Filing # 19564858 Electronically Filed 10/20/2014 11:56:36 AM

RECEIVED, 10/20/2014 11:58:44, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

WILLIE JAMES HODGES
Appellant,

v.

CASE NO. SC14-878
Lower ct. 2003-CF-005683

STATE OF FLORIDA
Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
IN AND FOR ESCAMBIA COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

ROBERT A. NORGARD
Counsel for Appellant

For the Firm
Norgard and Norgard
P.O. Box 811
Bartow, FL 33831
(863)533-8556
Fax (863)533-1334
Norgardlaw@verizon.net

Fla. Bar No. 322059

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

This appeal comes to this court after the denial of the Appellant's 3.851 Motion for Postconviction Relief in a capital case. The Appellant, Willie Hodges, will be referred to as Mr. Hodges. The prosecuting authority, the State of Florida, will be referred to as the State. The record on appeal consists of seven consecutively numbered volumes. The record on appeal will be referenced by the volume number, followed by the page number.

STATEMENT OF THE CASE AND FACTS

On December 17, 2003, an Indictment was returned by the Grand Jury for the First Judicial Circuit, in and for Escambia County, for the first degree murder of Mrs. Patricia Belanger on December 19, 20012.[I,Docket;63-4]. Mr. Hodges was found guilty and the jury recommended death by a vote of 10-2.[I,61] The trial court imposed a sentence of death on February 12, 2009.[I,61-96]

Mr. Hodge's appealed the conviction and sentence of death to this Court. The conviction and sentence were affirmed in Hodges v. State, 55 So.3d 515 (Fla. 2010).

Mr. Hodges filed a *Motion for Postconviction Relief* pursuant to Fla. R. Crim. P. 3.851 on September 14, 2012.[I,1-96] Mr. Hodges' raised twelve claims for relief:

Claim I: Mr. Hodges alleged trial counsel failed to properly cross-examine Dr. Martin Tracy, a state expert, about the statistical calculations performed which used a random match probability or inclusion principle and failed to object to the state expert's testimony which used the exclusion principle. Mr. Hodges further alleged the exclusion principle is not generally accepted in the scientific community, yet trial counsel permitted Dr. Tracy to offer testimony about the statistical likelihood of a "match" between Mr. Hodges' DNA and DNA found on certain items of evidence using the exclusion principle. Trial counsel failed to cross-examine Dr. Tracy about the scientific community's use of the inclusion principle and the SWGDAM requirement that a statistical calculation be made using the inclusion principle.[I,5-12] Trial counsel failed to consult, retain, and call an expert witness to impeach Dr. Tracy.

Claim II: Trial counsel was ineffective when he failed to investigate, consult, retain, and call an expert witness who would have assisted in the case and testified about the requirements for testimony on statistical calculations by lab representatives and that the labs used in this case did not meet those standards.[I.13-19]

Claim III: Trial counsel was ineffective when he failed to object to the introduction of DNA evidence by state witness

Cassie Johnson, a lab technician with Orchid Cellmark.[I,19-25] Ms. Johnson testified about her findings regarding DNA taken from the bite mark from the *Williams* rule evidence. Mr. Hodge's alleged that Ms. Johnson's testimony was inadmissible because her results were not peer reviewed, she failed to generate a written report, or audit report as required by the policies of Cellmark, as well as the FBI Quality Assurance standards, and she failed to provide any significance of the "match" results as required by SWGDAM and FBI standards.[I,21]

Claim IV: Trial counsel was ineffective in failing to investigate and call Mr. Hodges as a witness in this case.[I,26-29] Mr. Hodges alleged that a jacket, shoes, socks, belt, and pictures were considered key evidence in the case. Some items, such as the pictures were found just outside the victim's house and other items were found in the immediate area. The items were alleged to be the personal belongings of Mr. Hodges.[I,26-27] During opening statements trial counsel told the jury Mr. Hodges would testify these personal items were stolen from him shortly before the murder. Trial counsel averred that Mr. Hodges would testify he was staying at a "crack" house at the time the items were stolen.[I,27-8]

Testimony at trial further established that blood found on one of the socks found near the crime scene came from Mr. Hodges. Mr. Hodges would have testified he cut his hand while

working on a car at his cousin's house and used an item that could have been the sock to clean off the blood. His cousin lived next door to the victim. The cloth item with his blood from the cut was left at the cousin's house.

Mr. Hodges would have testified that he did not make incriminating statements to Debra Silver and he did not call her at Ida Mae Lewis Hibler's home because Ms. Hibler did not have a phone in May 2003.

During the trial no defense witnesses were called to substantiate counsel's claims and Mr. Hodges did not testify.

Mr. Hodges did not testify based upon the misadvice of counsel.[I,28;49-53]

Claim V: Trial counsel was ineffective in failing to adequately cross-examine state witnesses Jimmy Lee Williams and Debra Taylor on their identification of a jacket and shoes. [I,29] Mr. Williams testified a jacket and shoes found in the immediate area were the shoes and jacket Mr. Hodges wore.[I,29] Mrs. Taylor testified the jacket matched the one worn by the man she saw flee from her mother's house on the morning of the murder.[I,29] Defense counsel failed to establish through cross-examination neither witness could conclusively state these were the exact items, but rather could only identify class characteristics.[I,30]

Claim VI: Trial counsel was ineffective in failing to investigate and obtain phone records which would have impeached the testimony of Debra Silver.[I,31-34] Ms. Silver testified she was staying at the home of her mother, Ida Mae Lewis Hibler, in May 2003.[I,31] Ms. Silver claimed Mr. Hodges called her on Hibler's phone and during the conversation he made admissions that he had killed a woman in Cincinnati, Ohio and stole jewelry, money, a watch, and credit cards from her.[I,32] Ms. Silver further claimed Mr. Hodges told her he went into a woman's house in Florida, an altercation ensued in the downstairs part of the house, and he cut the woman with a kitchen knife.[I,32] Mr. Hodges claimed phone records would establish that Ida Mae Lewis Hibler did not have phone service in 2003 and there were no records of any phone calls to her home, thus impeaching Ms. Silver.[I,32-33]

Claim VII: Trial counsel was ineffective when he told the jury in opening statements that he would call a witness, Mr. Willie McCaskill, who had seen the killer, on the morning of the crime, in his backyard.[I,34] Trial counsel called Mr. McCaskill as a witness during the defense case. Mr. McCaskill testified he saw a man come through his yard and confronted the man. The man claimed to have been "jumped". Mr. McCaskill told the man to leave and went inside his house. The man then knocked on his back door and asked for a ride out of the area.

Mr. McCaskill refused, but watched the man walk off in the opposite direction of police cars gathered at the end of the street.[I35] Mr. McCaskill called the police the next day and reported his contact with the man after he learned of the murder.[I,35-6] Mr. McCaskill testified the man was not wearing shoes, but had on green socks, was short, medium build, and appeared scared.[I,36] Mr. McCaskill was called as a witness by Allred and testified he had been at the courthouse the day before and was asked by trial counsel to look at Mr. Hodges. Mr. McCaskill stated he looked at Mr. Hodges and told trial Mr. Hodges looked familiar. Mr. McCaskill then testified Mr. Hodges "was the same guy who came through my yard."[I,36] A stipulation was entered into evidence stating Mr. McCaskill came to the courtroom the day before, viewed Mr. Hodges, and stated Mr. Hodges looked familiar, he wasn't sure, but Mr. Hodges resembled the man.[I,38] Mr. McCaskill further testified trial counsel had come to his house with six pictures that he and his wife looked at. Mr. McCaskill claimed he put his initials on #19, but he did not put his initials on #18, although #18 had similar hair to the person he saw and the photograph did contain initials #17 had a similar face, but the picture said "face."[I,38] #19 had been eliminated by DNA testing.[I,39]

Defense counsel then called Delores McCaskill, Mr. McCaskill's wife, as a witness. Mrs. McCaskill testified she

recalled being shown pictures by trial counsel and she wrote initials on the back of several photos for Mr. McCaskill.[I,39] No one else was present during the presentation of the photos besides trial counsel and the McCaskills.[I,40] She wrote the word "face" on one.[I,40]

