI p.3486; P3488);

Mother's participation in exotic dancing/sex industry: Ms. Ortiz worked as an exotic dancer in a strip/topless club for much of Mr. Lebron's childhood. This employment and the associated lifestyle had a number of negative impacts on Mr. Lebron. Mr. Lebron recalled accompanying his mother to the club where she was working on occasion during his elementary school years. He also knew many of her coworkers who would hang out at their house (PCH VOL XXXVI p.3453;p.3488);

Sexually traumatic exposure: Mr. Lebron had a number of sexually traumatic exposures. Psychologically injurious sexual exposure may be of a number of different types, including genital sexual abuse, exposure to graphic sexuality, perverse family sexuality, and premature sexualization. Mr. Lebron had experience with all of these categories. (PCH VOL XXXVI p.3453-p3454; p. 3489; p.3490-p.3493);

Corruptive community and neighborhood violence: Mr. Lebron experienced both general community violence as well as personal

victimization while growing up. This included gunfire, gang conflict, and serious injuries to neighborhood peers while growing up (PCH VOL XXXVI p.35043508);

Immature mother: Jocelyn Ortiz was 17 years old when she gave birth to Mr. Lebron. Because of her young age, she was unable to bring the same degree of nurturance and support for Mr. Lebron that she could have if she were older.(PCH VOL XXXVI P.3463);

Childhood onset alcohol and/or drug abuse and dependence: Mr. Lebron began to take sips of beer while "hanging out" on his block in Queens, New York. At age 12 he was drinking a 40 ounce beer twice-weekly. At age 13 he drank a 40 ounce beer daily and smoked marijuana will 1-2 times. At age 14 he was drinking two 40 ounce beers daily. He popped downers that were given to him by an older peer. (PCH VOL XXXVI p.3510-p.3511);

Cocaine abuse and dependence: Mr. Lebron first snorted cocaine at age 18, after catching his girlfriend using cocaine with Ms. Ortiz and a male friend at Ms. Ortiz's strip club. His abuse of cocaine rapidly escalated to almost daily use. Mr. Lebron would snort cocaine all night until he ran out. He would then "re-up" the next day or the day after and again be up all night. In conjunction with this cocaine abuse, Mr. Lebron was smoking marijuana throughout the day on a daily basis, as well as continuing to drink daily (PCH VOL XXXVI p.3511 -3514);

The mitigating implications of each of these factors and the role of the respective factor in the trajectory that led to the capital offense could have been elicited through expert testimony. Such testimony would have provided the jury with a mechanism to understand and give scientifically-informed weight to each factor singly and cumulatively.

Trial counsel testified at the evidentiary hearing on Mr. Lebron's Motion to Vacate Judgments of Conviction and Sentence that Dr. Dee had "...described Mr. Lebron as the coldest antisocial personality disorder he had ever seen."(PCH VOL XXXVIII p. 3721) Because of Dr. Dee's characterization of Mr. Lebron's personality disorder, trial counsel testified "...[in]no way would I expose Mr. Lebron to a compelled mental health exam."(PCH VOL XXXVIII p. 3727). Trial counsel made a strategic decision not to present any mental health mitigation evidence at Mr. Lebron's penalty phase trial. It is important to note the absence of any testing results, notes or reports of either trial counsel or Dr. Dee confirming that Mr. Lebron was indeed the coldest antisocial personality disorder that Dr. Dee had ever seen.

While antisocial personality disorder may be viewed negatively by a jury, the record does not establish that Dr. Dee ever made this diagnosis, therefore the fear that a jury would hear that Mr. Lebron had antisocial personality disorder cannot be viewed as a valid strategic reason to forego the powerful testimony of a mental health expert. The deficient performance by Mr. Lebron's trial counsel in failing to present available evidence in support of numerous statutory and non-statutory mitigators cannot be considered strategic simply because the jury may have heard some negative information about Mr. Lebron during the penalty phase.

