IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-79

DAVID SYLVESTER FRANCES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

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REQUEST FOR ORAL ARGUMENT

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

PRELIMINARY STATEMENT REGARDING REFERENCES

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

STATEMENT OF THE CASE AND FACTS

This is an appeal of the circuit court's denial of a 3.851 motion for postconviction relief. Mr. Frances, along with his brother, was convicted of murdering his mother's close friend and her daughter shortly after their mother threw them out of the house. David Frances was sentenced to death and his brother Elvis Frances was sentenced to life. Mr. Frances' convictions and death sentences were upheld by this Court on direct appeal. *Frances v. State*, 970 So. 2d 806 (Fla. 2007).

The Office of the Capital Collateral Regional Counsel (Middle) was appointed to represent Mr. Frances following direct appeal. CCRC filed a 3.851 Motion (s*ee* Motion at PC ROA Vol. I, 80-145) citing numerous constitutional violations that occurred following the appointment of the public defender's office to Mr. Frances' case. After an extensive evidentiary hearing, the circuit court denied Mr. Frances' 3.851 Motion. (*See* Order at PC ROA Vol. VI, 130-165). This appeal follows.

Prior to the instant offense, David Sylvester Frances had no criminal record. These were his first convictions. He was just 20 years, 3 months old at the time of this offense. He accepted responsibility for his actions and was actually willing to plead guilty in exchange for a life sentence. But, the State refused to offer a life sentence because this was a "black on black" crime, and

prosecutors did not want to be accused of being racist in offering a life sentence.

In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the United States Supreme Court denied relief because they ruled that statistics alone were not enough to prove racial discrimination in choosing the death penalty.

> Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on the Baldus study.

McCleskey, Id. at 292. The decisionmakers in Mr. Frances' case acted with discriminatory purpose. There is evidence here that supports an inference that racial considerations played a part in his sentence. The first-assigned prosecutor on this case, Dorothy Sedgwick, admitted at the evidentiary hearing when asked why an offer of life was not extended to Mr. Frances: "I may have said that this case was so strong and so deserving of the death penalty that ***they would forever be accusing us of racial discrimination in other cases if we waived death in this case***." (emphasis added). PC ROA Vol. VIII, 22. This case was chosen for death because it involved a black on black crime, and the Orange County State Attorney's Office was trying to reverse the statistics that suggested the office was not seeking death in black on black murders.

In postconviction, CCRC introduced Orlando Sentinel newspaper articles researched and published after the *McCleskey* decision wherein it was suggested

that the Orange County State Attorney's Office did not seek the death penalty proportionately in black on black crimes. (*See* the newspaper articles at PC ROA Vol. IV, 63-80). In front page Orlando Sentinel exposure on Sunday, May 24, 1992, the day before Memorial Day, elected State Attorney Lawson Lamar's written statement in response to allegations that the death penalty was not frequently sought for black victims was printed. Mr. Lamar formally responded to the Orlando Sentinel's statistics as follows: "Even unconscious discrimination by race is not shown to be a factor in our decisions. On no occasion have I believed that because the parties were of any protected class that the case was more or less serious or the victims more or less precious." PC ROA Vol. IV, 66. In the case at bar, as corroborated by several witnesses, Prosecutor Sedgwick clearly indicated that the Frances victims were considered specially because they were black, and Frances was a black on black death penalty case.

Attorney George Couture testified that "on at least one occasion," when he was attempting to negotiate a life sentence in Frances, Prosecutor Sedgwick informed that she was "not going to let this one go" because of racial considerations, informing him that "this involved a black defendant and black victims." PC ROA Vol. XI, 479. Attorney George Couture testified: "I don't remember exactly what I said to her, but I remember debating with her that's kind of ironic because I felt that she was, in fact, basing the decision on race because

she was considering the race of the victim and the race of the defendant specifically in not entertaining a plea offer." PC ROA Vol. XI, 479.

Race continued to play a role in this case. During jury selection, many of the prospective jurors were questioned about their feelings on the death penalty. The Court and the State chastised many of the jurors who did not say initially that they would impose the death penalty in no uncertain terms. They were encouraged to speak like uncourteous, Northerner non-Gentiles. *See* i.e. Dir. ROA Vol. II 173-174. When prodded, lectured, and encouraged, the jurors came to assure the Court and the State that they would certainly impose the death penalty "according to the law." For example, when asked if they could impose the death penalty, many answered naturally: "I think so." Dir. ROA Vol. II, 174. The Court insisted that the jurors must *know* that they could impose the death penalty, and instructed that they speak more like "Northerners" instead of "Southerners," that they "put [their] ***gentile***, Southern nature aside" when answering questions about whether they could impose the death penalty, and "answer [] like a Yankee would." Dir. ROA Vol. II, 173 (emphasis added). The transcript consistently refers to the term "gentile." It does not reflect that the court used the terms "gentle" or "genteel" in discussions with the jurors.

At the end of *voir dire*, when it appeared that 12 jurors were ready to serve on this case, Prosecutor Mark Wixtrom inquired as to who the final juror was.

The court informed that Juror Roberts was the 12th juror. Juror Roberts was an African-American. Juror Roberts did not serve on the jury because she was swiftly stricken by Prosecutor Mark Wixtrom. Dir. ROA Vol. IV, 492-493. Before the defense even had a chance to make a *Batson* challenge, Prosecutor Wixtrom misinformed the trial court that she had announced opposition to the death penalty. Juror Roberts actually never had announced any opposition to the death penalty during *voir dire*. The trial court accepted the State's "race-neutral" explanation for the strike, and granted the State's "cause challenge."

This *Batson* issue was not raised on direct appeal. Had it been raised, this Court may have deemed the issue not preserved for appeal. At the evidentiary hearing, trial attorney Walter Ruiz admitted that he made a mistake in failing to preserve the *Batson* issue after the State erroneously struck a minority juror. Walter Ruiz admitted that he "didn't catch it." PC ROA Vol. XIII, 637-638.

Even though the State struck the minority juror, the lower court ruled as follows: "the Court finds credible Ruiz's testimony that he *did not* remember Roberts' testimony and thus mistakenly struck her for cause based on Wixtrom's mischaracterization of her testimony. The Court also finds that there is nothing in the record indicating that Ruiz intentionally called for a false strike or that the defense team was aware of the mistake at the time it was made." PC ROA Vol. VI, 145-146. (emphasis in original). Prosecutor Wixtrom struck Juror Roberts,

not trial attorney Ruiz.

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

SUMMARY OF THE ARGUMENTS

CLAIM I – Trial counsel was ineffective during *voir dire* for permitting the State to strike a minority juror for no good reason, in violation of *Strickland*, *Batson* and Equal Protection laws. To the extent that this issue may not have been preserved for direct appeal, trial counsel was ineffective in this regard for failing to adequately preserve the record for appeal. The lower court clearly erred in finding that *the defense* struck the minority juror. The record clearly refutes the State's alleged race-neutral reasons for its strike of minority Juror Roberts, and clearly refutes the lower court's findings on who made the strike.

CLAIM II --Trial counsel was ineffective for failing to file a motion under *McCleskey v. Kemp* to preclude the State from pursuing the death penalty in this case. The first-assigned prosecutor on this case informed the defense at least twice during plea negotiations that a life offer would not be extended because of racial considerations. Political pressure and the intent to balance the racial statistics in the death penalty drove the Orange County State Attorney's Office to choose this case for the death penalty. This led to the State's unreasonable and unconstitutional refusals to extend a life offer based on political and racial considerations. This claim is supported by the admission of the first-assigned

prosecutor, the testimony of various assistant public defenders who worked on the case, and e-mail correspondence from the public defender's office discussing the prosecutor's comments regarding race and their decision to pursue the death penalty. Additionally, evidentiary hearing testimony revealed that the public defender's office labored under a conflict of interest because they refrained from filing a *McCleskey v. Kemp* motion based on apprehension that such a filing might adversely affect plea negotiations in their other assigned capital cases.

CLAIM III -- Trial counsel was also ineffective during *voir dire* for failing to object to the trial court making repeated improper comments to the prospective jurors about Southerners, Yankees, and Gentiles. Although many jurors expressed absolutely no reservation during questioning about their ability to impose the death penalty, the trial court improperly sought "reassurances" that they would unequivocally impose the death penalty. In denying this claim, the lower court found that although the comments were improper, Mr. Frances failed to prove that the trial judge was trying to intentionally mislead or intimidate the jurors. *Strickland* does not require the Appellant to prove that the trial judge had ill intent. Because Mr. Frances was severely prejudiced by the comments, his sentences of death should be vacated. He was also prejudiced by trial counsel's failure to object when the State kept informing the jury that a list of mitigators would be provided.

CLAIM IV – Trial counsel ineffective for failing to investigate and present

available mitigation. Available for presentation in Mr. Frances' case were 7 statutory and 26 additional non-statutory mitigators. Had trial counsel presented available mitigation, and submitted a list of the mitigators to the jury, there is a reasonable probability of a different result, thus undermining confidence in the jury's death recommendation in this case.

CLAIM V--The grave errors in this case, both individually and cumulatively, lead to the inescapable conclusion that the Appellant should be afforded relief from this unconstitutional conviction and sentence of death.

CLAIM I

THE CIRCUIT COURT ERRED IN DENYING RELIEF IN THIS CASE. TRIAL COUNSEL WAS INEFFECTIVE FOR PERMITTING THE STATE TO STRIKE A MINORITY JUROR FOR NO GOOD REASON. TO THE EXTENT THAT THIS ISSUE MAY NOT HAVE BEEN PRESERVED FOR DIRECT APPEAL, TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE THIS ISSUE FOR APPEAL. THE LOWER COURT'S ORDER IS CLEARLY ERRONEOUS, FINDING THAT THE DEFENSE WAS NOT INEFFECTIVE FOR STRIKING THE JUROR AT ISSUE. THIS VIOLATED MR. FRANCES' RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHT AMENDMENTS.

Under the principles set forth by this Court in *Stephens v. State*, 748 So.2d

1028 (Fla. 1999), this claim is a mixed question of law and fact requiring *de novo* review with deference only to the factual findings by the lower court.

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

Failure to Raise/Preserve the Neil/Batson/Miller-El Violation During Voir Dire

We can have no confidence in the outcome of this trial where a minority juror was stricken by the State for no good reason. The State engaged in intentional discrimination when they exercised a strike on Juror Roberts. This violated David Frances' rights under the Fourteenth Amendment Equal Protection Clause of the United States Constitution and the clearly established law as determined by the Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986). To the extent that trial counsel failed to engage in meaningful efforts to raise and preserve these issues, they were ineffective.

In *Synder v. Louisiana*, 128 S. Ct. 1203 (2008), the United States Supreme Court found the State's alleged race-neutral reasons (alleged work conflicts and

nervousness) for the strike of an African-American juror to be "implausible." In the case at bar, the State's alleged race-neutral reasons for the strike of Juror Roberts are not just implausible, they are clearly erroneous.

The trial court actually granted the State a strike for cause on Juror Roberts. The following exchange occurred during the proceedings:

> Mr. Ruiz: Juror Number 31 the defense would move to exercise a peremptory, Your Honor.
> The Court: Mr. Wixtrom, among a panel consisting of jurors in seats number 7,8,11,14, 20, 21, 22, 24, 28, 29, 30, and 32, any challenges?
> Mr. Wixtrom: No, Your Honor.
> The Court: Mr. Ruiz?
> Mr. Ruiz: We would move to strike juror number 30.
> The Court: That is five peremptory challenges. You have five remaining. Mr. Wixtrom, among a panel consisting of jurors in seats numbered 7, 8, 11, 14, 20, 21, 22, 24, 28, 29, 32, and 41, any challenges?
> Mr. Wixtrom: The last one the Court ended with was seat 41?
> The Court: Yes, sir.
> Mr. Wixtrom: Your Honor, we would move to strike Ms. Roberts in seat number 41. She indicated yesterday she was opposed to the death penalty, which is a race-neutral reason, according to the case law. Although she said she could apply it, she still said she was opposed to it.
> Mr. Ruiz: For the record, she is an African-American.
> The Court: Your notes reflect that's the statement–her statement to that effect?
> Mr. Ruiz: That's what Mr. Wixtrom just indicated. Yes, sir, I believe that was correct.
> The Court: If that carries with it there is a Neil Violation, opposition to the death penalty is a race-neutral reason, and so the observation that she's an African-American is irrelevant, and I will grant the State's motion to strike Juror 41 for cause.
> Mr. Ruiz: Yes, Sir. I will simply add for purposes of the record, she

> indicated she would be able to put those feelings aside in making a decision.
> The Court: Any peremptories among that group?
> Mr. Wixtrom: If I may just have one moment, Your Honor. My chart needs to be updated. No, Your Honor.

[Dir. ROA Vol. IV, 492-493]. Nowhere in this record will one find that Ms. Roberts ever indicated that she was against the death penalty. Her answers ran completely contrary to the State's proffered reasons for the strike. Although it appears that the State *attempted* during *voir dire* to bait Ms. Roberts into somehow admitting that she was against the death penalty, Juror Roberts did not bite:

> Mr. Wixtrom: Ms. Roberts, what is your feeling or beliefs as it pertains to the death penalty?
> Juror Roberts: Well, if I find as far as–as far as with all the evidence that's been presented and everything, I feel like if he or she deserved that, yes, I can.
> Mr. Wixtrom: Okay. Ms. Roberts, just for the record, are you, then, saying you are not opposed to the death penalty in certain cases?
> Juror Roberts: That's correct.
> Mr. Wixtrom: Ms. Roberts, if you are chosen to sit on this jury and you sit through the trial, assuming the defendant is found guilty and we proceed to the penalty phase, you then sit and are given more evidence, additional evidence, and then you go back and you deliberate with the other jurors, having been provided the law, in your mind, if the facts coupled with the law warrant the penalty of death, could you vote for the death penalty?
> Juror Roberts: Yes, I could.
> Mr. Wixtrom: Okay, and having gone through the whole process, if in your mind the facts coupled with the law would warrant a life sentence, could you vote for a life sentence?
> Juror Roberts: Yes, I could.
> Mr. Wixtrom: Ms. Roberts, do you commit to us that you would keep an open mind throughout the entire proceeding, throughout the

> penalty phase, and only make up your mind which may you are going to vote after being presented with all the facts and all the law from the judge?
> Juror Roberts: Yes, I could.
> Mr. Wixtrom: Ms. Roberts–and this is kind of for everyone–there is no automatic death penalty in the State of Florida. There is no, you kill a child, you kill a police officer, you automatically get the death penalty in each and every case decision. Whether or not to vote for the death penalty rests with the jury and rests with that weighing process. Ms. Roberts, do you agree that you will go through that weighing process?
> Juror Roberts: Yes.
> Mr. Wixtrom: Mr. Ryan, do you agree to go through that weighing process?

[Dir. ROA Vol. II, 265-267]. The State did not single out or question any of the other jurors in this particular fashion. That further evidences discriminatory intent of the State during jury selection. There was nothing in the pages of transcript above, and nothing in the passage below, that evidenced anything that would make Ms. Roberts unsuitable to sit on the jury:

> Mr. Hooper: Okay. Ms. Roberts, it was hard for me to hear you sitting way over there. You say you are not opposed to the death penalty?
> Juror Roberts: No, I am not opposed to it.
> Mr. Hooper: You are unopposed to the death penalty. Without making me repeat what I just said to Ms. Tanner, same question. Would you be able to put your personal feelings about the death penalty in general aside and make a decision in this particular case whether this case was appropriate for the death penalty or not?
> Juror Roberts: Yes, I could.

[Dir. ROA Vol. II, 276].

David Frances is entitled to a new trial because one of the few available

African-Americans in the jury pool was stricken by the State for discriminatory reasons. It is noted that the State also struck two other African-Americans, number 2 (Juror Dorsey) and number 6 (Juror Spinks) from the first group of prospective jurors. Gerod Hooper confirmed at the evidentiary hearing that these jurors were black. (*see* PC ROA Vol. VI, 685-687, Defense Exhibit 8, Mr. Hooper's juror seating chart, PC ROA Vol. XVII, 54-69). Although jurors Spinks and Dorsey expressed aversion to the death penalty during *voir dire*, Juror Roberts ***never*** expressed any aversion to the death penalty whatsoever. One should closely scrutinize how the State began their *voir dire*. The *very first* person Prosecutor Ashton singled out and inquired whether she was against the death penalty was Juror Spinks, an African-American [Dir. ROA Vol. I, 84]. The third person that Mr. Ashton specifically addressed was Juror Dorsey, also an African-American:

> Mr. Ashton: Mr. Dorsey?
> Juror Dorsey: Yes.
> Mr. Ashton: How do you feel about that?
> Juror Dorsey: I'm with that lady right here. I don't believe in the death penalty period.
> Mr. Ashton: You were pointing to Ms. Spinks; is that correct?
> Juror Spinks: That's correct.