Mr. Hodges claimed trial counsel abdicated his responsibility as counsel when he called witnesses whose testimony enhanced the likelihood of conviction, called Mr. McCaskill who had to be impeached, and was then unable to effectively impeach Mr. McCaskill with the testimony of his wife, and had not ensured there was a third party present at the time the photos were shown who could have been used as an impeachment witness for both Mr. and Mrs. McCaskill.[I,41]

Claim VIII: Trial counsel was ineffective in failing to consult, retain, and call as a witness a forensic dentist to rebut the testimony of state expert witness Dr. Phil J. Levine, a retired dentist.[I,42-46] Dr. Levine testified that it was his expert opinion the bite mark found on the leg of Laverne Jansen, the victim in the *Williams* rule evidence, was made by the teeth of Mr. Hodges.[I,43] Trial counsel did not object to any of Dr. Levine's testimony, did not challenge the admissibility of such testimony with a *Frye* hearing, and did not call an expert to rebut Dr. Levine's analysis or conclusions.[I,43-44] Mr. Hodges claimed the opinion testimony

of Dr. Levine and his methodology was not generally accepted within the scientific community.[I,44-47]

Claim IX: Trial counsel was ineffective when he solicited improper opinion testimony from a crime scene technician who opined blood found on the sock alleged to belong to Mr. Hodges was deposited on the sock during the murder and the sock came from inside the victim's home when there was no evidence to support the opinion and the crime scene technician did not have the qualifications to testify as an expert on those issues.[I,46-49]

Claim X: Trial counsel was ineffective when he told Mr. Hodges if he testified he could be impeached with the facts of his actual prior charges and questioned regarding an uncharged Alabama murder that had been ruled inadmissible as *Williams* rule evidence.[I,52-53] Mr. Hodges averred he would have testified but for the misadvice of counsel on how he could be impeached with prior convictions and bad acts.[I,53]

Claim XI: Trial counsel was ineffective by not objecting to the trial court's failure to state its reasons on the record when denying Mr. Hodge's request to a waive the penalty phase jury.[I,54-55]

Claim XII: Florida's death penalty statute is unconstitutional premised on Evans v. McNeil, No. 08-

14402.[I,55-56] An evidentiary hearing was not requested on this claim.

The *State's Response to Hodge's Motion for Post-Conviction Relief* was filed on December 31, 2012.[I,101-135] The State did not oppose an evidentiary hearing on Claims I through IV; VII and VIII; X.[I,120;125] The State argued that claims V; VI; IX; and XI should be summarily denied.[I,120-121;123;130]

The trial court entered an *Order Granting Evidentiary Hearing In Accordance with the Court's Findings At Case Management Conference* on March 7, 2013.[I,139-141] The trial court denied Claim XII in light of appellate proceedings in the federal court that vitiated the claim and the waiver of the claim by trial counsel in light of the ruling.[I,139] An evidentiary hearing was granted on Claims I-XI.[I,139-40]

~~A~~ evidentiary hearings were held on June 25-26, 2013 and on March 18, 2014. A summary of the testimony from the hearings is as follows:

The trial court took judicial notice of the court file, including the trial transcripts, appellate proceedings, and trial exhibits.[II,172]

Mr. Jerry Allred testified he is a retired attorney who practiced with the State Attorney's Office in the First Circuit for 17 years, then maintained a private practice for 17 years, and returned to the Office of the Public Defender for

approximately 20 months before retiring.[II,174] Mr. Allred tried one capital case as an Assistant State Attorney and handled "probably a half dozen capital cases while in private practice."[II,174] Mr. Allred was appointed to represent Mr. Hodges.[II,175] Mr. Allred testified he remembered very little about this case.[II,177] Mr. Allred agreed with the State a lawyer will develop a strategy in a case.[II,221] Mr. Allred did not recall what his thought process or strategy was in this case.[II,221]

Mr. Allred agreed a defense attorney's job is to present positive evidence and to challenge the State's evidence.[II,237] The defense attorney also has a duty to present negative evidence in the light most favorable to the client.[II,237] Mr. Allred agreed a defense attorney should mitigate the negative weight and negative effect of evidence on a client's case where ever possible.[II,238]

A defense attorney should also plan for changes which may occur during a trial.[II,240] For example, a defense attorney should be prepared to impeach a witness if that witness "flip flops" his testimony.[II,240-1]

Mr. Martin Lester served as penalty phase counsel in this case.[II,268] Mr. Lester first practiced as a public defender in Virginia and was admitted to the Florida Bar in 2003.[II,268] Mr. Lester is in private practice with roughly 30%-40% of his

practice devoted to criminal law. Mr. Lester worked on two potential death penalty cases while in Virginia, but both were resolved after he left.[II,268] Mr. Lester has handled three death penalty cases in Florida.[II,270] Mr. Lester became involved in this case in late 2006.[II,270] Mr. Lester was primarily responsible for penalty phase and a small part of the retardation hearing.[II,270]

Mr. Willie Hodges testified he was 53 years old at the time of the evidentiary hearing.[II,300] At the time of the murder he had just come to Pensacola after staying in Alabama for several weeks with his cousin, Connie Hodges.[II,301] Mr. Hodges had left Cincinnati to go to Alabama.[II,301]

Mr. Hodges stated he had three prior felony convictions.[II,301]

Claims I-III

Mr. Allred was aware DNA evidence existed in this case.[II,222] He couldn't remember what his plan was for dealing with the DNA.[II,222] He viewed other evidence, such as an unknown fingerprint and a towel by the body, as more advantageous for his case than the DNA evidence.[II,222]

Mr. Allred acknowledged his statement to the trial court during trial that his knowledge of DNA was "crude, at best" was an accurate statement.[II,175;223] For example, Mr. Allred had heard the phrases "random match probability" and "inclusion

principle" during the trial, but had no idea what those things were.[II,176] Mr. Allred was familiar with the term "exclusion principle" and thought it meant the suspect is either included or excluded as a possible contributor of DNA, but he was not familiar with the statistics behind the principle.[II,177] Mr. Allred thought the exclusion principle might be based on some DNA sampling done in a small town in Texas used by the FBI for sampling probabilities, but he wasn't sure.[II,177] Mr. Allred did not really spend any time learning about the "minutia of fine details" of statistical analysis- the numbers passed the test of time, were admissible, and told him what was "worth going after."[II,223]

Mr. Allred knew there were DNA reports in this case.[II,177] He remembered "very, very little" about the case, but it was probably safe to say he was provided with all the reports from State experts prior to trial.[II,177] Mr. Allred looked at the reports and noted the reports from Candy Zuleger and Jennifer Hatler contained some statistical calculations.[II,218] Mr. Allred was shown three reports from Cassie Johnson of Orchid Cellmark.[II,219] Two contained statistical data, one did not.[II,219]

Mr. Allred acknowledged the State called Dr. Martin Tracy as a witness in the case, but he had no independent recall of his testimony.[II,176] Dr. Tracy testified using the exclusion

principle.[II,178] Mr. Allred could not recall if he cross-examined Dr. Tracy on this subject.[II,178] Mr. Allred did not know if there was and is a preference among DNA laboratories for using the inclusion principle versus the exclusion principle.[II,178]

Mr. Allred was not familiar with SWGDAM.[II,178] He did not familiarize himself with SWGDAM standards or any other standards which apply to DNA testing, expert testimony, and evidence regarding probabilities prior to trial in this case.[II,179;182] Mr. Allred did not review any of the FBI lab standards prior to trial.[II,182] Mr. Allred did not associate with an expert to assist him with cross-examination on DNA standards and analysis prior to trial.[II,182]

Mr. Allred was aware a lab performing testing was going to reach a statistical result. Mr. Allred stated he was aware of the principle codified in SWGDAM Section 4.1 which requires a lab performing DNA testing to provide a statistical analysis in support of any inclusion determined to be relevant in the context of the case, regardless of the number of alleles detected and quantitative value of the statistical analysis.[II,180]

State witnesses Cassie Johnson of Orchid Cellmark, Jennifer Hatler of FDLE, and Dr. Melton of Mytotyping testified in this case without providing inclusion data.[II,181] Mr. Allred

wondered how DNA testimony could be relevant without the testimony of inclusion data.[II,182]

Mr. Allred stated he currently did not know what non-exclusionary data was, but he might have known at a different point in time.[II,182] He did not recall an insufficient amount of non-exclusionary data was obtained in testing in this case.[II,182]

Cassie Johnson testified about the testing results from Orchid Cellmark but did not subject her results to peer review and did not report those results, in violation of Cellmark policies.[II,183] Ms. Johnson further failed to provide the significance of the match with any statistical interpretations for her work in her testimony.[II,183] Mr. Allred was unaware of the deficiencies in Johnson's testimony and reporting.[II,184]

Mr. Allred did not associate, consult, or work with a DNA expert while preparing for trial in this case.[II,179;184] Mr. Allred did not call a defense expert to testify in this case.[II,179] Mr. Allred was familiar with Mr. Kevin Noppinger, an expert in the DNA field.[II,179] Mr. Allred has used DNA experts in other cases, he just couldn't recall which cases.[II,222] Allred did not sign a JAC contract in this case and did not want to be personally responsible for any costs associated with experts.