In Sears v. Upton, 130 S.Ct. 3259 (2010) the United States Supreme Court discussed that where the evidence presented in post-conviction also showed some adverse information, this adverse information does not rule out prejudice:

> [T]he fact that along with this new mitigation evidence there was also some adverse evidence is unsurprising... given that counsel's initial mitigation investigation was constitutionally inadequate. Competent counsel should have been able to turn some of the adverse evidence into a positive-perhaps in support of a cognitive efficiency mitigation theory. In particular, evidence of Sears' grandiose self-conception and evidence of his magical thinking... [and] "profound personality disorder...". This evidence may not have made Sears more likeable to the jury, but it might well have helped jury understand Sears and his tremendous acts-especially in light of his purportedly stable upbringing. Sears, at 3264-64.

Like Sears, counsel for Mr. Lebron should have been able to tie any negative information about Mr. Lebron, including any antisocial traits, into a cohesive mitigation theory.

If the above information and expert testimony had been presented, it could have been used to support significant statutory and nonstatutory mitigation, including: the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; the defendant was an accomplice in a capital felony committed by another person and his or her participation was relatively minor; the defendant acted under extreme duress or under the substantial domination of another person; capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to

the requirements of law was substantially impaired; the age of the defendant at the time of the crime; and the existence of any other factor in the defendant's background that would mitigate against imposition of the death penalty.

Trial counsel's rendering of deficient performance in investigating and presenting mitigation evidence and testimony prejudiced Mr. Lebron in that Mr. Lebron did not receive the benefit of an adequate mental health examination and presentation of mitigating evidence as to adverse development to the jury and the court. Counsel's deficient performance prejudiced Mr. Lebron since counsel did not present valid mitigation relating to his background and childhood which is been found to be mitigating in nature. See: Power v. State, 886 So.2d 952 at 959 (Fla.2004) (family background and personal history or validly considered mitigation); Hurst v. State, 819 So.2d 689 at 699 (Fla.2002) (significant weight mitigation where defendant asserted a troubled background with a family history of instability, poverty, or abuse); Holsworth v. State,552 So.2d 348 at 354 (Fla.1988) (childhood trauma recognizes a mitigating factor). This line of cases are based on the seminal case of Lockette v. Ohio, 438 U.S. 586 at 604 (1978), where the Supreme Court held a jury must not be precluded from considering any aspect of a defendant's character or record in any of the circumstances of the offense that the defendant proffers as a basis for sentence less than death. Counsel's failure is amplified by the fact that such evidence and expert testimony should have been

presented and argued in support of numerous statutory and nonstatutory mitigators. But for the ineffective assistance of counsel of failing to investigate and present mitigation evidence, there is a reasonable probability that Mr. Lebron would have received a life sentence, especially in light of the 7 to 5 vote for death.

**G. Failure to Properly Appeal and Argue Against the Underlying Felony aggravator.**

Trial counsel rendered deficient performance by failing to properly appeal the underlying felony aggravator of the robbery of Roger Nassar , Case No.: 95-CF-2398. In that case, Mr. Lebron was charged with attempted first-degree murder, robbery with a firearm, and kidnapping with a firearm. Lebron v. State, 894 So.2d 849 (Fla. 2005) He was convicted of misdemeanor assault with a firearm, robbery and kidnapping, both without a firearm. Appellate counsel for Mr. Lebron in this underlying case was the same attorney that represented him in his penalty phase trial. Robert Norgard. Norgard was responsible for filing the appeal in the underlying aggravator. However, despite being given numerous extensions of time, Mr. Norgard did not timely filed his appellate brief in this case and as a result, the appeal was dismissed rather than ruled upon the merits.

Had trial counsel, acting his appellate counsel, properly appealed the underlying aggravator, there is a reasonable probability that the conviction would not have stood. Mr. Lebron had valid legal issues raised, and there is a reasonable

probability a properly filed appeal would have resulted in a reversal. Prior violent felony was the main aggravator against Mr. Lebron in this case and counsel's failure to adequately challenge such aggravator was deficient performance. Mr. Lebron's death sentence is based upon that improper aggravator and is the prejudice he suffered.