[Dir. ROA Vol. I, 89].

The State moved, and the court struck, both Jurors Dorsey and Spinks for cause [Dir. ROA Vol. I, 142, 144]. In the context of how Juror Roberts was later

stricken, these strikes become quite troublesome. The State in this case engaged early on in *voir dire* in a pattern of singling out minority jurors in an effort to stack the panel with whites only. At most, two African-Americans were seated on Mr. Frances' jury. The State violated the Fourteenth Amendment's Equal Protection Clause of the United States Constitution in the case at bar guaranteed to Mr. Frances. To the extent that the defense arguably might share some responsibility and blame for this error, Mr. Frances' Sixth Amendment rights were violated under *Strickland* for failing to ensure that Mr. Frances was tried by a jury of his peers.

The prejudice here is that at least one African-American citizen was wrongly denied the right to serve on Mr. Frances' jury, and consequently, Mr. Frances did not receive a "jury from a representative cross section of the community" in accordance with the Sixth Amendment. *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975). "The selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." *Id.* at 528. "The purpose of a jury is to guard against the exercise of arbitrary power-to make available the commonsense judgment of the community as ***a hedge against the overzealous or mistaken prosecutor***." *Id.* at 698. (*emphasis added*). The Fourteenth Amendment's Equal Protection Clause is violated when African-Americans are excluded from grand and petit juries. *See*

Strauder v. West Virginia, 100 U.S. 303, 306 (1880). "[The Fourteenth Amendment] not only gave citizenship and the privileges to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws." *Also see Duncan v. Louisiana*, 88 U.S. 1444 (1968). "Providing an accused with the right to be tried by a jury of his peers gave him an ***inestimable safeguard against the corrupt or overzealous prosecutor***." (*emphasis added*).

Attorney Walter Ruiz candidly admitted that he failed to effectively handle the Juror Roberts issue, and that he failed to preserve the issue for appeal. Mr. Ruiz stated, "Well, in retrospect, I believe the appropriate way of addressing that would have been to confer with counsel, co[-]counsel on the case, review exactly what Ms. Roberts had said, in fact, that she had indicated something very much in opposite to what Mr. Wixtrom was saying and make the court aware of that so the court could consider that in making a determination in [the] ruling on the challenge for cause on Ms. Roberts." PC ROA Vol. VI, 633. Following that testimony, the postconviction court stated that it would "accept his representation that he was incorrect in concurring with Mr. Wixtrom's misrepresentation." PC ROA Vol. VI, 634.

Mr. Ruiz stated that at trial he indicated "words to the effect she said she could set those feelings aside in considering the death penalty which is an incorrect

statement," and that he was attempting to preserve the record in that regard. PC ROA Vol. VI, 634. He stated that the trial team "had the opportunity to object to the panel as a whole, and at that point, while I objected to [the striking of] other jurors on a similar basis, I did not object to [the strike of] Ms. Roberts." PC ROA Vol. VI, 636. He felt that he made a mistake in this regard in that he "should have included Juror Roberts along with the additional two arguments." PC ROA Vol. VI, 635. He explained, "The appropriate representation on the record should have been that she could consider the death penalty, and that Mr. Wixtrom's representation was inaccurate, [] as the fact that she could, in fact, consider the full range of penalties, which was the same basic reason that I gave for the exclusion of the other jurors that are referenced in the record. It would have been an appropriate time, I believe, to re[-]raise the issue." PC ROA Vol. VI, 636.

> MR. HENDRY: Mr. Ruiz, do you feel you made a mistake in failing to specifically mention juror 21 [Roberts] during this time of the discussion of jurors 35 and 36?
> THE WITNESS: Yes,
> THE COURT: So you feel now that you made a mistake and you didn't feel then–
> THE WITNESS: Quite frankly, I didn't catch it.

PC ROA Vol. VI, 637-638.

Gerod Hooper's juror seating chart [Defense EH Exhibit 8, PC ROA Vol. XVII, 54-69] clearly indicates that Juror Roberts could in fact impose the death

penalty. PC ROA Vol. VI, 688. Mr. Hooper stated that he did not speak up when Prosecutor Wixtrom misrepresented Juror Roberts' responses regarding an alleged inability to impose the death penalty because Mr. Ruiz informed the trial court that Ms. Roberts could in fact impose the death penalty. PC ROA Vol. VI, 690. Also, Mr. Hooper said that the trial court "seemed to anticipate an objection, Neil objection, anticipate it and rule." PC ROA Vol. VI, 691. Mr. Hooper also stated that Ninth Judicial Circuit Local Rule Number 13 states the following: "Counsel shall refrain from any argument once the judge has ruled." PC ROA Vol. VI, 691. In any event, trial counsel failed in their duty to preserve the *Batson* issue for appeal, just exactly like the ineffective attorney in *Davis v. State*, 341 F. 3d 1310 (11th Cir. 2003). As our Eleventh Circuit Court of Appeals described in *Davis*:

> [E]ven when it is *trial* counsel who represents a client ineffectively in the *trial court*, the relevant focus in assessing prejudice may be the client's appeal.
>
> Under the peculiar circumstances of this case the only effect of *trial* counsel's negligence was on Davis's *appeal*. Unlike the situation in *Jackson* where defense counsel "remained absolutely silent as prosecutor Hudson struck all blacks from the venire," 42 F. 3d at 1360. - Davis's trial counsel ably brought the state's possibly unconstitutional conduct to the trial court's attention. He objected when the state moved to strike first one, and then a second, black venire member. He responded to the prosecutor's explanation for the second strike by emphasizing that not a single black juror had been seated on the panel as of that point in the selection process. Moreover, although Davis's counsel did not emphasize the point, the prosecutor's explanation for the strike did not make sense. As

Florida's Third District Court of Appeal later noted, this record was sufficient to make Davis's *Batson* claim "well taken." Davis, 710 So. 2d at 724.

The trial court nonetheless upheld both of the challenged strikes. It is only at this point in the proceedings that the efficacy of Davis's counsel became doubtful. Under Florida law, simply objecting to the state's possibly discriminatory strikes, and then countering any purportedly race-neutral explanation given by the prosecution, does not suffice to preserve a *Batson* claim for appeal. Rather, trial counsel must press the *already rejected* challenge a second time at the conclusion of voir dire, either by expressly renewing the objection or by accepting the jury pursuant to a reservation of this claim. Joiner, 618 So. 2d at 176; *see also Melbourne v. State*, 679 So. 2d 759, 765 (Fla. 1996) (ruling that a defendant "failed to preserve" a claim of discriminatory jury selection "because she did not renew her objection before the jury was sworn"). Davis's counsel did neither, and on direct appeal the Third District Court of Appeal accordingly ruled that the claim had not been preserved.

Thus, Davis faults his trial counsel not for failing to raise a *Batson* challenge-which counsel did-but for failing to preserve it. As his federal habeas counsel puts it, the issue is not trial counsel's failure "to bring the *Batson* issue to the attention of the trial court," but "failure in his separate and distinct role of preserving error for appeal." As in *Flores-Ortega*, the attorney error Davis identifies was, by its nature, unrelated to the outcome of his trial. To now require Davis to show an effect upon his trial is to require the impossible. Under no readily conceivable circumstance will a simple failure to preserve a claim-as opposed to a failure to raise that claim in the first instance-have any bearing on a trial's outcome. Rather, as when defense counsel defaults an appeal entirely by failing to file timely notice, the only possible impact is on the appeal.

Accordingly, when a defendant raises the unusual claim that trial counsel, while efficacious in raising an issue, nonetheless failed to preserve it for appeal, the appropriate prejudice inquiry asks whether there is a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved. *Cf. Clark v. Crosby*, No. 01-

12940, slip op. 2937, 2946 n. 9 (11th Cir. July 2, 2003) (defining "prejudice," in context of an ineffective assistance of appellate counsel claim as "the reasonable probability that the outcome *of the appeal* would have been different");(citation omitted) That means *Eagle*, not *Jackson,* should control this case. We therefore must consider how Davis would have fared on appeal had counsel preserved a *Batson* claim for review.

On the same record now before us, Florida's Third District Court of Appeal expressly announced its view that Davis's *Batson* challenge was "well taken." *Davis*, 710 So. 2d at 724. As this observation suggests, his claim is meritorious as a matter of law. Davis established a prima facie case of racial discrimination with respect to the second black juror's removal from the jury panel, and the state failed altogether to rebut the inference thereby raised. Thus, the record shows a violation of the Equal Protection Clause. *See United States v. David*, 803 F. 2d 1567, 1571 (11th Cir. 1986)("[U]nder *Batson,* the striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown.").

Both because Davis's *Batson* claim was meritorious and because the Third District recognized it as such, the only question as to the likely outcome of Davis's appeal, had counsel preserved the issue, is whether he would have been afforded a remedy. We believe that there is a reasonable probability that the Florida courts would have found the *Batson* violation to warrant automatic reversal. That is, the Florida Third District Court of Appeal or Supreme Court would have deemed "harmless error" review inapplicable in the context of *Batson* violations. This conclusion follows from several considerations.

To begin with, the United States Supreme has not suggested yet that the discriminatory exclusion of prospective jurors is subject to harmless error review. On several occasions, however, the Court has reversed convictions without pausing to determine whether the improper exclusion of jurors made any difference to the trial's outcome. (Citations omitted). . . .

Further, the Court has expressly recognized that the discriminatory exercise of peremptory challenges harms interests in addition to the

> defendant's, namely, the interests of jurors themselves in not being improperly excluded from service and the interest of the community in the unbiased administration of justice. (Citation omitted). Thus, the doctrine of third-party standing enables defendants to speak for improperly excluded jurors by raising *Batson* claims in their stead, even when the defendant and the improperly excluded juror or jurors are not of the same race. (Citation omitted). Also significant is the rule that a defendant is no more entitled than the state to exercise peremptory strikes on a racially discriminatory basis. (Citation omitted). Obviously, the harm proscribed by *Batson* must redound to interests beyond the defendant's if it constrains the defendant's own selection of trial strategies.
>
> A substantial number of our sister circuits also have declined to apply harmless error analysis in reviewing *Batson* violations. (Citations omitted). (explaining that Supreme Court precedent supports a conclusion that the harmless error analysis does not apply to *Batson* violations); (Citations omitted). (noting, in challenge to a grand jury's selection, "that harmless error analysis is inappropriate in cases involving discrimination in the jury selection process").
>
> Consequently, there is a reasonable probability that the Florida Third District Court of Appeal would have reversed Davis's conviction had trial counsel preserved a *Batson* challenge. Because we believe that the likelihood of a different outcome on appeal is the appropriate focus of our inquiry under *Strickland* and *Flores-Ortega*, we hold that the district court should grant Davis a writ of habeas corpus conditioned on the state's provision of either a new trial or an opportunity to take an out-of-time appeal wherein his freestanding *Batson* challenge could be decided by the state courts on the merits. (Citations omitted).

Id. at 1315-1317. *Davis* is right on point and leads to the inescapable conclusion here that the State violated the Equal Protection Clause of the United States Constitution. There is no doubt that the State's proffered reasons were a pretext for racial discrimination during jury selection, and that had the *Batson* issue been

effectively preserved by trial counsel and raised on direct appeal, the result of this proceeding would have been different. Had this issue been effectively preserved for appeal, the appellate attorney could have simply cited to *Roundtree v. State*, 546 So. 2d 1042 (Fla. 1989) to obtain relief from this conviction and death sentence. The Florida Supreme Court stated the following 23 years ago:

> [A]ny doubt as to whether the complaining party has met the initial burden required under *Neil* should be resolved in that party's favor. The burden then shifts to the state to rebut the inference that the use of the peremptory challenges is racially motivated. The state must proffer reasons that are, first, neutral and reasonable and, second, not a pretext. Additionally, the trial judge cannot merely accept the proffered reasons at face value, but must evaluate those reasons as he or she would any disputed fact.
>
> . . . .
>
> As in *Slappy*, it appears from our examination of the record that the trial judge believed he was bound to accept the state's explanations at face value since he questioned neither the state nor the prospective juror following the state's explanations.
>
> . . . .
>
> In this case, we need not determine whether the state's reasons are neutral and reasonable because under the circumstances presented they are obvious pretext.

Roundtree, Id. at 1044.

> Two more black jurors were challenged by the state because of their views concerning the death penalty although both indicated that they could follow the law and recommend a sentence of death if the circumstances of the case so warranted.

. . . .

> It is not sufficient that the state's explanations for its peremptory challenges are facially race neutral. The state's explanations must be critically evaluated by the trial court to assure they are not pretexts for racial discrimination. . . .We find the proffered reasons were a pretext for racial discrimination, and therefore we must reverse appellant's conviction and remand for a new trial.

Roundtree, *Id.* at 1045.

On the clear face of this record, the State made material misrepresentations following their very questionable move to strike a black juror. The State would have this Court excuse their mistake because they are attempting to establish, in part through a curiously non-bate stamped document in their files (*see* PC ROA Vol. XVII, 102-103) reflecting that Juror Roberts was **"OPPOSED,"** that their mistake was allegedly honest. Assuming *arguendo* that State's mistake was honest, it is still inexcusable under Florida case law. In the case of *Ault v. State*, 866 So. 2d 674 (Fla. 2003), this Court reversed a death sentence that also involved the erroneous strike of a juror. Remarkably, *Ault* was a situation where racial controversy did not even surround the strike of the juror like in the instant case; *Ault* was simply a case of a mistaken prosecutor (possibly honest) who misrepresented the juror's responses after he moved to strike her:

> While we give deference to the trial judge who sees and hears the juror and often has to make credibility findings based on information that cannot be easily discerned from an appellate record, *Witt*, 469

> U.S. at 429, 105 S.Ct. 844, the record in the instant case directly contradicts the judge's ruling. During voir dire questioning by the State, Reynolds raised her hand to indicate her opposition to the death penalty. In response to questioning by defense counsel, Reynolds expressed her belief that a juror would make a better decision when calm and deliberate rather than when upset and angry. . . .[she then] stated that she could put her personal feelings aside and be fair in the penalty phase, and stated that she could be fair in both the guilt and penalty phases even though she was personally opposed to the death penalty. These are the only instances where Reynolds was personally questioned during voir dire. The State argued that Reynolds had indicated that she could not consider both sentences and would not impose death even if the aggravating circumstances outweighed the mitigating circumstances. The trial judge granted the challenge for cause and voiced his "agree[ment] with the State." However, the record of Reynolds' responses directly contradicts the State's recitation of her responses. Reynolds did *not* state that she could not consider both sentences and would not impose death even if the aggravating circumstances outweighed the mitigating. In fact, the voir dire record shows that Reynolds was not questioned about these issues at all. Thus, the trial judge's determination that it was proper to strike Reynolds for cause was premised on an erroneous recitation of her statements.
>
> We conclude that Reynolds' responses, i.e., that she could put her personal feelings aside and be fair in the penalty phase and that she could be fair in the guilt and penalty phases even though she opposed the death penalty, satisfied the *Lusk* juror competency standard. Thus, the circuit court erred in granting the State's challenge for cause.
>
> The State argues that even if Reynolds was erroneously removed for cause, the error was harmless as the State had two peremptory challenges left at the end of voir dire questioning and could have used one of these to strike Reynolds. We conclude that such error is not subject to harmless error analysis.

Ault, *Id.* at 684-686. Had the prosecutor in *Ault* attempted at an evidentiary hearing to explain that he was honestly mistaken about Juror Reynolds' responses,

just like Mr. Wixtrom did in the instant case, it is unlikely that this Court would have excused the clear error in *Ault*. Since Florida courts are bound by the precedent of *Witherspoon, Witt, Roundtree,* and *Ault,* and since Florida courts must grant relief when competent jurors are mistakenly dismissed for cause in death penalty cases, it is axiomatic that relief must be granted when ***competent jurors of color*** are dismissed by the State for no good reason. This Court must also follow the binding precedent of *Batson* and *Snyder* granting relief when minority jurors are suspiciously stricken. *See also* the persuasive precedent of *Killebrew v. State,* 925 N.E. 2d 399, 403 (Ind. 2010)("*Batson* violations, hopefully, are and should be rare. . .courts must be vigilant in ensuring that the jury selection process in criminal cases is free from any hint of [racial] bias.").