Mr. Allred was unable to maximize the deficiencies in the DNA evidence in the light most favorable to Mr. Hodges because he did not have assistance from a DNA expert.[II,184] Mr. Allred agreed the specific instances of lab irregularities and problems with the testimony alleged in Claims I-III could have been attacked through the use of a defense expert.[II,238]

Mr. Lester's only involvement in the DNA issues in this case was to draft a motion requesting the appointment of an expert.[II,272] Mr. Lester filed the motion, along with numerous other motions, in February 2007.[II,272] The motion did not request a specific person.[II,273] Mr. Lester did not recall talking with Mr. Allred about the need for an expert, he thought it would be a good idea, so he filed the motion.[II,274] Mr. Lester did not see an order on the motion in the file.[II,272] He had no other involvement with DNA.[II,272]

Mr. Lester was aware Mr. Allred did not sign a JAC contract.[II,275] Mr. Lester did sign a contract and was able to procure experts and other due process needs with the Court's approval.[II,275]

Mr. Kevin Noppinger is an expert in DNA testing and statistics.[III,344] Mr. Noppinger has served as an auditor for DNA labs across the country and is familiar with the accreditation and regulatory requirements for DNA labs.[III,349]

At the time of trial in this case independent DNA consultants were available to be hired to assist defense attorneys.[III,353-54;367] A DNA consultant can assist defense counsel in preparing for trial by explaining complex matters contained in DNA reports, assisting with education on the generally accepted principles in the scientific community for use in cross-examination, and to testify in rebuttal to state DNA experts.[III,354]

Mr. Noppinger was retained by Mr. Hodges in this case during postconviction proceedings.[III,344] Mr. Noppinger reviewed the reports from FDLE, Orchid Cellmark, Mitotyping Laboratory, and AFA reports.[III,345] He reviewed some CDs, some SOPs, quality manuals, proficiency tests, and other materials provided from each of the labs which conducted DNA testing in this case, the data generated during testing, and the results of the testing in this case.[III,345] Mr. Noppinger reviewed the trial testimony of each person who was called by the State to address DNA in this case.[III,346]

Mr. Noppinger explained the inclusion principle is the probability of selecting a unrelated individual from the population that would be included, it is typically expressed as 1 person in 100.[III,347] In the United States and in all Florida labs the statistical probability used is the inclusion principle.[III,347]

Mr. Noppinger is familiar with Dr. Martin Tracy.[III,347] Dr. Tracy does not perform any lab work and does not conduct DNA analysis.[III,348] Dr. Tracy merely prepares a statistical report.[III,348] Dr. Tracy does not use the generally accepted inclusion principle, he chooses to use the exclusion principle when he testifies.[III,348]

Mr. Noppinger noted Dr. Tracy used the inclusion principle in his written report in this case, the typical manner used by crime labs.[III,348] However, Dr. Tracy was not questioned at all during the trial about the results using the inclusion principle as contained in his report.[III,349] Dr. Tracy was not questioned on the use of the inclusion principle as being the generally accepted principle in the United States.[III,349] Dr. Tracy was not questioned on his failure to use the inclusion principle in his testimony.[III,350;351]

Mr. Noppinger explained the exclusion principle is the probability of excluding a person.[III,348] The exclusion principle is expressed by a percentile, such as 99% of individuals would be excluded.[III,348]

No testimony was presented during the trial to establish the exclusion principle is not the generally accepted principle, but rather the inclusion principle is the generally accepted principle.[III,350] The exclusion principle is not the generally accepted method because, in Mr. Noppinger's opinion,

it makes the person of the population identified appear to be rarer than it actually is.[III,351] Mr. Noppinger explained that 1 person out of a 100 seems fairly common, whereas 99% match seems much rarer. For this reason, the scientific community uses the inclusion rather than the exclusion principle.[III,352]

Mr. Noppinger explained SWGDAM is a committee formed by the FBI. It is composed of FBI members and other members of the forensic community.[III,350] SWGDAM meets twice annually to promulgate guidelines for DNA labs throughout the United States.[III,350] Mr. Noppinger has previously served on the committee.[III,350] The guidelines established by SWGDAM are generally accepted by the bodies that provide accreditation for crime labs.[III,351] DNA and crime labs must be accredited.[III,351]

SWGDAM guidelines require that if a lab has a match inclusion, weight must be presented to that evidence and a statistical interpretation must be provided.[III,351]

Mr. Noppinger reviewed the work performed by Dr. Melton of Mitotyping.[III,354] MTDNA analysis was performed by Mitotyping.[III,354] MTDNA is DNA that is inherited solely through the mother, you get exactly what your biological mother has.[III,355] MTDNA is typically used on hair because it is found in the root of hairs.[III,355]

Dr. Melton's report was deficient under the SWGDAM guidelines because it failed to contain statistical calculations on each of the samples.[III,355] Statistical calculations were provided for only some samples. Dr. Melton's testimony at trial was equally deficient because she failed to testify on results from her required statistical calculations.[III,355]

Mr. Noppinger reviewed the lab report and testimony from Cassie Johnson of Orchid Cellmark.[III,357] Ms. Johnson performed STR testing, which is the identification of genetic markers on the Y chromosome.[III,357] The Y-STR profile is inherited through the father.[III,357] Ms. Johnson analyzed swabs from Laverne Jansen, the victim in the *Williams* rule case.[III,357] Ms. Johnson's report was deficient because she did not include a statistical calculation for the swab of the bite mark and wholly failed to do any type of report for her analysis.[III,357] SWGDAM requires DNA results be recorded and be reviewed by a second DNA analyst before they are reported in order for a lab to be and remain accredited.[III,358] Ms. Johnson testified she did not write a report, a violation of the SWGDAM requirements for lab accreditation.[III,358] Ms. Johnson further failed to provide any statistical analysis for her findings, another violation of SWGDAM guidelines.[III,358] Mr. Noppinger was hindered in reaching a statistical conclusion based on Johnson's work due to the lack of data, but he reached

a result of 1 in 55 for the Y profile and 1 in 214 African Americans for the vaginal swab.[III,359]

SWGDAM Requirement 4.1 mandates a statistical analysis in support of any inclusion be determined, irrespective of the number of alleles present.[III,360] The FBI requires statistical computation before the match as proof of identity can be made or such terminology used.[III,361] The absence of such calculations is not scientifically justifiable under FBI standards.[III,361] Dr. Melon, Cassie Johnson, and Jennifer Hatler all testified without providing the necessary data in violation of FBI and SWGAM requirements.[III,361-2]

Ms. Johnson's report contained the requisite statistical calculations, which were 1 in 18 or 3 in 214 African Americans, but she did not testify about those results.[III,362] 1 in 18 is a very common profile.[III,363] Ms. Johnson did not testify about non-exclusionary data. Ms. Johnson did not do a report on the bite mark DNA analysis.[III,363] The failure to provide reports was in violation of FBI Quality Assurance Standard 12.1.[III,364]

Mr. Noppinger reviewed the data generated by Candy Zuleger, Dr. Melton, and Ms. Hatler and their reports. He did not identify any errors the workups.[III,368-375]

Mr. Noppinger agreed during the time this case was pending there was some question about whether a population geneticist

would have to provide statistical testimony or whether that could be done by the lab expert. Mr. Noppinger found the issue was largely created by prosecutors.[III,376]