**H. Failure to Present Evidence and Expert Testimony about Mr. Lebron Activities from Age 18 to 21 and Establish that his Adverse Development, Mental Health and Neurological Problems Were Ongoing and Present at the Time of the Homicide.**

Trial counsel rendered deficient performance by failing to establish that Mr. Lebron's significant developmental, neurological, and mental health problems were of an ongoing nature and had a direct effect on him at the time of the homicide. In the penalty phase, trial counsel presented only the testimony of Mr. Lebron's mother and school records from his childhood. No evidence was presented about what Mr. Lebron was doing from the age of 18 until the time of the homicide, and counsel presented no expert testimony as to how the documented problems with Mr. Lebron would have impacted him at the time of the homicide, and this was deficient performance.

Numerous friends, associates and family members could have testified to Mr. Lebron's activities and behavior during this time period, and were readily

available to do so. These individuals include, but are not limited to: Victor Rios, Tawana Shoots, Ruthie Fernandez, Miriam Ruth, Stacie Kirk, and Lisa Costello.

Trial counsel testified at the evidentiary hearing on Mr. Lebron's Motion to Vacate Judgments of Conviction and Sentence that Dr. Dee had "...described Mr. Lebron as the coldest antisocial personality disorder he had ever seen."(PCH VOL XXXVIII p. 3721) Because of Dr. Dee's characterization of Mr. Lebron's personality disorder, trial counsel testified "...[in]no way would I expose Mr. Lebron to a compelled mental health exam."(PCH VOL XXXVIII p. 3727). Trial counsel made a strategic decision not to present any mental health mitigation evidence at Mr. Lebron's penalty phase trial. It is important to note the absence of any testing results, notes or reports of either trial counsel or Dr. Dee confirming that Mr. Lebron was indeed the coldest antisocial personality disorder that Dr. Dee had ever seen.

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Like Sears, counsel for Mr. Lebron should have been able to tie any negative information about Mr. Lebron, including any antisocial traits, into a cohesive mitigation theory.

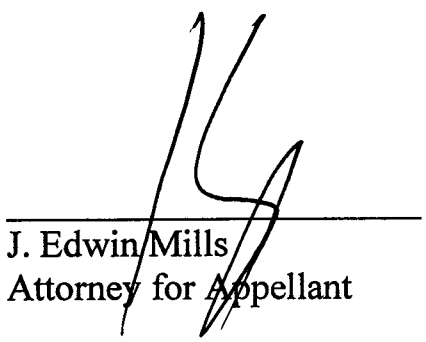
In addition, trial counsel for Mr. Lebron rendered deficient performance by failing to produce expert testimony from a psychologist, neuropsychologists, and/or other mental health and neurological experts. These experts could have testified about Mr. Lebron brain-damage, adverse development, mental illness, and substance abuse. These experts also could have testified about the effect these issues had on Mr. Lebron's underlying value system, moral development,

perception of life options and nature of choices, ability to exercise sound judgment, and impulse control. Specifically, these experts could have testified to the fact that Mr. Lebron's deficiencies were ongoing from childhood until the time of the homicide, and that those deficiencies and issues had a significant effect on his thoughts, judgment, and actions at the time of the homicide.

## CONCLUSION.

Jermaine Lebron prays this Honorable Court reverse and remand the trial court's denial of his Motion to Vacate judgments of Conviction and Sentence entered on March 13, 2012, thereby entitling Mr. Lebron to a new trial and/or penalty phase proceeding.

RESPECTFULLY SUBMITTED



J. Edwin Mills
Attorney for Appellant

## CERTIFICATE OF COMPLIANCE REGARDING FONT.

**I HEREBY CERTIFY** that this Appellant's Initial Brief is submitted using Times New Roman, 14 point font, pursuant to Florida Rule of Appellate

Procedure, Rule 9.210. Further, the undersigned, pursuant to Florida Rule of Appellate Procedure, Rule 9.210(a)(2), gives this his Notice and files this Certificate of Compliance regarding the font in this Initial Brief.

J. Edwin Mills
Attorney for Appellant

## CERTIFICATE OF SERVICE.

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has, been provided to the Office of the State Attorney, Ninth Judicial Circuit, 215 N. Orange Avenue, Orlando, FL 32801 by hand delivery; and to Kenneth S. Nunnelley, Senior Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, FL 32118 by United States Mail, postage prepaid this 27 day of September, 2012.

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