State's EH Exhibit 2, a note used by the State to refute the bad faith implication of their strike, is highly suspect. This page from Wixtrom's jury selection lacked a bate stamp (PC ROA Vol. XVII, 102-103). Even Wixtrom acknowledged that there were peculiarities with the document. Specifically, the State inquired about the following four notations on the document: 1) "No," 2) "Roberts," 3) "Okay," and 4) **"OPPOSED."** The State asked Wixtrom:

> Q: Now in looking at [State's Exhibit 2, the Juror Roberts note] and recalling as much as you can how you did the jury selection at that time, **can you tell the Court if there is a different timing in those**

different notations?

A: I would say definitely, yes. It almost appears like the "okay" portion directly underneath Roberts is the same tone of ink, for lack of a better word, or, same color of ink as the "okay" on Hughes below, Norton below. **Looks to me like the "no" and the "opposed" were written at a later time because the ink appears to be darker there.**

PC ROA Vol. XVI, 1025 (emphasis added). Wixtrom even confirmed later in his testimony, "It appears to be darker ink than 'okay' next to it. I don't know if I used a different pen or a different day." PC ROA Vol. XVI, 1048. If the timing of the "opposed" notation on State's Exhibit 2 "definitely" differed from the other notations on the sheet, that indicates that the notation was made in anticipation of appellate litigation. A reasonable inference here is that the notation was made later to provide a cover for the State's obvious pretextual strike of Juror Roberts.

During the State's examination of Prosecutor Wixtrom, and in response to the Court's inquiry, the State *finally* stipulated that the trial transcript reveals that Juror Roberts *never* indicated that she was opposed to the death penalty. PC ROA Vol. XVI, 1028. *But*, Wixtrom agreed with Prosecutor Ashton's leading suggestion and question about Mr. Hooper's manner of speaking:

Q: Do you recall Mr. Hooper's manner of speaking sometimes to be difficult to understand, tends to mumble or drop off, something like that?

A: Absolutely.

Q: At that particular point in this trial, do you recall that Mr. Hooper

had some medical treatment that affected in some way his–

A: I know he had throat surgery. . .there had been an issue about that and his need of water.

PC ROA Vol. XVI, 1028-1029. The strike of Juror Roberts was not the result of Mr. Hooper's manner of speaking. The strike was made because the State wanted to exclude blacks from Mr. Frances' jury, pure and simple. The State's manufactured excuses for the strike of Juror Roberts should be disregarded by this Court, and relief should be granted. Initially, Prosecutor Wixtrom *personally* and directly questioned Juror Roberts 6 times, and in each of those 6 times, Juror Roberts informed Wixtrom that she did not oppose the death penalty, and, she could follow the law. [Dir. ROA Vol. II, 265-267]. Gerod Hooper's follow-up inquiry only confirmed that Ms. Roberts was *not* opposed to the death penalty, and that she could indeed follow the law. [Dir. ROA Vol. II, 276]. The State presented absolutely no evidence that either Prosecutor Wixtrom or Juror Roberts were mumbling during the 6 times that they discussed the death penalty with one another, nor any evidence that Wixtrom was hard-of-hearing at the time of trial. Juror Roberts spoke without speech impediments. PC ROA Vol. XVI, 1061. And even if there was evidence to suggest that the strike of Juror Roberts and the attempted justification for the strike came with no ill-intent or without knowing misrepresentation on the part of the State, relief is *still* warranted. Prosecutor

Wixtrom agreed that his notes concerning Juror 41 (Ms. Roberts) with the big "S" on it might obfuscate or obliterate his underlying personal notes regarding Juror Roberts. PC ROA Vol. XVI, 1038-1039. When asked *why* he obliterated the portion of Juror Roberts' juror sheet with a giant scribbled letter, he answered, "I did that on every single case that I tried. . . .I wrote a giant C. That covered everything, giant S or triangle." PC ROA Vol. XVI, 1059.[1] Mr. Wixtrom claimed that one can read the information underneath if you "examine it closely, I think you can see it, perhaps, holding it up to a light source." PC ROA Vol. XVI, 1059.

Wixtrom's claim that he never took note of prospective jurors' races while trying cases as a prosecutor [PC ROA Vol. XVI, 1056-1057] was disingenuous at best. At trial, Mr. Wixtrom attempted to offer a race-neutral reason for the strike of Juror Roberts *before* the defense even raised a *Batson* challenge. Wixtrom is obviously not color-blind, and he is not deaf either. The moment Wixtrom made a motion to strike Juror Roberts, he knew that he made a big mistake. In

1 The postconviction court inquired if the "S" over Juror Roberts would have indicated a cause or peremptory challenge, and Mr. Wixtrom responded as follows: "the S would have indicated that the State struck. That's my pattern of how I have always operated. I don't care what the key said in the top corner. That's the Court's suggestion." PC ROA Vol. XVI, 1059-1060. If that is the case, one must wonder what scribbled "C"s mean on Mr. Wixtrom's chart, if "C"s do not in fact mean cause. Regarding Juror 39, at page PC ROA Vol. XVI, 1038, Mr. Wixtrom stated, "Cause. Yes, C for cause." In any event, it is absolutely clear from the record that the trial court "grant[ed] the State's motion to strike Juror 41 for cause." [Dir. ROA Vol. IV, 493]

postconviction, instead of conceding this glaring error and offering a fair resolution in this matter, the State has chosen instead to manufacture some very lame excuses for their mistake. Relief is certainly warranted here in this capital case under these very unique and unusual circumstances.

Problems with the Lower Court's Order

This Court should grant relief for this grave error conclusively-established by the trial record, and further-solidified by evidentiary hearing testimony. At page 2 of 36 of the lower court's order, footnote 2 correctly identifies the various defense and State attorneys involved in this case at trial and in postconviction. PC ROA Vol. VI, 131. The order correctly states that "During trial proceedings, Defendant was represented by Assistant Public Defender[] [] Walter Ruiz ("Ruiz") while Assistant State Attorney[] Mark Wixtrom ("Wixtrom") represented the State of Florida." PC ROA Vol. VI, 131. Yet the order erroneously finds on page 16 of 36 that "Ruiz[] [] mistakenly struck [Juror Roberts] for cause based on Wixtrom's mischaracterization of her testimony. . . . nothing in the record indicat[es] that Ruiz intentionally called for a false strike or that the defense team was aware of the mistake at the time it was made." PC ROA Vol. VI, 145-146.

This glaring factual error in the Order raises continuing questions about our

criminal justice system and its ability to afford our citizens equal protection under the laws of this State. Contrary to the lower court's factual findings, the State struck the juror here, not the defense. Prosecutor Wixtrom moved to strike Juror Roberts, not defense attorney Ruiz. And although she never announced any opposition at all to the death penalty, Juror Roberts was removed for cause by the trial court. Even ***if*** she had announced opposition to the death penalty, that would not have risen to a legitimate level to sustain a strike for *cause*. *See Ault and Witherspoon, Id.*

This Court should reverse this conviction and death sentence because competent defense counsel would not have permitted the State to strike a minority juror for no good reason in violation of *Batson*. The State is not lawfully permitted to retain this conviction and death sentence where it sought the death penalty because of race, where it would not extend a life offer because of race, and then it unlawfully struck a black juror because of race.

The trial court erred in striking Juror Roberts. The postconviction court should have cured this error appearing clear on the face of the trial record. As in *Ault*, absolutely no deference should be afforded here to the lower court when that court could not even correctly identify the party who moved to strike Juror Roberts. Had trial counsel functioned effectively, the result of this proceeding

would have been different: Juror Roberts would have actually sat on the jury.

This Court should not excuse the error based on the strengths of the State's case against Mr. Frances. This Court should grant relief because affirming this decision would upset the public's confidence in the criminal justice system. This Court should grant relief because the United State's Constitution, Bill of Rights, *Batson*, and *Synder*, do not permit the State to obtain and retain convictions and death sentences in cases where it strikes minority jurors for no good reason.

This Court should grant relief because of core principles reaffirmed in *(Henry) Davis v. State*, 872 So. 2d 250, 253 (Fla. 2004): "Initially, we strongly reaffirm the principle that racial prejudice has no acceptable place in our justice system." In *Davis*, this Court rejected trial counsel's *voir dire* "strategy" of using disparaging racial remarks and reversed a conviction and death sentence, reasoning: "Whether or not counsel is in fact a racist, his expressions or prejudice against African-Americans cannot be tolerated." Permitting the State to execute an African-American notwithstanding statements to defense counsel regarding race during plea negotiations, and considering misrepresentations of Juror Robert's responses following a move to strike her should not be tolerated by this Court.

Just as minorities have the right to serve on juries, to be fairly and equally treated during the *voir dire* process, and have such rights protected under law,

minorities also have the right to vote and be fairly represented in political elections. This related issue was recently addressed by this Court in the case of *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597 (Fla. 2012). This case indeed has applicable precedential value because the right to vote and be fairly represented in political elections is analogous to and related to the right to serve on a jury. These are basic civil rights once denied to minorities, now guaranteed and protected by state and federal law.

In *In re Senate Joint Resolution of Legislative Apportionment 1176,* this Court found that the Senate's apportionment plan was constitutionally invalid and ordered the plan to be redrawn. *Id.* at 684-686. This Court's majority opinion stressed that under law, the minority voting protection provision was designed to "protect racial and language minority voters in Florida: [to] prevent[] [] impermissible vote dilution and prevent[] [] impermissible diminishment of a minority group's ability to elect a candidate of its choice." *Id.* at 619 and 685. Likewise, criminal defendants who exercise their right to trial by jury have the right to retain minority jurors, and the right to prevent the State from making impressible strikes based on race. With regard to equal protection and jury service, *Batson* explained, "Purposeful racial discrimination in selection of the venire violates the defendant's right to equal protection because it denies him the

protection that a trial by jury is intended to secure." *Batson, Id.* at 86.

The case at bar not only involves a violation of Mr. Frances' right to a trial by jury, but it also involves a violation of his right to be treated fairly and equally under the law with regard to fair and equitable sentencing. Unfortunately justice was not blind in this case. The State here impermissibly chose Mr. Frances for death based on his race and based on the race of his victims, most likely for "remedial" or political reasons. This is *absolutely impermissible* under *McCleskey* (*see McCleskey,* contemplating relief in cases where there is "an inference that racial considerations played a part in his sentence." *Id.* at 292.). As Justice Perry recently stated in his concurrence in *In re Senate Joint Resolution of Legislative Apportionment 1176:*

> Certainly, the Senate was tasked with maintaining the delicate balance between righting an historical, racist wrong and moving forward into an era of racial equality where one person, one vote is not quantified by the color of the voter. However, as stated by Justice Pariente:
>
> > Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial

scrutiny.

Majority op. at 627 (quoting *Shaw*, 509 U.S. at 657, 113 S.Ct. 2816).

> Further, while I also agree that "a minority group's ability to elect a candidate of choice depends upon more than just population figures," majority op. at 625, 627, I cannot agree that there was a rational basis for the Senate to decide to turn a blind eye to population data when drawing their plan, *see* concurring in part and dissenting in part op. at 695. By refusing any attempt to draw more compact districts while maintaining the required racial proportions, there is at least the appearance that the Senate thumbed its nose at the will of the people. This Court finds that on this record, "the Senate plan does not facially dilute a minority group's voting strength or cause retrogression under Florida law," majority op. at 655; however, when the outcome appears to be antithetical to minority interest, I am skeptical when the burden is not on the Legislature to demonstrate that despite such appearance, the underlying intent is ultimately valid. Because the Senate now has "the benefit of our opinion when drawing its plan[,]" majority op. at 656, it is my hope that there is no further appearance of misuse of Florida's minority voting protection provision.

Id. at 694. Similarly here, there is the appearance that Juror Roberts was stricken by the State for racial reasons. Even if this Court cannot find that the strike here was *racially* made, this Court should find that the strike was *wrongfully* made.

The lower court acknowledges the *Neil* and *Batson* line of cases, but apparently it distinguishes *Neil* and *Batson*, reasoning as follows in its order denying relief: "However, those cases involve *peremptory* challenges used in a discriminatory manner as opposed to the *cause* strike in the instant case." PC ROA Vol. VI, 142. (emphasis in original). The fact that Juror Roberts was removed for

cause makes this error *even more egregious* than the errors in *Neil* and *Batson*

Again, even if Juror Roberts would have announced any opposition to the death penalty, which she did not, she should not have been removed for cause. *See Ault, Id.* The State intentionally made a discriminatory strike at trial against Juror Roberts. The *Neil* and *Batson* cases do not authorize jurors to be removed for cause when there is no legitimate cause. The "cause" supplying the alleged valid, race-neutral basis for the strike was the trial court's erroneous acceptance of the State's misrepresentation of Juror Roberts' responses during *voir dire*. *Neil, and Batson,* and Equal Protection laws are violated when the State strikes a juror for no good reason under the guise of a permissible challenge, be it peremptory or cause.

At PC ROA Vol. VI, 142 the lower court states the following: "a defendant is not entitled to a jury of any particular composition. *Neil,* 457 So. 2d at 487." That may be true in the general sense, but certainly a defendant is entitled to a jury trial free from the taint of the discriminatory strikes of an overzealous or mistaken prosecutor like in the case at bar. "Purposeful racial discrimination in selection of the venire violates the defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." *Batson, Id.* at 86.

The lower court's factual findings regarding the strike of Juror Roberts are completely erroneous. Furthermore, the lower court places an unfair and

unconstitutional burden on Mr. Frances at PC ROA Vol. VI, 146, holding that "Defendant has introduced no evidence showing that, but for Ruiz's mistake, ***the outcome of the trial*** could have been different. *Strickland*, 466 U.S. at 694. Accordingly, this claim is denied." (emphasis added). Mr. Frances emphasizes this language from the lower court's order because *Strickland* actually states that courts are to evaluate *not* whether the "outcome of the trial could have been different," but rather, whether "***the result of the proceeding*** would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* at 694. (emphasis added). And as discussed previously in this brief, this error is not subject to harmless error analysis under state and federal precedent.

Presumably the lower court denied relief reasoning that even if Juror Roberts would have served, there would still have been a conviction and death sentence. *But* the Frances proceeding resulted in a minority juror being removed by the State for pretextual reasons. This should be enough to undermine confidence in the outcome of this case. This error should have been cured either during trial or on direct appeal. As the 11th Circuit Court of Appeal in *Davis* informed, in these types of cases, "the relevant focus in assessing prejudice may be the client's appeal. . . .there is a reasonable probability that the Florida Third District Court of

Appeal would have reversed Davis's conviction had trial counsel preserved a Batson challenge. . . .the likelihood of a different outcome on appeal is the appropriate focus of our inquiry under *Strickland*." *Davis, Id.* at 1315, 1317. In the case at bar, had the *Batson* error been preserved and raised on direct appeal, Mr. Frances would have obtained a favorable result on direct appeal. Accordingly, the inescapable conclusion here is that this Court should grant postconviction relief under *Strickland* for trial counsel's failure to fully preserve the *Batson* issue.

CLAIM II

THE CIRCUIT COURT ERRED IN FAILING TO GRANT PENALTY PHASE RELIEF UNDER STRICKLAND AND THE PRINCIPLES ANNOUNCED IN MCCLESKEY VS. KEMP. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A MOTION TO PRECLUDE THE STATE FROM SEEKING DEATH. THE STATE VIOLATED EQUAL PROTECTION LAWS WHEN THEY IMPERMISSIBLY USED RACE AS A FACTOR IN CHOOSING THIS CASE FOR DEATH, AND IMPERMISSIBLY CONSIDERED RACE WHEN THEY REFUSED TO EXTEND AN OFFER OF LIFE IN THIS CASE.