Claims IV and X

Items of physical evidence, including a jacket, shoes, socks, a belt, and photographs were found in the general area outside the victim's home.[II,185] The State called Jimmy Williams, who is married to a family member of Mr. Hodges, as a witness.[II,186] Mr. Williams testified the jacket in evidence was "the jacket Willie used to wear".[II,187] Mr. Allred acknowledged he did not cross-examine Mr. Williams about whether the jacket could be identified as the specific jacket or if it was only similar to the jacket Mr. Hodges had worn.[II,187] Similarly, Mr. Williams testified "Willie used to wear those shoes" when shown the Timberland shoes in evidence.[II,187]

Mr. Allred acknowledged he did not remember anything unique about the jacket or shoes that would have made it reasonable for Mr. Williams to make a specific identification.[II,188] Absent cross-examination to highlight the lack of specificity, the jury was left with a positive identification of the shoes and jacket as belonging exclusively to Mr. Hodges.[II,188]

Mr. Jimmy Williams testified at the hearing he is married to Mr. Hodges' niece.[II,261] Mr. Williams was shown a jacket and a pair of shoes at trial.[II,261] Mr. Williams agreed he

could say the shoes and jacket were similar to those worn by Mr. Hodges, but he could not say the jacket and shoes were actually those belonging to Mr. Hodges.[II,262-64] There were no unique features, such as rips, tears, or scuff marks on the clothes and shoes which would permit an identification of exclusivity to Mr. Hodges.[II,266]

Ms. Debra Taylor testified the victim was her mother.[II,255] Ms. Taylor testified she saw a person wearing a blue and gray hip-length jacket fleeing the area just after her mother was killed.[II,255] She did not observe any details about the jacket other than color and length.[II,256] She would not be able to tell the jacket she saw from other jackets which looked the same.[II,257]

Mr. Allred testified he did not believe Mr. Hodges disputed ownership of the jacket because he told Mr. Allred his possessions had been stolen. Mr. Allred failed to show Mr. Hodges the jacket or shoes in evidence prior to trial to allow Mr. Hodges to ascertain if the items were his.[II,188;223] Mr. Allred recalled Mr. Hodges lived in a house where many others had access to his belongings and told him his belongings had been stolen.[II,223]

Mr. Hodges would have also testified blood on a sock found in the general area might have been his because it might have been what he used to clean his hand after cutting it. Mr. Hodges

had cut his hand helping his relative fix a car. The relative lived next door to Ms. Belanger. Mr. Hodges had used a cloth item that could have been the sock to stop the bleeding.[II,236] The sock also could have been one of the items stolen from him .[II,236] Allred knew that Mr. Hodges could explain the presence of his blood and why the sock was in the area.

Mr. Allred agreed a lawyer must be able to anticipate and prepare for changes in strategy during trial.[II,189] At the time of opening statements he committed to having Mr. Hodges testify, so Mr. Allred did not believe the ownership of the jacket and shoes was important because Mr. Hodges would explain the circumstances of the items being stolen when he testified.[II,190;223 When Mr. Hodges did not testify Mr. Allred was stuck with a positive identification and no explanation.[II,190]

Mr. Allred considered the jury might have given some consideration to his hypothesis in opening statement, despite being instructed by the judge the opening statement was not evidence.[II,190] Mr. Allred acknowledged there were no facts in evidence which would permit the jury to accept his hypothesis of the clothes being stolen, but believed the jury could do so anyway. Mr. Allred interpreted the reasonable doubt standard to permit it's application by the jury to look independently for a reasonable hypothesis of innocence and if the jury agreed with

his opening despite the lack of factual support, so be it.[II,191] Mr. Allred believed the jury would look more closely at the State's case if they had been provided an argument by the defense which contains a reasonably hypothesis, even if there is no factual support.[II,191]

Mr. Lester was not involved in deciding what to bring out during cross-examination of any particular witnesses.[II,276] Mr. Allred was responsible for making those decisions.[II,276]

Mr. Hodges testified he traveled from Alabama to Pensacola with a single suitcase.[II,305] All of his personal possessions, including his jacket, shoes, belt, and photographs were in that one suitcase.[II,306] When he arrived in Pensacola he stayed with his cousin, Esther Golden.[II,306] Mr. Hodges stayed in a room with two or three other guys and Ms. Golden's brothers.[II,306] Mr. Hodges stated people came and went from the house all the time.[II,306] The house was a drug house.[II,307] Approximately two weeks before the murder, his suitcase was stolen.[II,311] Mr. Hodges did not report the theft to the police because it was family, but he did tell the owner of the house.[III,329]

Mr. Hodges testified the jacket introduced into evidence looked similar to a jacket he owned, but his jacket had been stolen.[II,302;III,328] Mr. Hodges wore a size "large" jacket in 2003.[III,332] The shoes introduced into evidence were

Timberland shoes.[II,302] Mr. Hodges testified he had owned a pair of Timberland shoes similar to the shoes in evidence, but his shoes had been stolen.[II,303;III,328] Mr. Hodges testified his shoe size was a 10 to 10 ½ and a medium width.[III,332-33]

A belt introduced into evidence was also similar to a belt Mr. Hodges owned.[II,304] Mr. Hodges testified he owned several belts and he could not say if the belt in evidence was his.[II,304]

Mr. Hodges was aware during the course of the trial some photographs found outside the victim's house were introduced into evidence.[II,303] Mr. Hodges testified all but three of the photographs belonged to him, the other two belonged to his cousin.[II,303,309;III,328] Mr. Hodges had kept the photographs in his suitcase and that suitcase had been stolen.[II,303;III,328]

Mr. Hodges stated the socks found were not actually his, but he might have been given the socks by his cousin, Richard Patoni.[II,305;III,330] Mr. Hodges testified his cousin lived next door to the victim.[II,305;III,331] Mr. Hodges was at his cousin's house almost every day helping him fix his car.[II,305;III,332] One day Mr. Hodges was working on the car and cut his hand.[II,305] His cousin handed him something to wipe the blood off. It could have been the sock.[II,305;III,330] Mr. Hodges left the thing he used to wipe

off the blood at the house and did not take it with him.[II,305] Mr. Hodges couldn't say whether the sock was what he used or not, he just used what he was given.[III,330]

Mr. Hodges testified he had never seen Mrs. Belanger before.[III,331] He did not see her when he was at his cousin's house.[III,331]

Claim VI

During the trial Debra Silver testified she had telephone conversations with Mr. Hodges' from her mother's home in May 2003.[II,192] Her mother is Ida May Lewis Hibler. Mr. Allred made no effort to obtain the phone records for that residence or to ascertain if the residence had a phone during the relevant time period.[II,192]

Mr. Lester recalled some discussion about the lack of a phone, but was unaware of any attempt to get phone records.[II,277]

Mr. Hodges testified he did not call Debra Silver and speak to her about anything related to this case.[II,312] Mr. Hodges testified that he had just left Alabama, where he had stayed with Ms. Silver's mother and there was no phone.[II,312]

According to Mr. Hodges, Ms. Silver had something against him.[III,330] Mr. Hodges was "with her mother, and then I got with her when I was there. And I promised to bring her to Florida when I came, but I left without bringing her."[III,330]

Documentation provided by AT&T stated there was no record of any phone calls for the home of Ida May Lewis during May 2003.[IV,606;634-638]

Claim VII

In opening statements Mr. Allred told the jury a witness named Mr. McCaskill would be called who could identify the killer.[II,192] Mr. Allred stated during opening Mr. McCaskill "does not identify and has never to this day identified Mr. Hodges as that person."[II,194] Mr. Allred claimed he could not recall making the statements outlining the content of Mr. McCaskill's testimony in opening statements, but he did have a little recall of Mr. McCaskill.[II,193] Mr. McCaskill claimed to have seen a man emerge from the woods, barefoot and without a jacket, come into his yard just after the murder occurred.[II,226] Mr. Allred stated his comments in opening were true at the time, but they did not remain true.[II,194]

Mr. Allred received Mr. McCaskill's name in discovery and was aware that Mr. McCaskill had completed a composite drawing with law enforcement during the course of the investigation.[II,193] Mr. Allred did not recall if Mr. McCaskill had been shown any photopaks by the police.[II,193]

Mr. Allred recalled going alone to the McCaskill home during the trial.[II,194] He brought a photopak with him and spoke to Mr. McCaskill and his wife.[II,194] Mr. Allred could

not recall how he went about showing the photopak to Mr. McCaskill.[II,194] Mr. Allred was confident he did not make contemporaneous notes of his conversation and interaction with the McCaskills.[II,195] Based on what occurred during the meeting, Mr. Allred was not dissuaded from calling Mr. McCaskill as a witness.[II,195]

Mr. Allred thought Mr. McCaskill's testimony at trial would be the one picture ~~was~~ marked "face" must have meant the person in that photograph had a face similar to the man he saw on the day of the murder.[II,195-6]

Mr. Allred agreed it is important to have a third party present when meeting with witnesses such as the Mr. and Mrs. McCaskill so the third party can be called as a witness if impeachment is necessary.[II,196] Despite his belief a third party was important, Mr. Allred went alone and did not take a third party such as an investigator.[II,196] Mr. Allred had no investigator, but could not recall why he did not have one.[II,197]

Mr. Allred did recall that he had not signed a JAC contract in this case.[II,197] He did not want to sign a contract with JAC.[II,197] Mr. Allred could not recall if he was aware at the time if he didn't sign a contract he could be precluded from receiving due process funds.[II,198] He didn't have an investigator and that's all there was to it.[II,198]

Mr. McCaskill came to the courthouse during the trial.[II,198] Mr. McCaskill was able to observe Mr. Hodges.[II,198] Much to Mr. Allred's great surprise, Mr. McCaskill identified Mr. Hodges as the person in his yard on the morning of the murder.[II,198] Mr. Allred was "stunned", "just blown away" and thought "someone had gotten to him, quite frankly."[II,227] A stipulation was read the jury which outlined the events the day before when Mr. McCaskill viewed Mr. Hodges.[II,199-200] Despite this knowledge, Allred called Mr. McCaskill as a witness and Mr. McCaskill identified Mr. Hodges as the man in his yard.

Mr. Allred did not have a third party present when Mr. McCaskill viewed Mr. Hodges prior to his testimony who could be used to impeach Mr. McCaskill.[II,200] Mr. Allred acknowledged that neither he nor the prosecutor could become witnesses in the case.[II,200]

Mr. Allred thought he was saving his best witness, Mr. McCaskill, for last in the trial.[II,228]

Mr. Lester played no role in the decision to discuss Mr. McCaskill in opening statement or to call him as a witness.[II,278] He was generally aware of the discovery related to Mr. McCaskill.[II,278] Mr. Lester recalled a recess during one day of the trial when Mr. McCaskill entered the courtroom and saw Mr. Hodges.[II,2779] Mr. McCaskill looked at

Mr. Hodges, then said it "looked like him", catching he and Mr. Allred by surprise.[II,279] Mr. Lester was not around when the stipulation was drafted.[II,280]

Claim VIII

Mr. Allred recalled the *Williams* rule evidence that was admitted in this case.[II,201] He recalled the DNA evidence from a lady from Orchid Cellmark was admitted, where the inclusion principle was 1 in 214.[II,201-2] In addition to the relatively unremarkable DNA numbers, there was testimony about a bite mark.[II,202] The bite mark evidence was a key piece of evidence tying Mr. Hodges to the *Williams* rule offense.[II,204]

Mr. Allred acknowledged he made statements in the record which addressed his lack of preparation for dealing with the bite mark evidence and those statements were correct.[II,204] Mr. Allred told the trial court he had just received a model of the teeth the day before Dr. Levine was called as a witness, he had not received a report from Dr. Levine, he had not deposed Dr. Levine, and he was not prepared to face the issue of the bite mark, the admissibility of the evidence and what degree of certainty would be necessary as a prerequisite to admission of bite mark testimony.[II,204] Mr. Allred did not seek a *Frye* hearing, did not consult, retain, or call a defense expert to rebut the testimony of Dr. Levine, to assist him in preparing

cross-examination, or otherwise prepare him to confront the state's witness.[II,205]

Mr. Allred believed bite mark testimony was admissible, but couldn't recall if he ~~had~~ actually researched the issue other than his recollection of *Bundy*.[II,228] It was his belief, at the time, that bite mark evidence met the requisite standard of scientific certainty because it came in after *Bundy*.[II,228] Mr. Allred did not know if the bite mark evidence in *Bundy* was subjected to a *Frye* challenge.[II,241] Mr. Allred agreed questionable scientific evidence should be challenged through a *Frye* hearing, but he never considered one in this case.[II,243]

Mr. Allred recalled Dr. Levine had testified several different levels of match, ranging from a very strong probabilities that Mr. Hodges' teeth made the mark, to probably, to something greater, and to within a reasonable degree of dental certainty.[II,205] Dr. Levine's opinion was Mr. Hodges made the bite mark.[II,205] Mr. Allred agreed these were some "pretty remarkable conclusions."[II,242] However, Mr. Allred didn't think the jury would attach a great deal of weight to the "whole bite mark thing."[II,243]

Mr. Allred did admit if he had attacked the bite mark evidence, with the low DNA of 1-214 statistical inclusion related to Mr. Hodges, he could have done significant damage to

the *Williams* rule evidence.[II,244-45] Mr. Allred admitted the *Williams* rule evidence was significant in this case.[II,244]

Mr. Lester did not work on obtaining a defense bite mark expert.[II,280] He did not talk with Mr. Allred about this issue.[II,281]

Dr. Daniel Spitz is the forensic pathologist and Chief Medical Examiner for Macomb County, Michigan.[III,3990] Dr. Spitz has also worked as a medical examiner in Miami, Sarasota County, and Hillsborough County.[III,383} He is currently a professor of pathology at Wayne State University of Medicine and an assistant professor at Wayne State College.[III,393] Dr. Spitz previously served as an assistant professor of pathology at the University of South Florida.[III,393] He serves on the editorial review board for the Journal of Forensic Medicine and Pathology, is a frequent lecturer, and has a sub-specialty in wound pattern recognition.[III,394] Dr. Spitz is the co- author of the *Spitz and Fisher Medicoloegal Investigation of Death*, Fourth Edition, which he wrote with his father.[III,394]

Dr. Spitz is experienced with the recognition, analysis, and preservation of suspected bite marks in death investigations.[III,396] He is familiar with both the *Frye* and *Daubert* standards of admissibility for scientific evidence.[III,396]

Dr. Spitz testified in the post-conviction hearing and stated it is not generally accepted within the scientific community for an expert to testify regarding the probabilities that a particular individual made a particular bite mark.[III,396] The comparison is not considered reliable in the scientific community.[III,396-7] Bite mark analysis is generally subjective, which leads to problems with comparison.[III,397] There are no objective criteria for bite mark comparison.[III,398] There are no defined methods for identification.[III,398] There are no established error rates.[III,399] Bite mark analysis is always with a known suspect and not a blind determination.[III,400] Human skin is not a good medium for accurately recording a human bite mark due to skin distortion.[III,400] Surface irregularities, bleeding, swelling, diffusion, and gravity in skin contribute to problems with bite mark analysis and difficulty in analyzing point to point skin contact.[III,401] Bite mark analysis with the goal of making a comparison to a known suspect is just too difficult to render accurate results.[III,402]

Dr. Spitz reviewed the testimony of Dr. Levine, a report from the National Academy of Science on bite mark analysis, and some materials from a pending criminal case in New York prior to testifying.[III,403] Dr. Spitz was quite taken aback by Dr. Levine's use of probabilities like "90%" and "probable" the bite

mark related back to Mr. Hodges.[III,405] The science of bite mark analysis is too subjective for the degree of determination made by Levine.

The bite mark in this case exhibited too much diffusion and active bleeding to render any specific comparison.[III,406] Absent evidence of DNA, it would be quite possible that this would not have been identified as a bite mark by looking at the photograph. The photograph would not lead to a definitive conclusion this injury was a bite mark.[III,407] Dr. Spitz testified there are other injuries in the area of the photograph which were not consistent with the bite mark, including discrepancies where the overlay indicates where teeth marks might be and there are injuries on the photo that do not involve teeth.[III,407]

Claim IX

Allred was ineffective when he cross-examined crime scene technician Janice Johnson by asking her if she believed the perpetrator entered the home bare-handed, then took measures to cover his hands once inside the house. Johnson testified she believed the perpetrator took socks from the home because a blood stain was found on the sock and speculated the perpetrator didn't want to cut his hands when he escaped by breaking a window. Allred further asked Johnson if the blood could have

gotten on the sock prior to the crime and she responded that this was unlikely, a response contrary to the defense theory.