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

McCleskey v. Kemp Issues—Failure to File a Motion to Preclude the Death Penalty Based on the Original Prosecutor's Statements Regarding Race

Trial counsel was ineffective under *Strickland, Id.* for failing to file a motion to bar the State from seeking the death penalty against Mr. Frances based on the State's pursuit of the death penalty driven primarily by race. Because the defense received information that the State was not offering life in this case because of the racial compositions of the individuals involved, as well as public perceptions and politics, a motion to preclude the death penalty should have been filed at some point before trial. Racial considerations were driving the pursuit of this death sentence, not the aggravators. Had attorney George Couture continued with his representation of Mr. Frances, a motion based on *McCleskey v. Kemp* would have been filed.[2] Because the State directly informed the defense that race was playing a part in the decision to refuse to consider a negotiated life sentence in this case, Mr. Frances' Equal Protection Rights were blatantly violated here.

In this case, sound, careful, reasonable and rational sentencing discretion

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2 The failure to file the appropriate *McCleskey v. Kemp* motion was the result of an ***actual conflict of interest in this case.*** Attorney Peter Schmer informed: "I believe the discussions in the office centered around ***how it would impact other defendants*** if a McCleskey type claim were to be raised." (emphasis added). PC ROA Vol. XI, 505. As far as prejudice, all Mr. Frances is required to show here is that the actual conflict of interest dissuaded his attorneys from filing the motion. Frances need not show that the motion had a reasonable probability of being granted. *See Cuyler v. Sullivan*, 446 U.S. 335, 349-350 (1980)("[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.").

was replaced by overriding arbitrary, capricious, race-based and political concerns. In light of Prosecutor Sedgwick's comments to defense counsel during attempted plea negotiations, a *McCleskey v. Kemp* motion should have been filed.

In a *Washington Times* newspaper article dated February 23, 1994 entitled "Blackmun Renounces Death Penalty," 1994 WLNR 242265 (1994), the following article was written by reporter Nancy Roman:

Blackmun Renounces Death Penalty

> All death-penalty laws are unconstitutional, Justice Harry A. Blackmun declared in an emotional dissent from the Supreme Court's decision not to hear the appeal of a Texas inmate scheduled to be executed today.
>
> "From this day forward, I no longer shall tinker with the machinery of death," he wrote, becoming the only sitting justice to oppose the death penalty in all circumstances.
>
> "It seems that the decision whether a human being should live or die is so inherently subjective - rife with all of life's understandings, experiences, prejudices and passions - that it inevitably defies the rationality and consistency required by the Constitution," he said.
> The Supreme Court banned the death penalty in 1972, saying states had failed to protect the rights of the accused. Four years later, it allowed states to reinstate the penalty with standards to guide judges and juries.
>
> "For more than 20 years I have endeavored - indeed, I have struggled - along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor," he wrote.
>
> "Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has

> failed," he said.
>
> Throughout his 22-page opinion, Justice Blackmun frequently cited Furman vs. Georgia, in which the [C]ourt held that the death penalty must be imposed fairly and with reasonable consistency or not at all.
>
> He said legal formulas and procedural rules have not been able to prevent the death penalty from sometimes being misapplied.
>
> "The problem is that the inevitability of factual, legal and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent and reliable sentences of death required by the Constitution," he wrote.

Frances is a obviously case where the procedural safeguards designed to prevent the unconstitutional misapplication of the death penalty failed. Mr. Frances' death sentence violates the Equal Protection laws because the death sentence was vigorously pursued by the State in efforts to make their statistical choices to seek death *appear* fair and legitimate, and in efforts to refute past negative press about their prior death penalty decisions in black on black murders.

Prosecutor Sedgwick confirmed at the evidentiary hearing that when attorney George Couture approached her about a possible life resolution in this case, her answer was no, that life would not be offered. She admitted that she "may have" said something to Mr. Couture about race during those plea discussions because another attorney may have "accuse[d her] [] of being racially discriminatory" on another death penalty case. PC ROA Vol. VIII, 18. With regards to the Frances case, she stated: "I, basically, would have thought that if I

did offer a plea of life in this case it would have been a matter of ridicule that we would be accused of being racially discriminatory." PC ROA Vol. VIII, 18. Race should not become the topic of discussion during plea negotiations in death penalty cases, but it was ***the*** topic of discussion in this case.

Prosecutor Sedgwick stated that she was "assigned to the [Elvis and David Frances] cases to carry them all the way through." PC ROA Vol. VIII, 15. She ultimately did not try the David Frances case because she was "transferred out of the division after being there a very long time," and her cases were transferred to prosecutor Mark Wixtrom. PC ROA Vol. VIII, 16. Regarding discussions with the defense about a life plea in the David Frances case, she stated, "there were probably some conversations about that." PC ROA Vol. VIII, 17. Prosecutor Sedgwick was asked:

> Could you describe those conversations further about reasons why you might or might not offer a life sentence in this case?
> A Say that again?
> Q Could you please describe in further detail, if you could, your conversations and your thought processes of why you might or might not offer a life sentence in this case?
> A My thought processes?
> Q Yes.
> A My thought processes the whole time was, I did not expect I would ever be offering a life sentence in this case because upon the evidence that I saw. I was also waiting to see if some huge problem developed. I didn't really anticipate that, and I don't recall anything developing.
> Q Did you, in fact, mention to attorney George Couture that race

was a factor in your decision?
A Absolutely not. And -- it's unclear to me, even after reading George Couture's affidavit, precisely what he is accusing me of saying. And the reason I say that is because the only words he has in quotations is, not letting this one go. It feels he is confident of accusing me saying I said not letting this one go. Nothing else is in quotations.
Q Did race play any consideration in your decision not to offer life in the David Frances case?
A Absolutely not. Period. Positively. No question about it.
Q Did you say anything at all regarding race to George Couture in connection with this case?
A I may have.
Q And what context might that have been?
A I recall having conversations with several attorneys starting out with Don West. After Don West filed a motion under McCleskey versus Kemp, you know, alleging – trying to allege racial discrimination in a case in seeking the death penalty, and then when he was confronted with the case law and he had to determine whether he was going to accuse me of being racially discriminatory in the case, he withdrew it. After looking at the case law on that, I had discussions with numerous attorneys, sometimes, you know -- I had discussions with probably several attorneys in cases which I may have had with George Couture in which, you know, I would have challenged him that the evidence in this case was so overwhelming, the invasion was so terrible that there was absolutely no reason to offer a plea of life in this case. And if -- you know, I, basically, would have thought that if I did offer a plea of life in this case it would have been a matter of ridicule that we would be accused of being racially discriminatory.

PC ROA Vol. VIII, 17-19. Race was obviously a factor in the State's decision to seek the death penalty in this case, and to not extend a life offer during plea negotiations in this case. Prosecutor Sedgwick confirmed in her testimony above that after attorney Don West filed a motion under *McCleskey v. Kemp* in another

case, she might have had a conversation with George Couture about "ridicule that we would be accused of being racially discriminatory." Although she only admitted that she "may have" and "probably" had such conversations, there is documentary evidence in the public defender files to corroborate conversations about race in connection with plea negotiations [see Defense EH Exhibit 4, PC ROA Vol. XVII, 19-21, admitted at PC ROA Vol XII, 461, e-mails from attorney Gerod Hooper].[3] An e-mail dated August 3, 2004 informed: "...they will NOT allow David to plea to life. . . .ASA Dorothy Sedgwick [said] since her office had come under criticism in the past for seeking death disproportionately when the victim was White, she would not now consider waiving death [] in a Black on Black homicide. . . .[we] have discussed the possibility of a M/ to recuse the SAO 9th from further prosecution of this case based upon inappropriate consideration of race in making a determination to seek death."

Ironically, because the State was sensitive to issues of race, and because they were consciously trying to avoid the appearance that race might be playing a factor

3 An August 27, 2004 e-mail from Gerod Hooper to Peter Schmer and Susan Cary stated, "In any event there is no present need to discuss plea options with David. The SAO has in the past come under fire for seeking death disproportionately in cases where the victim was White. Having spoken to George Couture about comments made by the ASA formerly assigned to this case my suspicion is they will not come off death in this case as the victims are Black and they perceive a need to balance the stats. (Think this is wrong?[])."

in their decisions to seek death and make life offers, it for those racial reasons that they refused to extend a life offer to Mr. Frances. As a consequence, race was therefore certainly a motivating factor in their decision to refuse a life offer to Mr. Frances. Had Mr. Frances been a different race, or had the victims been a different race, it seems likely that a life offer would have been extended to Mr. Frances. Prosecutor Sedgwick was asked:

> The question, Ms. Sedgwick, was, did George Couture approach you and ask you about a life sentence in the David Frances case?
> A I recall, generally, that George Couture indicated they were willing to plea to life in this case.
> Q And what was your response?
> A No.
> Q Did you mention anything at all about race after saying no?
> A As I said, I may have said that this case was so strong and so deserving of the death penalty that they would forever be accusing us of racial discrimination in other cases if we waived death in this case.

PC ROA Vol. VIII, 22. Overwhelming evidence was presented at the evidentiary hearing reflecting not just a possibility that race was playing a major factor in the State's decision to pursue death in this case, but rather, a *certainty* that race was playing a major factor in their decision. The assigned prosecutor admitted, "I may have used some words, you know, referencing that a plea to life on this case would be so ridiculous we would be accused of racial discrimination forever by defense attorneys for offering a plea of life on this case." PC ROA Vol. VIII, 25. Such a decision to pursue death in this case may have been good for the political image of

the State Attorney's Office, but it was not good for David Frances, and it was not good for the Equal Protection Clause of the Fourteenth Amendment. Affirmative action in a university system may be an acceptable, positive, and lawful policy if it promotes educational opportunities for minorities; but affirmative action in a legal system is unacceptable, negative, and unconstitutional when it unfairly promotes the execution of minorities like Mr. Frances based on race.

***"I have never ever heard a prosecutor say something as shocking like that to me."* -Attorney George Couture, PC ROA Vol. XIV, 866**

Attorney George Couture described how race became involved in this case, and how race became an obstacle in his efforts to settle this case for life. Mr. Couture testified as follows: "[F]rom the first day I met Mr. Frances, he expressed remorse," and he was willing to accept a "life sentence without the possibility of parole. And to that end, I recall having conversations with Ms. Sedgwick about that." PC ROA Vol. XI, 477. He stated:

> I remember at least on one occasion, I asked [Prosecutor Sedgwick] if she would be willing to allow Mr. Frances to plead to a life sentence without the possibility of parole in exchange for dropping the death penalty in this case. I recall that her response was, no way, not going to do that, not going to let this one go. Upon further inquiry, I asked her to explain herself. She said, I would not do that because this involved a black defendant and black victims, and she would never hear the end of it. I further inquired, and she explained that she was concerned that her office would be accused of making decisions in death penalty cases based upon race. And I think -- I don't remember exactly what I said to her, but I remember debating with her that's

> kind of ironic because I felt that she was, in fact, basing the decision on race because she was considering the race of the victim and the race of the defendant specifically in not entertaining a plea offer.

PC ROA Vol. XI, 479. He stated that he shared the information with his colleagues in the public defender's office and that, "We may have even had conversations about what to do, whether to file a *McCleskey* motion." PC ROA Vol. XI, 480. George Couture explained the basis of a proposed *McCleskey* motion: "A motion to dismiss the death penalty notice in the case based upon the State's using race as a criteria to make their decision." PC ROA Vol. XI, 481. He marveled, "I had never heard a prosecutor use that language to describe a decision in a capital case before." PC ROA Vol. XI, 480. He stated that he did not file or draft a motion because he was hopeful he would "still [] be able to settle the case in part. And I knew it would probably be explosive if I did make that public allegation. I was still trying to settle the case." PC ROA Vol. XI, 480. On cross-examination, Mr. Couture confirmed that "[Prosecutor Sedgwick] addressed to me that the race of the victim and the race of the defendant was the most important thing to her about not settling the case." PC ROA Vol. XI, 483. He stated, "I recall distinctly her saying, we won't let this one go. Why, Dorothy? She said, because it was a black victim and a black defendant." PC ROA Vol. XI, 486.

Prosecutor Jeff Ashton, in his cross-examination of Mr. Couture,

acknowledged through his questions that his office had been accused in the media and in the courts of making race-based decisions in seeking death:

> Q [by Ashton] But you also recall her telling you that her office would believe she was accused of racism if she did what you wanted?
> A [by Couture] I think –
> Q You recall her saying that?
> A Not accused of racism, they would be accused of, I guess –
> THE COURT: Making decisions based --
> BY MR. ASHTON:
> Q Making decisions based on race, that's what she said to you?
> A I think that's what --
> Q That if she did what you wanted, her office would have been accused of making decisions based on race?
> A Yes.
> Q And in fact, at that period of time, prosecutors were being accused of racism based on statistical studies, indicating that white victims of black defendants were more commonly subjected to the death penalty than black victims, isn't that correct?
> A Is that a question for me?
> Q Yes, it is.
> A I don't know.
> Q You are not familiar with McCleskey versus Kemp?
> A I'm not -- that's not your question. Do you want to repeat your question?
> Q Sure. Are you aware that during that period of time, that three-year period, you are not really able to remember when, at that period of time, prosecutors were not only in the media but in the courts being accused of racism based upon the idea that prosecutors more frequently seek the death penalty when the victim is white than black?
> A I'm aware of before and after McCleskey, and even today, that prosecutors, authorities, are scrutinized for their decisions in capital cases, including the race of the victim and the race of the defendant.
> Q Okay. Particularly sensitivity where the victims are black; is that correct?
> A Sure.
> MR. ASHTON: I'll stop. It's five o'clock.

> THE COURT: Are there more questions? Can Mr. Couture come back tomorrow morning?
> MR. HENDRY: We don't have any further questions.
> THE COURT: Are you done, Mr. Ashton?
> MR. ASHTON: I wasn't. Whether I could be, I need -- no, I'm not. I'm not.

PC ROA Vol. XI, 486-488. With statistics from the press revealing racial inequities in the Orange County State Attorney's Office's choice of cases for the death penalty, they became especially sensitive to murder cases involving black on black crime, and that is why they chose the Frances case as a death case. That is also why they refused to extend a life offer to Mr. Frances, as confirmed by Prosecutor Sedgwick, George Couture, and attorney Junior Barrett (Mr. Barrett's testimony is located at PC ROA Vol. XIV, 898-910). Junior Barrett confirmed:

> Q: When you approached Ms. Sedgwick about the possibility of a life settlement in this case, what single reason did she supply to you for her decision not to offer life?
> A: Because it was a black on black crime and she did not want to give the impression that she was giving him a life offer and being more lenient because he was a black defendant and it was black victims in the case.

PC ROA Vol. XIV, 910.

Prosecutor Sedgwick mentioned in her testimony past allegations that their office was making race-based death penalty decisions. This is important because the decision to vigorously seek death in this case was unfortunately guided by the office's need to seek death in cases where the victim was black, all in efforts to

balance the inequity in the death penalty statistics. As a consequence, death was sought for Mr. Frances because he was black and his victims were black. A life offer was not extended to Mr. Frances for those very same racial reasons. Such a practice violates *McCleskey v. Kemp*.

Prosecutor Ashton was not forthcoming at all regarding his knowledge of case law supporting relief in this case. When asked, "What's the bottom line of McCleskey v. Kemp," Prosecutor Ashton curiously refused to answer the question, stating: "I'm refusing to answer that because, in all honesty, I cannot answer it separating what I have learned as an advocate in this case versus what I knew before, so I'm going to refuse to answer that because it involves work product that I have gained as a member of the team in this case." PC ROA Vol. XIV, 922. The bottom line here is, the State Attorney's Office should have been precluded from seeking the death penalty because race was an obvious factor in their decision. In *McCleskey v. Kemp*, the Court ruled that *statistics alone* from the Baldus-study were not enough to justify relief, and that some other evidence would have to be presented by the petitioner to show that race was a factor in the decision-making:

> Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on the Baldus study.

McCleskey, Id. at 292. It should be noted that when Mr. McCleskey was executed by the State of Georgia in 1991, Justice Powell stated later that year that his decision to uphold the death penalty in the *McCleskey* case was his greatest regret ever. (*See* confirmation of that report in "*Justice Lewis F. Powell: A Biography*" (1994), a cooperative biography authored by John Jeffries, Justice Powell's former law clerk, once Dean and now current professor at the University of Virginia).

In the case at bar, unlike in *McCleskey*, Mr. Frances has actually brought not just mere statistics, but concrete evidence, specific to his own case, remarkably from the prosecutor's own mouth, that race was a factor in the State's decisions to pursue the death penalty in this case. This case includes the type of evidence contemplated by *McCleskey* which warrants relief from the death sentence.