Allred testified he recalled Ms. Johnson testifying. [IV,608] Allred did not recall questioning Johnson about when the perpetrator covered his hands.[IV,610] Allred stated he thought his questions undermined her opinion as an expert because he could argue she didn't know when the blood was deposited on the sock.[IV,612] Allred was trying to show she was unreasonable for believing the sock came from inside the house.[IV,612] Allred wanted her to speculate on matters beyond her expertise to show she was a "hired gun."[IV,614]

Claim X

In this claim Mr. Hodges challenged the advice Mr. Allred gave him about the scope of impeachment that could be done with his prior record if he testified. Mr. Allred acknowledged during opening statements he told the jury Mr. Hodges would testify.[II,206-7] The strategy was to have Mr. Hodges testify his belongings had been stolen from him, thus accounting for his clothing and some personal photos being found in the area of the crime scene.[II,206] Mr. Allred stated Mr. Hodges wanted to tell his story.[II,207]

Mr. Lester did not have any recollection of what desire Mr. Hodges had about testifying.[II,281] Mr. Lester's primary contacts with Mr. Hodges were directed at developing

mitigation.[II,281] Mr. Lester thought he and Mr. Allred might have discussed the pros and cons of having Mr. Hodges testify, but he could not recall those discussions.[II,283] Mr. Lester could not recall what the pros and cons were and could not articulate the pros and cons at the evidentiary hearing.[II,292]

Mr. Allred testified the judge had issued a pretrial ruling in this case that the Ohio offense would be admissible as *Williams* rule evidence.[III,338] An Alabama case could not come into evidence.[III,338] Mr. Hodges was present when these rulings were made.[III,338] Mr. Allred could not recall discussing the ruling with Mr. Hodges, but he had no reason to believe that Mr. Hodges was not aware of how the court had ruled.[III,338]

Mr. Hodges testified he wanted to testify.[II,312;III,321] He felt it was important for the jury to hear about how his blood could have gotten on the socks and how he was visiting next door to the victim because his cousin was working on his car.[II,312;III,326] Mr. Hodges would have testified that his personal belongings, including his jacket, boots, belt, and photographs were stolen from him two weeks prior to the murder.[III,327-8 At the start of the trial Mr. Hodges thought he was going to testify.[II,313] No one talked to him about the plusses and minuses prior to trial.[III,322]

Ultimately, Mr. Hodges was not called as a witness.[II,207] Mr. Allred stated there were conversations between he and Mr. Hodges after the opening statement about whether he would testify, but he could not recall the content of those conversations.[II,207] Mr. Allred seemed to remember they were in recess and were discussing the decision with Mr. Hodges in the courtroom.[II,207;232] Mr. Allred could not remember any of the dialogue.[II,207] Mr. Allred could not remember if he discussed Rule 90.610 with his client prior to trial.[II,214]

Mr. Lester recalled some discussion between he, Mr. Hodges, and Mr. Allred about whether Mr. Hodges would testify taking place in the lockup during the trial.[II,284;286] He did not recall the discussion in any specific detail.[II,284] Mr. Lester thought the discussion was complete, but could not recall how long it lasted, but thought it was less than an hour.[II,285;294] Mr. Lester believed there would have been discussion about the pros and cons of testifying, but he couldn't remember what was said.[II,288] Mr. Lester did not recall Mr. Hodges' pushing to testify, he thought Mr. Hodges was listening to what was being told to him.[II,289] Mr. Lester did not discuss the issue of testifying at any other time with Mr. Hodges.[II,294]

Mr. Hodges testified he talked with both lawyers during the trial while he was in the holding tank.[II,313] They talked

"really shortly, maybe 10 or 15 minutes."[II,314] There was some talk about what was happening next in the trial.[II,314]

Mr. Hodges testified he waived his right to testify because his lawyers told him it was not in his best interest because the prosecutor could bring up his past and the jury could convict him on his past.[II,313;III,319;322] Mr. Hodges thought the prosecutor could bring up everything about all the cases, his whole record, "Alabama and everything".[II,314;III,323] Mr. Hodges assumed his whole record meant everything.[III,323] Mr. Hodges was told that he could be questioned about the Ohio case because it was *Williams* rule evidence.[III,320;III,323] Mr. Hodges thought he had been arrested on the Ohio case because police from Ohio and Jenny Lu had come and talked to him and Mr. Allred told him he was "charged" with the crime in Ohio.[III,324] The lawyers did not tell him it would bad for him to testify about the Ohio case because it was still pending.[III,325]

Mr. Hodges was told he could be questioned about the facts of the Alabama case if he took the stand.[III,322] Mr. Hodges explained he was told that if he "didn't hit the witness stand, he couldn't use that", but if Mr. Hodges took the stand, the prosecutor could bring up Alabama because it wasn't *Williams* rule evidence.[II,314-15;III,319-320] Mr. Hodges' stated he really didn't understand all he was being told.[III,322] Mr.

Hodges went along with what he was told because he did not want the jury to hear about the Alabama case or the details of his prior record.[II,315-16] Mr. Hodges had this conversation with both lawyers just before the colloquy with the trial court.[II,315]

Mr. Allred testified he would not have told Mr. Hodges he could be questioned on the Alabama case.[III,339] Mr. Allred could not say whether or not he cautioned Mr. Hodges about not opening the door to allowing questioning about the Alabama case if he testified.[III,340] Mr. Allred acknowledged even if evidence is excluded by pretrial rulings, something can happen during trial which might open the door to evidence being admitted which would otherwise have been inadmissible.[III,340]

Mr. Allred was aware of the colloquy between the trial court and Mr. Hodges.[II,208] At the beginning of the colloquy Mr. Hodges repeatedly told the trial court he was doing what his lawyer told him to do.[II,208] The record reflects a break was taken to permit Mr. Allred to confer with Mr. Hodges.[II,208] Mr. Allred had no memory of what occurred during that discussion.[II,208]

Mr. Allred knew Mr. Hodges had some impeachable offenses prior to trial, but he could not recall how many.[II,208] It could have been as few as two.[II,208] Mr. Allred has had many clients with as many as 10 or 12 impeachable offenses.[II,209]

Mr. Lester thought Mr. Hodges had two, prior impeachable convictions.[II,296]

Mr. Allred was certain he would have told Mr. Hodges the State could bring out any felony convictions and any misdemeanor convictions that had an element of fraud.[II,209;212;229] The State could ask him how many of each.[II,209;212] Mr. Allred could not specifically recall telling Mr. Hodges the State could not ask about the facts of the underlying convictions.[II,210]

Mr. Allred recalled Mr. Hodges had been a suspect in an Alabama homicide, but the trial court had ruled the evidence inadmissible *Williams* rule evidence.[II,210] Mr. Allred claimed he would not have led Mr. Hodges to believe if he testified the State could question him about that offense.[II,210] Mr. Allred did not think either he or Mr. Lester said anything which could have caused Mr. Hodges to believe he could be questioned about the Alabama case, but he could not put himself inside Mr. Hodges' head.[II,211] Mr. Lester could not recall what was said about impeachment.[II,286;288]

Mr. Allred did tell Mr. Hodges he might be asked questions about the Ohio [*Williams Rule*] case because it was still an open case.[II,230;245] Mr. Allred cautioned Mr. Hodges anything he said about the Ohio case could be used in against him in that case.[II,231] Mr. Allred couldn't remember exactly what he said about the Ohio case, just it was broached.[II,246] Mr. Lester

could not recall what was talked about related to the Ohio case.[II,292] Mr. Lester stated Mr. Hodges had always denied involvement in the Ohio case, but Mr. Lester had concerns about what the prosecutor would ask about that case.[II,292-93]

Mr. Allred was aware prior to trial Mr. Hodges had mental limitations.[II,213] Mr. Allred noted Mr. Hodges had an IQ in the mentally retarded range, but the defense could not establish retardation due to adaptive behavior.[II,213] Mr. Allred had never represented a mentally retarded person before.[II,213] He agreed a lawyer must take a client's limitations into consideration when talking with and dealing with the client.[II,213]

Mr. Allred stated it is always the client's decision whether to testify.[II,230] According to Mr. Allred, Mr. Hodges made the decision to not testify.[II,233] Mr. Allred did not remember why Mr. Hodges changed his mind.[II,249] Mr. Allred had no sense of what impression caused the scale to tip.[II,249] Mr. Allred probably asked Mr. Hodges why he changed his mind, but he didn't remember any answer.[II,249]

Mr. Lester agreed without Mr. Hodges' testimony there was no explanation for the presence of his property near or at the crime scene.[II,284;294] Very incriminating evidence went unrebutted and unexplained.

Written closing arguments were submitted by both sides.[IV,459-547;552-577;583-87;Appendix]

The trial court entered an order denying the *Motion for Postconviction Relief"* on March 28, 2014.[V,639-838;VI,839-942]

A timely Notice of Appeal was filed on April 28, 2014.[VI,943-989]

STANDARD OF REVIEW

Ineffective assistance of counsel claims are reviewed in accordance with Strickland v. Washington, 466 U.S. 668 (1984). A claim for ineffective assistance of counsel must establish two prongs: counsel's performance must be shown to be deficient and the deficient performance must have prejudiced the defendant.

Deficient performance is performance which falls below the standard guaranteed by the Sixth Amendment to the United States Constitution and is established when counsel's actions or inactions are shown to be outside the broad range of reasonably competent performance under prevailing professional norms. Deference is given to counsel's performance. Walker v. State, 88 So.3d 128, 132 (Fla. 2012)(quoting *Strickland* 466 U.S. at 689).

Prejudice is established where 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. Bradley v. State, 33 So.3d 664, 671-

72 (Fla. 2010). A defendant does not have to show that he would have been acquitted in order to establish prejudice. Kimmelman v. Morrison, 477 U.S. 365, 374 (1986)["The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect…"]

Both prongs of the Strickland test carry mixed questions of law and fact; thus the appellate court applies a mixed standard of review. The appellate court defers to the trial court's factual findings if supported by competent substantial evidence and reviews the trial court's legal conclusions *de novo*. Walker v. State, 88 So.3d at 132-3.

SUMMARY OF THE ARGUMENT

ISSUE I: Trial counsel's failure to consult and retain defense experts in DNA and bite mark analysis prior to trial led to deficient performance in counsel's duty to educate himself about the forensic evidence resulting in a failure to subject the State's forensic evidence to the constitutional challenges required of counsel. Trial counsel further failed to call defense experts in DNA and bite mark analysis resulting in the deprivation of any attack on the weight and credibility of the State's experts and evidence. The failures caused prejudice to

Mr. Hodges sufficient to undermine confidence in the outcome of the proceedings.

ISSUE II: Trial counsel's performance was deficient when he built the entire theory of defense around the need for Mr. Hodges to testify, but failed to call him as a witness. Trial counsel promised the jury in opening statements that Mr. Hodges would testify and provide a plausible explanation for presence of his personal belongings and clothing at the crime scene and surrounding area other than him being the perpetrator. Mr. Hodges would have further explained the presence of his blood on a sock found near the victim's home. And Mr. Hodges would have denied making incriminating statements to Debra Silver.

Trial counsel continued the strategy throughout the trial by continuously failing to cross-examine key witnesses. Just prior to the State resting their case trial counsel advised Mr. Hodges not to testify. This single brief discussion included statements which Mr. Hodges believed made it possible for the State to impeach him with the facts of his two prior convictions and to question him about an uncharged Alabama murder and the Ohio *Williams Rule* case. Mr. Hodges waived his right to testify based on this misadvice.

The prejudice resulting from the unreasonable abandonment of the defense theory at the end of the trial was cataclysmic.

The practical effect was the concession by trial counsel to the jury that Mr. Hodges was the perpetrator.

ISSUE III: Trial counsel was ineffective when he committed to calling Mr. Willie McCaskill as a witness in his opening statement claiming that Mr. McCaskill saw the perpetrator in his yard, but did not identify Mr. Hodges as that man. Allred then called Mr. McCaskill as a witness after learning that Mr. McCaskill would identify Mr. Hodges as the man in his yard, thus establishing Mr. Hodges was the perpetrator.

Trial counsel told the jury that the perpetrator had been in Mr. McCaskill's yard just after the murder and Mr. McCaskill would not identify Mr. Hodges as that man. Instead, Mr. McCaskill, upon seeing Mr. Hodges in the courtroom, made statements which resulted in a stipulation being read to the jury that Mr. McCaskill had seen Mr. Hodges in court and that he looked familiar and resembled the man in his yard just after the murder. Allred failed to impeach Mr. McCaskill and did not take steps necessary to do so prior to bringing him to the courthouse. Mr. Hodges was prejudiced by these errors when once again trial counsel presented evidence which identified Mr. Hodges as the perpetrator.

ISSUE IV: Trial counsel was ineffective when he failed to investigate and procure evidence to impeach Debra Silver. Ms. Silver testified ~~that~~ she spoke with Mr. Hodges on the phone in

her mother's home in May 2003. Ms. Silver claimed that during that call Mr. Hodges implicated himself in the Ohio and Florida crimes. Ida Mae Lewis Hibler is Ms. Silver's mother. During the postconviction proceedings it was discovered that AT&T had no records of any incoming, outgoing, collect or other calls made to Ida Mae Lewis Hibler's residence and had no records of service disruption or cancellation and no record of incoming or outgoing calls during May 2003. Ms. Silver was not impeached with the fact that there were no records to establish she could have talked with Mr. Hodges from the Hibler residence.

Mr. Hodges was prejudiced by trial counsel's failure to impeach Ms. Silver~~s~~. When this error is considered in conjunction with the other errors in this case, there is sufficient prejudice to undermine confidence in the outcome of the proceedings.

ISSUE V: Trial counsel was ineffective in failing to cross- examine two state witnesses, Mr. Williams and Ms. Taylor on their identification of a jacket and shoes found in the area surrounding the crime scene. Mr. Williams, a relative of Mr. Hodges, identified the jacket and shoes at trial as belonging to Mr. Hodges. Ms. Taylor identified the jacket as being worn by the perpetrator. At the evidentiary hearing both admitted that they could say the items were similar at best, but neither could identify any unique characteristics of either of the items to

conclusively state the items belonged to Mr. Hodges or was the exact jacket seen.

Trial counsel did not cross-examine these witnesses because he intended to call Mr. Hodges. This decision prejudiced Mr. Hodges when trial counsel abandoned the defense theory after these witnesses testified. When Mr. Hodges failed to take the stand the jury was left with no conclusion to draw from the evidence other than the clothing belonged to Mr. Hodges, Mr. Hodges was wearing the clothing, making him the perpetrator.

ISSUE VI: Trial counsel was ineffective when he introduced evidence during the cross-examination of CST Janice Johnson which was contrary to the defense theory of the case and which resulted in further identification of Mr. Hodges as the perpetrator.

The defense theory of the case was that Mr. Hodges' clothes were stolen, including the sock found at the scene and the sock that contained Mr. Hodges' blood, which he might have used to wipe off blood from an injury that occurred at the neighboring house prior to the murder. Trial counsel elicited testimony from Ms. Johnson that the questioned sock was from the victim's house, that the perpetrator obtained the sock after entering the home, and that the sock might have been used for protection when the window was broken to effectuate the perpetrator's escape.

Ms. Johnson further opined it was unlikely the blood got on the sock prior to the murder.

Trial counsel's strategy for introducing this evidence was unreasonable and resulted in prejudice to Mr. Hodges. The evidence undermined what was still, at that time, the theory of defense. This error, when considered in conjunction with the other errors in this case, undermines confidence in the outcome.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING RELIEF WHEN TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO CONSULT, RETAIN, AND PRESENT EXPERT TESTIMONY IN BOTH DNA AND BITEMARK ANALYSIS ~~IN ORDER~~ TO REBUT EVIDENCE PRESENTED BY THE STATE AND TO UTILIZE SUCH EXPERTS TO ASSIST IN THE CROSS-EXAMINATION OF THE STATE'S DNA AND BITEMARK EXPERTS.

In this case the State relied on two types of scientific evidence and called numerous experts to testify regarding DNA evidence and bite mark analysis. In Claims I, II, III, and VIII Mr. Hodges' challenged Mr. Allred's failure to investigate, consult, retain, and utilize independent defense experts in both these areas prior to trial to assist in preparing for trial, educate him on the relevant areas of concern in both the DNA analysis and bite mark analysis, develop cross-examination, and to testify at trial as defense experts.