Influential Statistical Inequities Reported Prominently in the Orlando Sentinel

Six years after the release of the *McCleskey v. Kemp* opinion, negative Orange County press reporting remarkable inequitable statistics in the death penalty decisions were prominently printed on the front and back pages of Sunday's edition of the Orlando Sentinel (Memorial Day eve edition) (*see* Defense EH exhibit 13, PC ROA Vol. XVII, 95-97, introduced at PC ROA Vol. XVI, 1084; the most legible copies of the articles can be found at PC ROA Vol. IV, 69-80). In light of defense Equal Protection motions, and admonishments from the Chief

Judge of the Ninth Judicial Circuit that followed,[4] the State Attorney's Office actively sought to balance the statistics in favor of appearing fair equitable in their decisions to seek death in black on black murders. A large Sunday front and back page spread in the May 24, 1992 Orlando Sentinel printed three articles entitled:

1) "SLAIN TEEN'S FAMILY WONDERS IF RACE PLAYED ROLE IN SENTENCE [–] THE PARENTS SAY THEY WERENT CONSULTED ABOUT NOT PURSUING THE DEATH PENALTY FOR THEIR BLACK SON'S KILLER. PROSECUTORS DENY PREJUDICE"

2) "[TWO] 2 DOUBLE MURDERS, 2 DIFFERENT STORIES [–] BLACKS WILL DISTRUST THE SYSTEM AS LONG AS THEY SEE SIMILAR CASES HANDLED DIFFERENTLY, LEADERS SAY"

3) "PROSECUTORS SEE DEATH PENALTY IN BLACK AND WHITE."

In one of these articles, a community leader called the State Attorney's Office out, commenting: "[The death penalty statistics indicate that] African-American life is not as valuable." PC ROA Vol. IV, 74. One article reported that the victim's family "suspects [that] another reason [the killer] never faced the electric chair [was because] [the victim] was black." PC ROA Vol. IV, 71. Even Chief Judge Belvin Perry, whose photograph was prominently displayed in one of

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4 The lower court took judicial notice of *Mansfield v. State*, 911 So. 2d 1160, 1168 (Fla. 2005) wherein it was reported that the Chief Judge of the Ninth Judicial Circuit made comments to Prosecutor Sedgwick about "people of ebony hue, people of color and people who were victims of color," when the State announced they were considering taking death off the table in that case. Hearing that death might be taken off the table, the judicial comments seemed to apprehend the sentiments reported in the 1992 news articles.

the articles, commented to the press in the large Sunday spread, "These figures and these cases may not show whether the system is just or not, [b]ut clearly they show it does not have the appearance of justice." PC ROA Vol. IV, 80. So there was pressure on the State to seek death in cases of black on black crime in order to make the system appear more fair and equitable. And they succumbed to the pressure, to the point that Prosecutor Sedgwick refused to "let this one go." Though sinister intent may not have motivated the decisions of the State, still, ***race motivated the decisions to seek death***, contrary to *McCleskey v. Kemp*.

Elected State Attorney Lawson Lamar prepared a written statement and forwarded it to the Sentinel in response to the statistics suggesting that the death penalty was not frequently sought for black victims. He defensively responded to the press: "Even unconscious discrimination by race is not shown to be a factor in our decisions. On no occasion have I believed that because the parties were of any protected class that the case was more or less serious or the victims more or less precious." PC ROA Vol. IV, 78. In the case at bar, as corroborated by several witnesses, Prosecutor Sedgwick indicated that the Frances victims were more precious because they were black when she informed the defense attorneys that this was a black on black death penalty case that she would not let go because of race. And Prosecutor Ashton's refusal at the evidentiary hearing to answer

questions about his understanding of the holding of *McCleskey v. Kemp*, citing "work product that I have gained as a member of the team in this case," certainly raises more questions about the State's processes in choosing this case for death.

One article in the series reported that "The Sentinel's study found no obvious discrimination by prosecutors." PC ROA Vol. IV, 79. But in the case at bar, David Frances has presented actual testimonial and documentary evidence that the State sought to execute him because this was a black on black crime, and they did not want to appear soft on black on black crime. Prosecutor Sedgwick did not deny making the statements, and the statements were in fact corroborated by at least two attorneys, George Couture and Junior Barrett.

Reaction to the Press: The Execution of the Severely Mentally Ill Based on Race

At the evidentiary hearing, the court took judicial notice of (*Steven) Evans v. State*, 800 So. 2d 182 (2001), a black-on-black murder case that Mr. Ashton handled. PC ROA Vol. XIV, 928, 922. When questioned, Mr. Ashton could not recall who made the decision to seek death against Mr. Evans, or whether he personally made the decision. PC ROA Vol. XIV, 923. He could not recall that Mr. Evans was twice-adjudged mentally incompetent to stand trial before the capital trial proceeded. PC ROA Vol. XIV, 924. He *did* however remember that this was a single victim case, and, the victim was black. ROA Vol. XIV, 924, 926.

He "absolutely" had the discretion to offer life to Mr. Evans, yet he did not offer him life. PC ROA Vol. XIV, 929. The State's pursuit of death against a twice-adjudged mentally incompetent, paranoid schizophrenic man in a relatively unremarkable single-murder case (the shooting of a gang member nicknamed "Capone"), was obviously reactionary selection, guided by the race of the victim and defendant, and not the aggravators and mitigators. Frances similarly was chosen as a death penalty case for the same improper race-based reasons.

Attorney George Couture: Total Recall

As far as case-specific, race-based decisions to pursue death in the instant case, George Couture was later recalled by the State and testified further. Just in case there was any doubt whatsoever about whether racial statements were made by Prosecutor Sedgwick in connection with the State's continued decision to pursue the death penalty in this case, attorney George Couture ensured:

> I have never ever heard a prosecutor say something as shocking like that to me. It was unnecessary to record it contemporaneous because I was shocked. It is something I will never ever forget. There is no doubt in my mind as I sit here today. This is not an opinion. This is my impression of what she said to me because in the context of that conversation, we did not discuss agents [sic, "aggs"] and mitts. She exclusively relied upon the race of the victim and the race of the defendant in making her decision. And she told me as much in the conversation making her decision not to allow Mr. Frances to plea. I will never forget what she said. . . .I'm not verbatim quoting it, but she made it very clear to me, Mr. Couture, I will not settle this case, I will not let it go, I will not let him plea because it is a black on black

crime.

PC ROA Vol. XIV, 866, 867. Contrary to Prosecutor Ashton's disingenuous suggestions to the contrary during his questioning of various witnesses who corroborated the truth in this matter, statements regarding race *were* in fact made by Ms. Sedgwick to trial counsel during attempted plea negotiations in this case.

The first prosecutor on this case informed trial counsel that *race* was primarily driving the pursuit of this death sentence. The aggravators were only secondary concerns to the State in this case. To deny the obvious and invidious substance of the conversation mentioned during attempted plea negotiations, one would have to ignore the following: the testimony of the prosecutor herself, the testimony of attorneys George Couture and Junior Barrett, and the corroborating business records from the public defender's office (the aforementioned e-mails generated in 2004 discussing Prosecutor Sedgwick's comments).

Attorney George Couture confirmed that he would have filed the appropriate motion based on Prosecutor Sedgwick's comments had he stayed on this case:

> My question to you is, what motion would you have filed in this case based on the information you received from Dorothy Sedgwick?
> A I would like to have believed that I would have filed a motion to dismiss that portion of the indictment which would allow the State to seek the death penalty. I would have -- would like to believe I would have filed a motion to preclude the death sentence in this case based on due process/equal protection type of argument. But I, obviously, didn't file it in this case. And I passed the case on to someone else.

> Q Had the public defenders filed such a motion, were you available for the defense to testify in such a hearing?
> A I would have been available to testify. And I think my -- probably my recollection would have been a lot better -- my memory would have certainly been better.

PC ROA Vol. XIV, 882. Also available for such a hearing would have been former assistant public defender Junior Barrett, who testified without a moment's hesitation that "Ms. Sedgwick [said] she would not offer life because she didn't want to be accused of being more lenient with a black on black crime." PC ROA Vol. XIV, 903. Because Mr. Frances has shown that a *McCleskey v. Kemp* motion should have been filed, this Court should grant relief.

Evidence of *specific* racial considerations, something lacking in *McCleskey v. Kemp,* is actually found in the case at bar.

Racism Condemned by the Courts

Racism has no place in our criminal justice system, and it is undeniably intolerable in a capital case where a defendant's very life is at stake. As this Court stated eight years ago while granting relief in another capital case where race became an issue, *(Henry) Davis v. State*, 872 So. 2d 250, 253-254. (Fla. 2004):

> Applying these standards and principles, we conclude that the expressions of racial animus voiced by trial counsel during voir dire so seriously affected the fairness and reliability of the proceedings that our confidence in the jury's verdicts of guilt is undermined. We cannot agree with the trial court's conclusion that an explicit expression of racial prejudice can be considered a legitimate tactical approach.

Whether or not counsel is in fact a racist, his expressions of prejudice against African-Americans cannot be tolerated.

Initially, we strongly reaffirm the principle that racial prejudice has no acceptable place in our justice system. As we [have] stated [previously] [citation omitted],

'[t]he founding principle upon which this nation was established is that all persons were initially created equal and are entitled to have their individual human dignity respected. This guarantee of equal treatment has been carried forward in explicit provisions of our federal and state constitutions. It is not by chance that the words "Equal Justice Under Law" have been placed for all to see above the entrance to this nation's highest court. If we are to expect our citizens to treat one another with equal dignity and respect, the justice system must serve as the great example of maintaining that standard. And while we have been far from perfect in implementing this founding principle, our initial declaration and our imperfect struggle and efforts have served as a beacon for people around the world.'

[W]e considered [citations omitted] whether to authorize an inquiry to ascertain whether racist jokes and statements were made by jurors in a trial involving a suit by the plaintiffs, who were black citizens of Jamaica, against an insurance company for claims arising from an automobile accident. [] We authorized the inquiry, and ruled that if the trial court determined that the statements were in fact made, the comments warranted a new trial []. Rejecting any notion that this was not a proper concern within the purview of the justice system, we stated:

'The issue of racial, ethnic, and religious bias in the courts is not simply a matter of "political correctness" to be brushed aside by a thick-skinned judiciary. . . . Despite longstanding and continual efforts, both by legislative enactments and by judicial decisions to purge our society of the scourge of racial and religious prejudice, both racism and anti-Semitism remain ugly malignancies sapping the strength of our body politic. The judiciary, as an institution given a constitutional mandate to ensure equality and fairness in the affairs of

> our country when called on to act in litigated cases, must remain ever vigilant in its responsibility. The obvious difficulty with prejudice in a judicial context is that it prevents the impartial decision-making that both the Sixth Amendment and fundamental fair play require. A racially or religiously biased individual harbors certain negative stereotypes which, despite his protestations to the contrary, may well prevent him or her from making decisions based solely on the facts and law that our jury system requires.'
>
> (Quoting *United States v. Heller*, 785 F. 2d 1524, 1527 (11th Cir. 1986). The United States Supreme Court has observed that it has been compelled to "engage [] in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system." *McCleskey v. Kemp*, 481 U.S. 279 [] (1987). (quoting *Batson v. Kentucky*, 476 U.S. 79 [] (1986)).

If our Courts will not tolerate a defense attorney making "strategic" racial comments during *voir dire*, they surely should not tolerate the State strategically pursuing the death penalty based on race and politics, refusing to offer life based on race and anticipated public perceptions, and then striking jurors based solely on race. The example of a defense attorney informing the jury that he does not like black people is no less offensive that the State informing the defense that they are seeking death in a case because it is a black on black crime, and they want the public perception regarding their choice of death cases to be favorable.

Problems with the Lower Court's Order

The lower court acknowledges a plethora of evidence supporting a claim of ineffective assistance of counsel for failure to file a motion to preclude the death

penalty based on *McCleskey v. Kemp*, then unfairly ignores and dismisses the evidence. Starting at page "18 of 36" of the order [PC ROA Vol. VI], the lower court acknowledges the following evidence supporting the fact that racial considerations drove this death sentence before denying the claim:

> "[Attorney George] Couture stated he had never heard a prosecutor say anything as shocking as this and because he would never forget it, it was 'unnecessary to record it contemporaneous…,' although he did share it with his supervisor and other's at the Public Defender's Office. (EH. 866, 878). . . .[Prosecutor Sedgwick] did admit [] that she may have said that the case was so strong and so deserving of the death penalty that 'they would forever be accusing us of racial discrimination in other cases if we waived death in this case.' (EH. 18, 21-26). . . .[Attorney Peter] Schmer had no independent recollection of why a *McCleskey* motion was not filed, but stated that the discussions in his office centered around how it would impact other defendants. . . .[Attorney Walter] Ruiz testified that the defense team discussed the possibility of resolving the instant case with life, but Defendant's race was an impediment to that resolution. (EH. 625, 640, 641). . . .he did not know 'there was a legal possibility to file that motion.' (EH. 641). . . .[Attorney Gerod] Hooper testified that he had reviewed the e-mails that he sent in August 2004 and he believed that it was wrong for the State to use race as a consideration in seeking the death penalty. (EH. 697, 698). . . .he did not remember if there was any reason not to file a McCleskey motion. (EH. 701). . . .Former Public Defender Barrett [] testified that even though he would accept a life offer, Sedgwick would not agree because 'she did not want to be accused of being more lenient on black on black crime….' and/or did not want to give the impression the State was more lenient on black on black crimes (EH. 902-905, 910)."

Lower Court's Order, PC ROA Vol. VI 147-148. Notwithstanding all of the evidence above, the lower court unreasonably concludes at PC ROA Vol. VI, 149

that "the Court finds that this testimony is not credible wherein there is nothing in the record to support the vague recollections of these witnesses."

The only testimony that was "vague" is the testimony from Prosecutor Sedgwick wherein she only admits she "may" have said something about race during the attempted plea negotiations, when she actually *knows* she mentioned race in connection with this case and the penalty sought. Other "vague" testimony includes some of the defense attorneys who could not remember why a *McCleskey* motion was not filed; this actually supports relief because it shows there obviously was no strategy involved in failing to file a motion for Mr. Frances. Actually, to the contrary, most troubling is the non-vague testimony from attorney Peter Schmer wherein he stated that in the context of failure to file a *McCleskey* motion in Frances and the reasons for this omission, he stated that "the discussions in the office centered around how it would impact other defendants if a McCleskey type claim were to be raised." PC ROA Vol. XI, 505.

Though a true conflict here might be based on Mr. Schmer's "vague recollection" about discussions in his office about how the filing of a *McCleskey* motion might negatively affect the other capital cases in the public defender's office, there is nothing vague about George Couture and Junior Barrett's recollection about plea discussions in this case, and there is nothing vague about

the e-mails supporting those discussions located at PC ROA Vol. XVII, 19-21. If the public defender's office indeed was concerned that the filing a *McCleskey* motion in Frances might adversely affect life offers in their other capital cases, prejudice here should be presumed ("Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.' *Cuyler v. Sullivan, supra* 446 U.S., at 350, 348 []." *Strickland, Id.* at 692. Fearful that the filing of a *McCleskey* motion in Frances might shut down negotiations in their other capital cases, the public defender's office chose not to file a *McCleskey* motion in Frances. This conflict indeed adversely affected the representation.

Even if prejudice cannot be presumed for the failure to file a motion under *McCleskey*, prejudice is clearly demonstrated here because a *McCleskey* motion would have had underlying merits had counsel filed the motion. The lower court applied an unreasonably strict and unconstitutional standard for relief here. It unfairly mischaracterizes the Appellant's *McCleskey* claim as follows: "Defendant [] claims that because of pressure from the press and the Ninth Judicial Circuit, the State sought the death penalty **solely** because he is black." (emphasis added). PCROA Vol. VI, 146. While *McCleskey* only requires a petitioner to demonstrate that "racial considerations played **a part** in his sentence" (emphasis added), the

lower court unfairly denied relief reasoning that "Defendant fails to establish that race was ever **the reason** the State sought the death penalty against him." (emphasis added). PC ROA Vol. VI, 149. The claim here is that race played a part in sentencing. Though evidence suggests that race was actually "the reason" why the State sought death in his case, he need only show under *McCleskey* that race played "a part" in the sentence. At the very least, Prosecutor Sedgwick's own admissions show that race obviously played a part in this death sentence.

Conclusion

The *(Henry) Davis* opinion was issued only eight years ago, but the exclusion of blacks from juries because of their race was ruled officially unconstitutional over one hundred and thirty years ago *(see Strauder v. West Virginia*, 100 U.S. 303, 306 (1880). "[The Fourteenth Amendment] not only gave citizenship and the privileges to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws"). The exclusion of blacks from juries because of their race is obviously still wrong today, as is the execution of blacks based on racial considerations. By authority of *Strauder* (1880), *Snyder* (2008), and *McCleskey* (1986), by way of *Strickland* (1984), this Court should not permit the State to execute David Frances.

Accordingly, this Court should vacate the current unconstitutional

conviction and sentence of death, and bar the State from seeking death on retrial because its decisions have been based, at least in part, on racial considerations.

CLAIM III

MR. FRANCES WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING JURY SELECTION FOR FAILING TO OBJECT TO IMPROPER COMMENTS MADE BY THE COURT ABOUT SOUTHERNERS, YANKEES AND GENTILES. THIS VIOLATED MR. FRANCES' RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. TRIAL COUNSEL WAS ALSO INEFFECTIVE FOR FAILING TO OBJECT WHEN THE STATE INFORMED THE JURY THAT A LIST OF MITIGATORS WOULD BE PROVIDED.

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

Failure to Object to the Court's Improper Comments Regarding Southerners, Yankees and Gentiles / Failure to Prevent Jury Contamination

Trial counsel was ineffective for failure to adequately object to the court's improper comments regarding Southerners, Yankees and Gentiles during *voir dire*. During jury selection, several times, the court interrupted and made distinctions about how "Southerners" tended to be more "gentile," and that the court needed them to answer questions more directly, more like a "Yank" would (*see* transcript

below). Trial counsel's failure to specifically object to these interjections and instructions from the bench precluded a fair ruling at trial, tainted the jury pool against Brooklyn-native Gerod Hooper and foreign-born David Frances.

The following comments were made by the court during jury selection as they answered questions about imposing the death penalty:

> Let me say a word about our use of language. Oftentimes those of us who are raised in the South tend to say things delicately. It just seems to be a more courteous or a gentile way of handling things than maybe the Yanks do. So we tend to say, yes, I think I could, when what we really mean is yes. People raised in another environment might be inclined to give a more direct and positive answer.
> . . . .
>
> This is not an easy task for anyone involved in the room. What I'm asking for you to do is put your gentile, southern nature aside and give us an answer about whether you could [vote for the death penalty] under any circumstances.

[Dir. ROA Vol. II, 172, 173]. In response to this instruction directed her way, Juror Hill assured the court that she *could* in fact impose the death penalty under any circumstances. The court responded, "Thank you, Ma'am. That's what I thought your answer was going to be." [Dir. ROA Vol. II, 173]. Those comments by the court had the effect of instructing Juror Hill and the other prospective jurors listening that the correct answer to the question posed regarding the imposition of the death penalty was: "yes, death should definitely be imposed." Anything less than an enthusiastic answer of "Most certainly I can vote for death!" was

characterized and criticized by the court as "delicate, courteous, gentile, and less positive." The jury pool was essentially instructed that the correct answer was that the death penalty *should* be imposed "under any circumstances." It was ineffective for counsel to fail to move for a replacement panel after these prejudicial comments were made by the court.

The trial transcript indicates that the trial judge used the word "gentile" twice as opposed to "gentle" or "genteel" in the course of this admonition to the jury. Dir. ROA Vol. II, 172, 173. If the court *did* in fact intend this invidious distinction based on race or religion, this would obviously constitute grounds for a new trial. *See U.S. v. Heller*, 785 F. 2d 1524, 1527 (11th Cir. 1986) ("Despite longstanding and continual efforts, both by legislative enactments and by judicial decisions to purge our society of the scourge of racial and religious prejudice, both racism and anti-Semitism remain ugly malignancies sapping the strength of our body politic," cited by *Davis v. State*, 872 So. 2d 250, 254 (Fla. 2004)). If this was simply a scrivener's error, there still exists the danger that the jury pool was further tainted by those comments. In any event, the jury should not have been instructed in any manner that they needed to be more certain about a decision for death.

The trial court continued, without objection or a defense motion to strike the panel, to alienate the jurors who seemed apprehensive at all to impose death:

> Ms. Pagan, I wasn't sure about you for a while, but now I think I'm sure. I thought your answer was more direct at the end, and I'm asking for reassurance now. If you felt that the facts of the case warranted it and you weighed the factors on both sides and according to the instructions given by the Court, could you under those circumstances vote for a death penalty?
> Juror Pagan: I think so.
> The Court: "I think so." See, it's our Southern heritage[]...But we would like to know if you can ever picture yourself voting for a death penalty.

[Dir. ROA Vol. II, 174]. The above passage shows that the court was seeking "reassurance" that Juror Pagan could vote for the death penalty. This had the effect of tainting the jury pool as the court virtually instructed the prospective jurors that if they were not prepared to vote for death in certain and unwavering fashion, they should not be sitting on the jury. Trial counsel was ineffective for failing to ensure that a panel was seated free from these prejudicial instructions. No juror should ever feel predisposed to vote for death before hearing the facts of the crime and the applicable law. The court was basically instructing these prospective jurors that they must be so predisposed, otherwise any apprehension or hesitation to vote for death would make them unfit for jury service.

Trial counsel was ineffective for failing to raise an objection and move for a mistrial, specifically on the issue of the court seeming to direct the prospective jury that they should not be on the jury unless they were certain they could vote for death. Additionally, regarding the "Southerners" and "Yanks" comments,

although a general objection was made by trial counsel at Dir. ROA Vol. IV 615-616 that the court was unfairly leading the prospective jurors into definitive answers, trial counsel failed to specifically raise the specific issue that these geographical distinctions separated and tainted the pool of jurors who would be deliberating the fate of someone not from the North or the South. The limited, ineffective objection was as follows:

> Specifically, the –on the recitation by the Court to the jury was to the effect of, for lack of a better description, the polite Southerner example that the Court gave, and that was given on more than one occasion. The purpose was apparently so that the jurors would be more definitive in their position. The case law does not require that. Those are our objections. And we would accept the jury panel, subject to those objections. But we believe that that interplay, that exchange, has affected our ability to pick jurors that should have been allowed to remain for the remaining of the jury and subject to choosing a jury.

[Dir. ROA Vol. IV, 616]

Though the defense may have objected to the improper comments, they never moved for a mistrial nor requested a new jury panel. This is not a question of what case law "requires." This is the prospective jury pool being egregiously and prejudicially misinstructed by the court. Trial counsel should have raised specific objections that the jury was essentially instructed by the trial court that if they were not inclined to vote for death, they were unfit to serve. Trial counsel should have objected and moved to replace the entire tainted panel. Had the State

engaged in misinforming prospective jurors during *voir dire* that the law requires them to be predisposed to vote for death, one would hope that the defense would object and request a curative instruction, and perhaps a mistrial. Because these improper instructions came from the bench, they were all the more prejudicial.

Mr. Hooper testified that he did not find the trial court's comments to be objectionable, including the court's seeking of "reassurances" that jurors could definitely impose the death penalty objectionable. PC ROA Vol. XIV, 814-817. These comments were certainly prejudicial and objectionable under the long-established case law of *Witherspoon v. Illinois*, 391 U.S. 510 (1968):

> A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. . . . [I]n a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment-of all who would be reluctant to pronounce the extreme penalty-such a jury can speak only for a distinct and dwindling minority.
>
> If the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply 'neutral' with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die.

Witherspoon, Id. at 519-521.

In *Witherspoon*, the standard practice of excluding jurors based on personal opposition to the death penalty was condemned, and an Illinois death sentence was reversed because of the systematic exclusion of prospective jurors who voiced any opposition to the death penalty. Under current law, jurors personally opposed to the death penalty cannot be precluded from serving on a capital case if they can follow the law and vote for death, albeit apprehensively. Juror Pagan did not voice any opposition *at all* to the death penalty. As such, the trial court was wrong to instruct her to be more definitive in her answers about her ability to choose death.

The trial court's comments were prejudicial and objectionable, and trial counsel should have moved to strike the entire panel and request that the court not taint the next panel of jurors with comments about Southern/Northern heritage and the need to be definitive on voting for the death penalty. Trial counsel should have asked that the trial court to refrain from seeking "reassurances" that the jurors were most-certainly inclined towards imposing the death penalty. Regarding the court's comments, Gerod Hooper stated: "[D]o I think it was objectionable? No. Did Mr. Ruiz? Obviously, yes." PC ROA Vol. XIV, 819. Mr. Hooper also stated, "Now, whether was it seriously considered in this time moving for a mistrial and a new jury panel, that I don't recall." PC ROA Vol. XIV, 820.

Wainwright v. Witt, 469 U.S. 412, 416 (1985) reinforced the relevant principles of *Witherspoon*:

> In *Witherspoon*, this Court held that the State infringes a capital defendant's right under the Sixth and Fourteenth Amendments to trial by an impartial jury when it excuses for cause all those members of the venire who express conscientious objections to capital punishment. As the Court of Appeals in this case noted, however, the *Witherspoon* Court also recognized the State's legitimate interest in excluding those jurors whose opposition to capital punishment would not allow them to view the proceedings impartially, and who therefore might frustrate administration of a State's death penalty scheme.

Jurors Hill and Pagan did not voice the slightest opposition to the death penalty. The court was wrong to make reference to the Southerner/Northerner language examples with this jury, and was wrong to seek reassurances that all of the jurors could *most certainly* impose the death penalty. Trial counsel was ineffective for failing to protect Mr. Frances' rights. A mistrial/new jury panel should have been requested based on the court's improper comments. This issue was not *fully* preserved for appeal because although objections were made by trial counsel and overruled by the court [*see* Dir. ROA Vol. IV, 615-617], a new jury panel was not requested following the court's objectionable and prejudicial comments.

Problems with the Lower Court's Order

The lower court makes some significant factual findings before denying this claim based on impossible and unconstitutional legal standards. The lower court's

conclusion on this claim reads as follows:

> [T]he Court finds that the trial judge's comments and/or questions concerning "Southerners" and "Yanks" were perhaps patronizing and unrealistic, particularly in light of the evolving standards of jury selection, and that counsel lodged and objection to them. But the Court also finds that because there is no indication in the record that the trial court judge was intentionally misleading or trying to intimidate any of the potential jurors, these comments and/or questions, albeit improper, do not rise to the requisite level of prejudice, wherein there is no reasonable probability that but for counsel's alleged omission, the outcome of the case would have been different. *Strickland*, 466 U.S. at 694. Accordingly the claim is denied.

PC ROA Vol. VI, 140-141. There is actually nothing at all in the record to support the lower court's findings that trial counsel specifically objected to the improper comments about Northerners and Southerners while they were actually being made. The only objection from trial counsel about improper "Southerners/Northerners" came at the very end of jury selection, at Dir. ROA Vol. IV 615-616. And in that objection, trial counsel failed to request a mistrial and a new panel based on what the postconviction court agreed were improper and "patronizing" comments. Mr. Frances is more concerned about the prejudicial effect that these comments would have on the entire jury pool, including the jurors who actually served on this case.

At Dir. ROA Vol. IV 615-616, Walter Ruiz's objections are specific only to the *removal* of Jurors 35 and 36. Trial counsel should have objected to the entire

sitting panel for the prejudicial comments that instructed/mandated death as a penalty in this case. The entire jury panel was tainted by the Court's comments. That is a more extensive and global problem than three jurors being stricken for no good reason. The defense objection was too little, too late. It is at Dir. ROA Vol. IV 615-616 where attorney Ruiz should have also specifically mentioned Juror 41 Roberts as a juror who was wrongfully excluded. The lower court was wrong to generically find that counsel lodged a proper objection here.

The lower court also fails to address the problematic issue of the word "gentile" utilized by the trial court during *voir dire*. Without specifying its actual factual findings, the lower court simply places the word "[sic]" after "gentile." *See* PC ROA Vol. VI, 138. If the lower court is making a finding here that "gentile" is simply a scrivener's error, it should so specify clearly. But there is nothing in the record to support that it is a simple scrivener's error. Had the State called the court reporter to testify at the evidentiary hearing that this was a scrivener's error, such would be acceptable. But they did not. For the postconviction court to ignore what the trial court stated to these jurors in the trial transcript about being less "gentile" in their answers is wrong. As the transcript reads in this case, the trial court made not just geographical distinctions between the way people speak, but also distinctions about Gentiles and non-Gentiles. This

is now a case that has seen a fair share of *McCleskey* errors in sentencing, *Batson* and *Witherspoon* errors during jury selection, and now this troublesome error. Enough is enough.

It was not enough that the trial court provided improper and erroneous jury instructions during *voir dire* regarding the need to unequivocally impose a death sentence utilizing bizarre, "patronizing," and "unrealistic" geographical and otherwise improper distinctions. The lower court actually imposed a requirement here that Mr. Frances prove that the trial court had the ill intent to intentionally mislead and/or intimidate the jurors into voting for death. The lower court sets an impossible bar to obtaining relief in this case when real error is apparent.

Strickland does not carry a specific intent requirement. There is no requirement that a petitioner show that the court intentionally erred, or that trial counsel intentionally erred to obtain relief. There is no depraved-heart judge requirement. Hypothetically, if a trial court instructs that mitigators must be proven beyond a reasonable doubt, and that aggravators need only be proven by preponderance of the evidence, trial counsel should object. And if trial counsel fails to object, the postconviction claim should not fail because the petitioner cannot prove that the trial judge actually intended to mislead the jury.

Analyzing the trial court's comments and directives in this case, it becomes

clear that the court was improperly instructing the jury that they must unequivocally impose a death sentence. Perhaps the trial court was confused about what areas the jurors should not equivocate about, such as respecting a defendant's right to remain silent and the presumption of evidence. But when it comes to the death penalty, it is entirely proper for them to struggle with the notion of voting for death. *See Witherspoon v. Illinois*, 391 U.S. 510, 519-521 (1968). A court should not utilize these improper distinctions to encourage and mandate that jurors unequivocally agree that death should be imposed in a capital case.

For the trial court to press these jurors in this fashion is to improperly impress upon them the notion that the Court prefers death over life, that death is the appropriate penalty in the case, and that unless they are absolutely inclined to vote for death, they are unsuitable to serve on the jury. A "death-qualified" juror is not a juror who should be predisposed towards recommending death in a capital case. Much to the contrary, because of confusion in this area of law, this Court just overhauled and amended Florida's jury instructions in 2009. This penalty phase was tried in 2004, but it has *never* been the law in the State of Florida that a death sentence be mandated in a capital case. The Court and the State were wrong to suggest otherwise, and the defense was ineffective for failing to object to particular comments made during *voir dire*, for failing to request curative instructions, and

for failing to cite to and request a reading of available case law illustrating that a juror is *never* compelled to vote for death, even in a case where aggravators are many and weighty, and mitigators are few and weak.

In 2009, this Court specifically *clarified* the law in capital sentencing:

> And second, in the latter portion of the instruction, we have authorized an amendment stating that **the jury is "neither compelled nor required to recommend death," even where the aggravating circumstances outweigh the mitigating circumstances.** This amendment is consistent with our state and federal case law in this area. *See Cox v. State*, 819 So. 2d 705, 717 (Fla. 2002)("[W]e have declared many times that 'a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors' ") (quoting *Henyard v. State*, 689 So. 2d 239, 249-250 (Fla. 1996); *see also Greg v. Georgia*, 428 U.S. 153 [] (1976)(plurality)(explaining that a jury can constitutionally dispense mercy in cases deserving of the death penalty). We note that this amended language is less stringent than the proposal, which provides: "Regardless of your findings with respect to aggravating and mitigating circumstances you are *never* required to recommend a sentence of death." (emphasis added)

In re STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES-REPORT NO. 2005-2. In re Standard Jury Instructions In Criminal Cases-Penalty Phase of Capital Trials, 22 So. 3d 17, 22 (Fla. 2009).

By requiring proof that the outcome of this case would have been different absent the error, the lower court once again places an unfair prejudice burden on the defendant. As the beneficiary of this error, the State should have the burden here to prove that these improper instructions from the court did not affect the judgment of the jury in their death recommendation. Mr. Frances should be

afforded a new penalty phase because one cannot determine the effect of these errors. *See Barrow v. State*, --So. 3d--, 2012 WL 1947880, 1 (Fla. 2012) ("Because we are unable to find beyond a reasonable doubt that the error did not contribute to the guilty verdict, Barrow is entitled to a new trial."). *Barrow* held that in failing to provide requested transcripts of five witnesses' testimony to the jury, or at least give the jury a read-back of the requested testimony, and instead asking them to simply rely on their memories, was reversible error because that could have contributed to the guilty verdict.

Similarly, the State cannot show here that the court's improper comments to the venire did not affect the penalty phase deliberations. Under *Strickland* there should be a lack of confidence in the outcome of this case where at least two jurors were wrongfully stricken contrary to *Witherspoon*, at least one juror was stricken contrary to *Batson*, and *all* of the sitting jurors were exposed to the trial court's improper and prejudicial comments about the necessity of voting for death under the law. This Court should not permit this death sentence to be carried forward when the trial court's comments clearly diminished the State's burden of proof in the penalty phase, and predisposed them towards voting for death.

Failure to Object to Comments Erroneously Informing the Jury that a List of Mitigators Would be Presented to the Jury at the Penalty Phase

During *voir dire*, the State consistently advised the panel, including those

members who ultimately comprised the jury, that should the case reach a penalty phase, the jurors would actually be given mitigators to consider. In one instance, the State specified they would be given a list of mitigators (*see* relevant trial transcript below). The defense never objected, never moved to correct the State, nor moved to strike the panel based on this promise by the State that the defense would present a list of mitigators. The State used the following language at various points during *voir dire*:

a. To the second *voir dire* group, from which one juror was selected:

The judge will give you guidelines to follow. He will tell you that ***there are a group of factors called aggravating circumstances***, things that arguably would support the death penalty in the individual case. He'll tell you ***there are things called mitigating circumstances, since that arguably support a life sentence.*** (Dir. ROA Vol. I, 118)

b. To the third group, from which one juror was selected:

And it is at that point, then, that ***the jury is given guidelines*** – they're ***known as aggravators*** – in favor or in support of the death penalty ***and mitigators***, which are against the death penalty, or in support of a life sentence.

And once the jury is given ***those guidelines***, ***the aggravators and mitigators***, it is then the jury's responsibility in the penalty phase to determine ***what weight each aggravator and each mitigator is going to be given***, and then after weighing that, the jury then makes a recommendation for the sentence. (Dir. ROA Vol. II, 150)

c. To the fourth group in *voir dire*, from which one juror was selected:

And in the penalty phase evidence is presented, facts are presented, ***the Court would give the jury a list of factors*** that the jury can look at. ***They're called***

aggravators, factors in favor of the death penalty. Mitigators, factors in favor of a life sentence. (Dir. ROA Vol. II, 181)

d. To the fifth group in *voir dire*, from which two jurors were selected:

The jury will be given ***a framework of the law from the Court***, and ***included in that framework will be factors that the jury can look at, and they're called aggravating circumstances or mitigating circumstances. Aggravating factors will be factors in support of the death penalty; mitigating circumstances will be factors in support of a life sentence.*** (Dir. ROA Vol. II, 201)

e. To the seventh group in *voir dire*, from which three jurors were selected:

[A]nd ***the Court will provide the jury with a legal guideline of how to view those facts and how to view that evidence. And in those guidelines from the Court will be aggravating circumstances or factors in support of the jury voting for the death penalty or mitigating circumstances, which would be factors in support of the jury voting for a life sentence.*** (Dir. ROA Vol. II, 261)

f. To the eighth group in *voir dire*, from which three jurors were selected:

[I]n the penalty phase. . . .evidence is presented to the jury that ***the judge instructs the jury as to things that the jury can look at. Aggravating circumstances, circumstances that if the jury finds them the circumstances are in favor of the death penalty. Mitigating circumstances, factors the jury can find that are in support of a life sentence in opposition of the death penalty.*** (Dir. ROA Vol. II, 282)

Contrary to the State's *voir dire* advisories, as far as mitigation during the penalty phase, the defense and the trial court provided no "guidelines," no "framework," no "list of factors," no "legal guidelines," and no "mitigating circumstances." The defense failed to advise on "things that the jury c[ould] look at" "in support of a life sentence." The defense had a duty to provide the jury with

any and all available mitigating factors to support a life sentence, but they failed to do so in violation of *Strickland*. If the defense knew at the time of *voir dire* that it intended *only* to have the court instruct the jury on the "catch-all" mitigation instruction without mentioning specific available mitigators, they had a duty to object to the State's comments. Instead, the jury was provided with an available list of aggravators, but no list of mitigators, all to the detriment of Mr. Frances.

Fla. Stat. 921.142(7) specifically delineates all of the relevant mitigating circumstances that are available for a capital defense attorney to argue for clients facing the death penalty. Under Fla. Stat. 921.142(3)(b) the jury is instructed that they must determine "Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." In this case, the jury was given a specific list of aggravators that the State argued applied to the instant murder, yet no specific list mitigators was provided to the jury. This was especially prejudicial because the jury was misled to believe, without objection from the defense, that they would be given a list of mitigators to consider. Instead, they were only provided the "catch all" found in Fla. Stat. 921.142(7)(h). As seen below, listing the available mitigators does not limit the available mitigators at all. At the time of this penalty phase, Fla. Stat. 921.142(7)(2004) specifically stated:

> **(7) Mitigating circumstances.--**Mitigating circumstances shall include the following:

> (a) The defendant has no significant history of prior criminal activity.
> (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
> (c) The defendant was an accomplice in the capital felony committed by another person, and the defendant's participation was relatively minor.
> (d) The defendant was under extreme duress or under the substantial domination of another person.
> (e) The capacity of the defendant to appreciate the criminality of her or his conduct or to conform her or his conduct to the requirements of law was substantially impaired.
> (f) The age of the defendant at the time of the offense.
> (g) The defendant could not have reasonably foreseen that her or his conduct in the course of the commission of the offense would cause or would create a grave risk of death to one or more persons.
> (h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

Arguably, by at least a preponderance of evidence, every single specific statutory mitigator listed above in (a)-(g) applied to Mr. David Frances. The failure to provide the jury with this specific list of mitigators limits the mitigation in this case; any suggestion to the contrary defies logic. Fla. Stat. 921.141(h) opens up the field of mitigation to "any *other* factors in the defendant's background that would mitigate against imposition of the death penalty."[5] (emphasis added). Mr. Frances was deprived of a reliable capital sentencing proceeding in this case because the jury was not instructed on the specific statutory mitigation that was

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5 If the jury was only provided with this "catch-all" instruction, and no specific mitigating factors were provided to the jury for consideration, the jury was left to wonder: Other than *what factors?* In effect, trial counsel provided the jury with a virtual "catch-nothing" instruction.

available for consideration. By analogy, if two parties have competing ideas of where to go to dinner, and party one lists ten possible restaurants, and party two simply says, "wherever, anywhere, no limit to the choices," the ultimate decision would have to come from one of party one's choices. Party two gave absolutely no specific guidance for a choice of restaurant. Trial counsel was ineffective because objections should have been made to the State's comments in *voir dire* that a list of mitigation would be given to them, *knowing* that a list would not be given.

The only "guideline" provided to the jury was the "catch-all" mitigation provision that mentioned that the jury could consider, "if established by the evidence, [] any aspect of the Defendant's character, record, background, or other circumstance of the offense that would mitigate against the imposition of the death penalty." Jury Instructions, Penalty Phase 309-310. For starters, the defense should have presented *all* available statutory mitigating evidence that arguably applied to Mr. Frances, and asked that all applicable instructions be provided by the court. Due to his troubling upbringing and amputated attachments and the emotional malnourishment he suffered in his developmental years, he suffered extreme emotional distress at the time of this offense. Just prior to the murders, David had just been basically kicked out of the house by Gleneth because of brother Elvis' criminal behavior, he was left to care for and control out-of-control

Elvis, and he was in a time of great stress. The defense should have pointed out the statutory mitigation to the jury by arguing that David had no significant criminal history, he was only really an accomplice to Elvis in these murders, he was under emotional duress, and he was dominated by Elvis. He could not control Elvis, and he could not control his own impulses to participate in these offenses due to his pathological dependence on Elvis. He was a very young man at the time of the offenses, and while he might have anticipated that they might commit a grand theft auto so that they could get to Tallahassee, David did not envision that he might commit a murder with Elvis.

At the charge conference, the defense informed: "the defense prefers not to have the mitigating circumstances laid out." ("Penalty Phase" Dir. ROA Vol. II, 236). That is because the defense failed to investigate the available mitigation, and they consequently had nothing to present. Nothing was "laid out" for the jury because the defense was ill-prepared to lay anything out at the penalty phase.

Considering the testimony of Gerod Hooper on this issue, it is clear that he *still* fails to appreciate the problem with not providing a specific list of mitigating factors that the defense might be relying upon in support of life. A list of mitigators was especially necessary in this case where the State told them in *voir dire* that a list of aggravators and mitigators would be provided by the court. By

analogy, this situation was tantamount to and just as prejudicial as informing the jury that they would hear the defendant testify at trial, and then the defendant changes his mind and remains silent. That is why reasonable defense counsel does not inform the jury in opening statement that the jury will hear from the defendant. Any reasonable defense attorney in the case at bar would have provided a list of available mitigating factors for the jury to consider in their case for life. If trial counsel was seriously contemplating not providing such a list, an objection *must* be made when the State continually and erroneously informs the jury that respective lists of aggravators and mitigators would be provided in the penalty phase.

Gerod Hooper Characterizes Mitigators as a "Handicap"

At the evidentiary hearing, Gerod Hooper claimed that "it's a handicap to the State that they're limited to aggravating circumstances and they have to list the aggravating circumstances. I don't want to handicap myself by listing the mitigating circumstances. . . .I don't want them to feel in any way that they're limited to, you have to find this aggravator, this mitigator, you have to find that mitigator." PC ROA Vol. XIII, 721. Fla. Stat. 921.142(7)(h) is quite clear that mitigating factors are not limited by the list of specifically-mentioned mitigators. Fla. Stat. 921.142(6) is clear that aggravating factors *are limited* to a specific list: "**6) Aggravating circumstances.--**Aggravating circumstances shall be limited to

the following [factors]." Trial counsel's failure to investigate, develop, and list *all* of the available mitigation in this case handicapped and prejudiced Mr. Frances at the penalty phase. The jury was informed that they would receive guidance on available mitigation, and the defense precluded and prevented guidance from being provided. At the very least, an objection should have been made during *voir dire*.

Gerod Hooper was asked if he knew, going into the penalty phase, that he would not be providing a list of mitigators to the court and jury, and he stated, "I don't–no, I can't tell you exactly the point I had done that. It may have been two trials before that. Certainly since then. But it's my customary practice not to ask for a list of the statutory mitigators, but just to ask for the catchall." PC ROA Vol. XIII, 723. If that was the case, he needed to object during the State's advisories about a forthcoming list of mitigators during *voir dire*. In any event, when asked if he discussed his plans with Mr. Frances outside of court to forgo the list of mitigation, he answered, "probably not." PC ROA Vol. XIII, 739. For the sake of argument, even if such a questionable decision to have the court not review a list of mitigation with the jury might be considered acceptable strategy, steps need to be taken so that the jury is not misinformed that a list will be provided.

The failure to object when the State promised the jury that it would hear proposed mitigators outlined by the court, coupled with defense counsel's failure

to present any framework for determining the existence of mitigators, as well as the weight that should be placed on them, deprived the jury of any guidance in determining what mitigators applied and how the jury could balance them against aggravators presented by the State. As such, Mr. Frances was prejudiced.

Problems with the Lower Court's Order

The lower court was all too willing to accept that this was part of some reasonable penalty phase strategy. The court found that "counsel chose to have the general instructions issued to the jury, and this instruction provided a template [for] the mitigators." PC ROA Vol. VI, 155. The reality is that trial counsel failed to investigate mitigation, and therefore was incapable of listing available mitigators. This was not trial strategy, this was dereliction of duty.

The lower court claims that "It is also clear that Defendant waived the standard jury instructions on mitigators in favor of Hooper's strategy to seek a general or 'catchall' instruction." PC ROA Vol. VI, 155. Hooper did not "catchall," he actually caught nothing due to his failure to investigate available mitigation. Mr. Frances was unaware of the available mitigation that was developed in postconviction, therefore any alleged "waiver" cannot be deemed knowing or intelligent. The jury was continually informed that a list of available mitigation would be provided to them. The defense, apparently knowing that their

"strategy" would be to refrain from providing a list of mitigation, should have objected to the repeated advisories about a forthcoming list of mitigation.

Even if going with a "general catchall" instruction was sound strategy, this instruction clearly conflicted with the repeated advisories. An objection clearly should have been made during *voir dire* when the State kept advising the jury that a list of aggravators and mitigators would be provided to the jury. This claim is not just about the general "catchall" instruction. It is about the prejudice that Mr. Frances suffered when trial counsel failed to object to the repeated advisories that they would be given some specific guidance as to which particular mitigators could be considered at the penalty phase, then they received no such guidance. Prejudice was compounded here being coupled with the trial court's improper comments about how the jurors should unequivocally impose the death penalty.

CLAIM IV

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

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

review with deference only to the factual findings by the lower court.

Failure to Investigate and Present Available Mitigation

Trial counsel was ineffective for failing to investigate and present a plethora of available statutory and non-statutory mitigation in this case. As discussed only briefly above, trial counsel had the opportunity to investigate, develop, and present facts to support all seven specifically-delineated statutory mitigators. The list of statutory mitigators found at Fla. Stat. 921.142(7) is a capital defense attorney's tool box to be utilized by defense attorneys to strengthen and support a case for life, just as Fla. Stat. 921.142(6) (the list of aggravators) is a capital prosecutor's tool box designed to be utilized by prosecutors to strengthen and support a case for death. The State of Florida utilized its tools, the available statutory aggravators, to build their case for death. The defense in this case failed to utilize its tools, the available statutory mitigators, to build a case for life. As far as available non-statutory mitigation that could have been presented in this case, trial counsel failed in this regard as well. As such, this is not a verdict worthy of confidence under *Strickland v. Washington*, 466 U.S. 668, 694 (1984). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Trial counsel's

omissions and errors at the penalty phase in this case were so grave that one's confidence in the outcome of this case is surely undermined.

In closing arguments that spanned only 18 pages of transcript, "Penalty Phase" Dir. ROA Vol. II, 288-306, trial counsel specifically mentioned *not one specific provision from Fla. Stat. 921.142(7),*[6] and *not once mentioned the defense's low burden of proof for mitigation*. The burden of proof for mitigators is only "reasonably convinced" (see jury instructions at "Penalty Phase" Dir. ROA Vol. II, 311), not beyond a reasonable doubt like the aggravators (see jury instructions at "Penalty Phase" Dir. ROA Vol. II, 310). During preliminary jury instructions, the jury was informed, *this time by the court*, that after evidence was presented in the penalty phase, and after closing arguments, "you will be instructed on the factors in aggravation and mitigation that you may consider." "Penalty Phase" Dir. ROA Vol. I, 42. Even the court seemed surprised when it stated, "The defense has not given me a list of mitigating circumstances." When the defense announced that they preferred "not to have the mitigating circumstances listed out.

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6 Although age was mentioned by the defense during closing argument, as well as some arguments about the relative culpability of Elvis and David Frances, the defense failed to inform the jury that the legislature specifically designated certain factors that are found in the Frances case for consideration of a life sentence as opposed to a death sentence. This argument would have countered the State's improper suggestions during *voir dire* that there was some type of legislative-legitimacy to the decision to their seek death in this case.

. . . we just wish the general instructions," the court inquired, "is defense requesting any non-statutory mitigating circumstances." ("Penalty Phase" Dir. ROA Vol. II, 236). The defense responded as follows, "We don't want to have anything listed out." ("Penalty Phase" Dir. ROA Vol. II, 236). On that note, the State said, "I would suggest that, and [the court is] probably thinking the same thing, it might be a good idea to get the defendant's specific waiver on some of these because there are some statutories that he is–based on the evidence, might arguably apply." ("Penalty Phase" Dir. ROA Vol. II, 236). The court at that point stated that Mr. Frances was "entitled" to have the jury instructed on the specifically-listed mitigators in Fla. Stat. 921.142." ("Penalty Phase" Dir. ROA Vol. II, 237). Upon inquiry, Mr. Frances stated, "We discussed it was a good idea, as you say." ("Penalty Phase" Dir. ROA Vol. II, 238). As mentioned previously in this pleading above, Mr. Hooper admitted, when asked if he discussed his plans with Mr. Frances *outside of court* to forgo the list of mitigation, he answered, "probably not." PC ROA Vol. XIII, 739. The record of the penalty phase reflects that Mr. Hooper requested absolutely no additional time to speak with Mr. Frances about this controversial decision before the "waiver" was made. Though the State may wish to characterize this as a "waiver" of effective assistance of counsel, it certainly is not a waiver of his Sixth Amendment right to effective counsel.

In *Rompilla v. Beard*, 125 S. Ct. 2456, 2460 (2005), the United States Supreme Court held that "even when a capital defendant's family members and the defendant himself have suggested that no mitigation evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." The Court found that counsel rendered deficient performance for failure to review Rompilla's prior conviction, failure to obtain school records, failure to obtain records of Rompilla's prior incarcerations, and failure to gather evidence of a history of substance abuse. *Id.* at 2463.

In *Rompilla*, trial counsel spoke with several members of Rompilla's family and three mental health experts, none of whom had any particularly favorable or useful information. *Id.* Rompilla himself was not very cooperative, even giving counsel fake leads, thus frustrating the gathering of information. *Id.* Moreover, even the consultation with the three mental health witnesses who had examined Rompilla prior to trial turned up nothing fruitful. *Id.* at 2563.

The Court recognized that "the duty to investigate does not force defense lawyers to scour the globe on the off-chance that something will turn up; reasonable diligent counsel may draw the line to think further investigation would be a waste." *Rompilla*, *Id*. (citing *Wiggins*, 539 U.S. 510). In rejecting the

Commonwealth's argument that the information trial counsel gathered from Rompilla and other sources gave them reason to believe that further investigation would be pointless, the Court found that counsel's failure to examine the court file on Rompilla's prior conviction was deficient performance. *Id.*

Mr. Frances never waived the investigation into the plethora of mitigation that was developed and presented in postconviction. Any waiver of a reading of the available specific mitigating circumstances would be invalid because it was obviously not knowing or intelligent. The record reflects that Mr. Hooper had only a brief moment in court with his client before representing, "He concurs, Your Honor, that it's the better approach." "Penalty Phase" Dir. ROA Vol. II, 237. Just prior to this, Mr. Ashton asked for a "waiver," and the court stated, "I will inquire;" and then the court asked, "Have you *now* discussed that with your client." "Penalty Phase" Dir. ROA Vol. II, 236. (emphasis added). Mr. Hooper never requested a recess before making this representation, and the record does not reflect how long Mr. Hooper spoke to Mr. Frances at this point in the proceedings.

Mr. Frances is an unsophisticated young man from the Caribbean who left the military to care for his troubled brother Elvis. David Frances did not go to law school, he did not pass the Florida Bar, and he has never tried a capital case before. At his penalty phase, he was unfamiliar with the general jury instructions, he did not know what he was allegedly waiving, and he trusted the judgment of his

appointed attorneys. Trial counsel violated his trust. Any doubt that Mr. Frances did *not* waive mitigation in this case is alleviated by the following factual finding:

> The State contends that the statutory mitigating circumstances were waived by Frances and cites to a portion of the charge conference as evidence of this waiver. However, when the excerpt is read in context, it is clear that Frances did not waive the statutory mitigators but only the standard jury instructions on these mitigators. Instead of giving the jury individual instructions on each of the statutory mitigators and a general instruction on any other aspect of the defendant's background or the circumstances of the crime, Frances requested that the jury only receive the general instruction. . . .The transcript of the charge conference clearly indicates that Frances wanted a general instruction that the jury could consider any aspect of his character, background, or record that it found to be mitigating, in lieu of specific instructions listing the enumerated statutory mitigators and a general instruction on nonstatutory mitigators. Thus, we conclude that Frances did not waive the statutory mitigators.

Frances, Id. at 818, 819. Though trial counsel virtually waived all of the available statutory and non-statutory mitigators because of their complete lack of due diligence, Mr. Frances certainly did not waive them. The jury who recommended death was unaware if there was a waiver of statutory and non-statutory mitigation; they only knew that the mitigation presented at the penalty phase was lacking.

Available Non-Statutory Mitigation, 26 Adverse Developmental Factors

In addition to the seven specific statutory mitigators that were available in this case yet not presented due to the ineffective assistance of defense counsel, available were 26 additional non-statutory mitigators. As Dr. Cunningham discussed at length, the following non-statutory mitigators were available for

presentation at the penalty phase:

1. Generational family dysfunction
2. Functional abandonment by mother as a baby
3. Amputation of primary attachment
4. Deficient maternal bonding to David
5. Hereditary predisposition to personality pathology from mother
6. Abandonment by father
7. Instability of care and relationships in childhood
8. Experience of paternal rejection
9. Hereditary predisposition to personality pathology from father
10. Crowded, impoverished and emotionally-overwhelmed household of maternal grandparents
11. Deficient opportunity for primary attachment
12. Deficient attachment or reciprocal maternal bonding from grandmother
13. Inadequate stability in parenting and household structure
14. Death of grandfather
15. Amputation from all relationships and everything familiar at age 6
16. Severed relationships with maternal family
17. Severed relationship with maternal grandmother
18. Pervasive insensitivity of family/parental figures to developmental needs
19. Emotional neglect by mother and stepfather
20. Physical Abuse and observed physical abuse
21. Social isolation of household
22. Parental marital problems and voluntary infrequent contact
23. Corruptive community
24. Neighborhood and school violence
25. Marijuana dependence
26. Youthfulness

In all, 33 available statutory and non-statutory mitigators could have been presented to oppose the 3 limited statutory aggravators that were presented. Instead, the jury was instructed with only a vague "catch-all" provision. Though the State has attempted to claim in this case that Mr. Frances previously "waived" the available mitigation, he most certainly *did not* waive mitigation. Through a

lack of investigation and through lack of due diligence, trial counsel ineffectively passed on the opportunity to present a plethora of available mitigation.

Dr. Cunningham testified at length during the evidentiary hearing. In over 200 capital cases that Dr. Cunningham has worked, Dr. Cunningham has never had a case where a defendant saw "someone having their throat slit at school right in front of them." PC ROA Vol. IX, 189. His testimony covers nearly 400 pages of transcript (*see* PC ROA Vol. VIII-X, 35-419). Dr. Cunningham's testimony was the result of a comprehensive investigation of Mr. Frances' upbringing and family life, and he answered questions as to how and why Mr. Frances ended up involved in this very tragic situation. Dr. Cunningham identified for the postconviction court 26 non-statutory mitigating circumstances. In contrast, not much mitigation was offered at trial at all. Trial counsel conceded in his closing arguments to the jury that these murders made no sense: "The reason you have to look at David's character is to try to make some sense of this, if we can. And we may not be able to." "Penalty Phase" Dir. ROA Vol. II, 299. He conceded further, "Dr. Mings may have not given you a whole lot of answers. He was honest. He may have given you more questions." "Penalty Phase" Dir. ROA Vol. II, 300. In his penalty phase closing argument, Mr. Hooper's case was so devoid of mitigation that he stated, "[W]e have to move on to what Mr. Ruiz said what this case has really always been about. We have to acknowledge the victims in the case."

"Penalty Phase" Dir. ROA Vol. II, 289. What this penalty phase *should* have been about is the presentation of 33 available statutory and non-statutory factors to the jury. Trial counsel failed in this regard, and consequently provided constitutionally-deficient legal assistance to Mr. Frances at the penalty phase.

The reason why a list of statutory (and non-statutory) mitigators was not requested to be presented to the jury at the penalty phase was the unpreparedness of counsel. In addition to the standard jury instructions on statutory mitigation, the trial court was willing to read instructions on any other non-statutory mitigating factors the defense wished to present. Trial counsel passed on this opportunity. Although age is a statutory mitigator, and age was mentioned by trial counsel in closing argument, the jury never heard from the court that the legislature specifically designated age of the defendant as a special mitigator. Because age is in a special statutory category, the defense should request that the court inform the jury that this mitigator is in a special category. Instead, the jury never considered this mitigator's extra significance, if at all, due to the lack of definitive guidance and instruction. And likewise, the other six categories of statutory mitigators did not attain their special significance (if considered by the jury at all) due to the deficiency of trial counsel to the detriment of the Defendant.

This was clearly a dysfunctional trial team. Previously-assigned assistant public defender Junior Barrett testified that the major crimes unit was "disbanded

for a while;" he informed: "even within major crimes, there was some separation done." PC ROA Vol. XIV, 900. Mr. Barrett remembered, "So there was a lot of things going on in the office internal at the time." PC ROA Vol. XIV, 900-901. The internal state of affairs and upheaval at the public defender's office might explain the attorneys' failure to present available powerful mitigation in this case. One must wonder why David Frances had nearly eight attorneys working on his case up to trial. Such attorney turnover did not serve this legal representation well.

A misdemeanor attorney who had never done anything in felony court delivered the opening statement at the guilt phase of this capital case. PC ROA Vol. XIV, 890. Mr. Hooper did not recall that the person who delivered the opening statement was a misdemeanor attorney, remembering only that "she wasn't death certified," "she wasn't in major crimes," and, he remembered that she was brought in to "do some limited work on the case." PC ROA Vol. XIII, 679-680. When asked why a misdemeanor attorney did the opening statement in this capital case, he said he "[did not] recall whether she did or not." PC ROA Vol. XIII, 680. Leading up to trial, there was obviously little thought and care put into this case by trial counsel. If Mr. Hooper does not remember why a misdemeanor attorney delivered the opening statement in this case, he obviously would not remember any alleged strategic reason why he passed on available mitigation.

Without a list of mitigation for the jury to consider, the jury quite frankly

does not know what to consider. Juries need more guidance than simply the "catchall" instruction. The "catchall" instruction is part and parcel of the general instructions, and it makes clear that mitigation is statutorily unlimited. It makes no sense to read only the "catchall" instruction to the jury. Without further guidance, this "catchall" instruction is rendered meaningless. The list of available mitigating circumstances should be read in conjunction with the "catchall" instruction. Juries need to be told: 1) what the mitigators are, 2) why each of the listed mitigators applies, and 3) the weight to be afforded each mitigator. Trial counsel failed in all of these duties across the board. Contrary to trial counsel's illogical conjecture, a list of available statutory and non-statutory mitigators read by the trial court during jury instructions would not have "handicapped" or "limited" the defense. ***Acknowledgment by the court of a list of defense-sponsored mitigation would have reminded, legitimized, enumerated, and empowered all of the available mitigation.*** The jury was instructed that there were 2 available aggravators as to one victim, and 3 aggravators as to the other victim. "Penalty Phase" Dir. ROA Vol. II, 308. By contrast, the jury had no idea what mitigators they could consider.

The aggravators were: Previous capital conviction (just *this* case with *two victims*), and, murder during the commission of a robbery. Over defense objections that HAC did not apply to these murders, the court stated, "I'll give HAC as to Joanna Charles." "Penalty Phase" Dir. ROA Vol. II, 251. HAC was

instructed by the court as to victim Charles, and the recommendation for death was accordingly weightier. That indicates that specific mention and instruction on available mitigation would have swayed the jury towards a life recommendation.

After the jury was presented via the court's instructions with a *maximum* of 3 aggravators that could be considered in their decision for life or death, the court instructed that they had a "duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. Among the circumstances that you may consider, if established by the evidence, are any aspect of the defendant's character, record, background, or any other circumstance of the offense that would mitigate against the imposition of the death penalty."[7] "Penalty Phase" Dir. ROA Vol. II, 309-310. In effect, the jury was instructed that there were no mitigating factors to consider. Not one specific mitigator was offered here for the jury's consideration following the mention of three specific aggravators.

At the close of the evidence and argument by counsel, the court instructed the jury they had to decide "whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances." "Penalty Phase" Dir. ROA Vol. II, 307. Yet, the jury was not informed what the mitigating circumstances were that they might consider. The court was obviously concerned with this because it knew that

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7 This is where the seven specific factors available to the defense under Fla. Stat. 921.142(7) should have been read to the jury, followed by 26 available non-statutory mitigating factors.

an order imposing the death penalty might have to be drafted soon, and it would have to consider mitigation in this case and assign the appropriate weight to each mitigating factor. The court needed guidance from the defense as well. The court informed that it certainly wanted a list of mitigation from the defense, advising the defense: "You may, in your argument make reference to certain circumstances that you are going to ask the jury to rely on that fall within generally what you asked for. I'll ask you to come with a list of those for my reference in the event I'm called on to draft a sentencing order. Because I don't want to overlook anything." "Penalty Phase" Dir. ROA Vol. II, 239. Due to the ineffective assistance of counsel in this case, *lots* of available mitigation was overlooked at the penalty phase. Without the list, the court would have had no guidance on mitigation. Without the list, the jury had no guidance on mitigation.

Penalty phase relief should be afforded to Mr. Frances just as penalty phase relief was afforded in *Hildwin v. State*, 654 So. 2d 107, 109-110 (1995).

Trial counsel ineffectively failed to qualify Julie Norman as an expert at trial. In postconviction, she confirmed that she would expect the following information to be presented to the jury as it related to Frances penalty phase issues:

(1) "[I]n St. Thomas, [Mr. Frances'] neighborhood, there were turf wars between rival drug dealers over territory or corner." She stated, "Yes, and at the high school as well." EH 559;
(2) "There were violent rivalries between neighborhoods." EH 559;
(3) "[W]hen David was in his mid teens, Malik Myers, age 15, was killed off campus secondary to rivalry between neighborhoods." EH 559-560;

(4) "David recall[ed] that gunfire was heard nearly daily in his neighborhood." EH 600;
(5) "[W]hen David was in grade school, he observed a man walk by and shoot into the air." EH 600;
(6) "[A]t age 12, when David was in grade school, he observed one male chasing another and shooting at this intended victim." EH 600;
(7) "[W]hile he was in high school, an older acquaintance actually fatally shot himself by playing with a gun." EH 600.
(8) "[W]hen David was in ninth grade, a youth named Lamar was strongarming other teens at school for their money. David described one day he observed that Sheebo George, a baseball teammate of David, walk up behind Lamar and slit Lamar's throat from behind. David described blood was springing like crazy. He described Lamar held his throat, bent over and collapsed. David reported that he was only about ten feet away from this when this occurred. That Sheebo ran across the street to the daycare center where Sheebo's mother worked. Lamar was still alive when the ambulance arrived but subsequently died. David believed case was ruled self-defense." EH 600-601.

Individualized sentencing requires that the above information be presented to the jury. Ms. Norman stated that as a mitigation specialist, she would "absolutely" want such evidence presented to a jury. PC ROA Vol. XII, 601. The evidence mentioned above could have, but did not reach the jury. This was clearly the result of lack of witness preparation. The sentencing memo actually mentions that the defense was "precluded by Court form [sic] providing details as to conditions [during David Frances' formative years]." Dir. ROA Vol. VII, 1223. This preclusion prevented the jury from understanding David Frances as an individual.

Dr. Cunningham Described Four Applicable Statutory Mental Health Mitigators

In addition to the 26 "other" mitigating factors, there was evidence to support the application of the following statutory mitigators: 1) this crime was

committed while the defendant was under the influence of extreme mental or emotional disturbance [PC ROA Vol. X, 280]; 2) that the defendant acted under extreme duress or under the substantial domination of another [PC ROA Vol. X, 281]; 3) that the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirement of law was substantially impaired. [PC ROA Vol. X, 284]; and, 4) the age mitigator [PC ROA Vol. X, 284-285]. Trial counsel's failure to present the plethora of available statutory and non-statutory mitigation for Mr. Frances was unreasonable and unconscionable.

Due to the complete lack of investigation and preparation for the penalty phase, and the poor presentation at the penalty phase, counsel provided ineffective assistance of counsel which warrants a new penalty phase at the very least.

CLAIM V

CUMULATIVE ERROR

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

CONCLUSION AND RELIEF SOUGHT

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by U.S. Mail to all counsel of record on this 23rd day of July, 2012.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of the Appellant, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

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