In Claims I, II, and III Mr. Hodges alleged Mr. Allred was unprepared to cross-examine and impeach state expert witnesses

about deficiencies in their testing and reporting in violation of the SWGDAM, and the FBI requirements for DNA labs. Mr. Hodges further challenged trial counsel's failure to cross-examine state expert Dr. Martin Tracy on critical aspects of his testimony, especially his use of the exclusion principle. In Claim VIII Mr. Hodges alleged Allred was wholly unprepared to address the bite mark evidence admitted as part of the Williams rule case, including a challenge to the admissibility of the evidence under *Frye* and the opinions and conclusions reached by state expert Dr. Levine.

The trial court found although Allred admitted his understanding of DNA evidence was "crude"[V,654] and he could have "pursued the DNA evidence with more vigor" [V,657]. his performance was not deficient and there was no prejudice because the results of the testing were not inaccurate.[V,658]

The trial court found although Allred "was not prepared to challenge the bite mark evidence"[V,677] and "could have done more to assail the bite mark evidence"[V,678] his performance was not deficient, and even if deficiency existed, prejudice was not established because of the DNA removed from the bite mark.[V,679] The trial court's finding that Allred's performance was not deficient and there was no prejudice under Strickland as to each of these four claims was error.

During the two years prior to trial Allred represented Mr. Hodges he had a professional obligation to investigate the evidence, in particular the forensic evidence, and to identify any impeaching or exculpatory evidence which might assist the defense. State v. Fitzpatrick, 118 So.3d 737, 753 (Fla. 2013). As this Court observed "One of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial. 'Pretrial preparation, principally because it provides a basis upon which most of the defense case rests, is, perhaps the most critical stage of a lawyer's preparation.'"[*quoting*, Magill v. Dugger, 824 F.2d 879, 886 (11th Cir. 1987)(quoting House v. Balkcom, 725 F.2d 608 (11th Cir. 1984)). In Fitzpatrick the defense attorney represented the defendant for four years and during that time he failed to adequately prepare himself to present an intelligent or knowledgeable defense about the most critical aspect of the case- the forensic evidence. Fitzpatrick's lawyer failed to consult or retain any experts to assist him with scientific evidence he knew little to nothing about. Allred's performance was equally deficient.

Fitzpatrick's attorney testified at the evidentiary hearing, but recalled virtually nothing about the case. The lack of memory was noted to be "embarrassingly scant" given the four years of representation. The attorney could not recall

conversations and had no notes. Ibid., at 754, n.12. Allred's recollection of his preparation for trial and the trial itself was equally scant. Allred's combined errors in failing to prepare and challenge the State's forensic evidence was constitutionally infirm under the Fitzpatrick analysis.

The primary means by which the State's evidence is subjected to adversarial testing is through full and effective cross-examination and impeachment of the State's witnesses. Davis v. Alaska, 415 U.S. 308, 316; 94 S.Ct. 1105. 39 L.Ed.2d 347 (1974); Steinhorst v. State, 412 So.2d 332, 337 (Fla. 1982). The need for effective cross-examination is more pressing where the witness is a key state witness. Perez v. State, 949 So.2d 363 (Fla. 2d DCA 2007). Allred's performance was deficient because he wholly failed to educate himself in both the areas of DNA and bite mark evidence prior to trial, and as a result, failed to provide constitutionally sufficient cross-examination and failed to present impeachment evidence through defense experts. *See*, Jennings v. State, 123 So. 3d 1101 (Fla. 2013).

In this case Allred's deficiencies mirror those of the attorney in Fitzpatrick. Allred admittedly had only a crude understanding of the most critical forensic evidence in this case, the DNA, and admitted he was wholly unprepared to challenge the bite mark evidence. Allred admitted he did not consult or hire any experts, probably because he had not signed

a JAC contract and did not want to be personally obligated for such expenditures. Despite being able to seek due process costs to pay for such experts and thus avoid any personal responsibility for such expenses, Allred did nothing. Allred could also have obtained the experts through co-counsel, who had signed a JAC contract. Allred's failure to seek experts due to concerns about payment is neither a sound strategic or tactical decision and is ethically questionable. The evidence establishes Allred's decision to forgo expert assistance pretrial and his failure to present expert testimony to rebut or impeach state witnesses was constitutionally deficient and his decisions cannot be attributed to tactical or reflective thought of a reasonable trial attorney. *See*, Williams v. Thaler, 684 F.2d 597, 604 (5th Cir. 2012), *cert. denied*, 133 S.Ct. 866 (2012)[Defense counsel's performance fell below an objective standard of reasonableness when counsel failed to "obtain any independent ballistics or forensics experts, and was therefore unable to offer any meaningful challenge to the findings and conclusions of the state's experts, many of which proved to be incorrect."] Like defense counsel in Fitzpatrick, Allred's performance was deficient. "By failing to conduct a reasonable investigation into these issues, counsel inhibited his ability to know or discover whether the State's experts made scientifically correct statements." Fitzpatrick, 118 So.3d at

755. Allred admitted at the evidentiary hearing that he was unaware of any of the problems with the state experts that were identified by Mr. Noppinger and Dr. Spitz. Allred did absolutely nothing to meaningfully challenge the state's experts and forensic evidence.

Not only does counsel have a duty to educate himself or herself about the scientific aspects of a case he or she does not understand, "…gaining knowledge of a subject does not end counsel's obligation to his or her client. Counsel must *apply* the knowledge gained in a way that provides his or her client with evidence and constitutionally adequate legal representation." *Ibid.*, at 758. Allred's failure to educate himself on DNA and bite mark analysis resulted in a complete inability to provide constitutionally adequate representation because Allred simply had no idea what to do.

Allred failed to meet his professional obligation to investigate and prepare for trial in challenging the DNA evidence and the bite mark evidence. Allred's failure to gain any knowledge of the areas of impeachment and challenge to the DNA and bite mark evidence resulted in Allred failing to provide constitutionally adequate legal representation to Mr. Hodges as follows:

<u>DNA Evidence</u>

At the evidentiary hearing it was established Allred failed to impeach each state expert witness with deficiencies in their testing and reporting which violated the SWGDAM and FBI standards and requirements for DNA labs. The accreditation standards promulgated by SWGDAM and the FBI were not developed in an arbitrary or capricious manner. The standards were developed to ensure the reliability of evidence and maintain integrity in the judicial process. The failure of Cellmark, Mitotyping, and FDLE to comply with relevant rules and regulations required for accreditation of DNA labs and the representatives of those labs failure to testify in accordance with the SWGDAM and FBI standards constituted significant impeachment evidence which Allred could have used to attack the DNA evidence and which the jury should have been aware of there is a reasonable probability the outcome at trial would have been different.

It was Allred's duty to attack the weight of the evidence and the credibility of the witnesses. Allred did not do this. Allred's failure to prepare himself adequately prior to trial to identify weakness in the state's experts and then utilize those weakness and deficiencies to his client's advantage fell below the prevailing professional norms under Fitzpatrick.

The trial court's determination Allred's "attempt" to cross-examine Ms. Johnson about the deficiencies in her

testimony was a sufficient basis to deny relief is error.[VII,655-656] Howeverk, Allred called no experts such as Noppinger to establish the deficiencies in Ms. Johnson's work, such as her failure to prepare a written report, her failure to subject her work for peer review, and her failure to adequately identify the lab process she utilized, and to properly record her data. Further, Allred wholly failed to subject the lab examiners from FDLE and Mitotyping to even a cross-examination similar to the "attempt" he made with Ms. Johnson. The fact that some action is taken by defense counsel does not excuse other failures. For example in Meus v. State, 968 So.2d 706 (Fla. 2d DCA 2005), defense counsel was held to be ineffective when failing to investigate and call as a witness a lay person who came upon the crash scene and could have offered testimony about the demeanor of the defendant despite the fact that the defense attorney consulted and called an accident reconstructionist as an expert witness. Allred's minimal attempt at cross-examination of Ms. Johnson did not excuse his failure to fully bring out the deficiencies in her work or to adequately conduct cross-examination on the other State expert witnesses. If Allred had consulted, retained, or utilized a defense expert he could have done this and he could have called that expert as a defense witness to further demonstrate the problems with the State's witnesses.

Since Allred failed to challenge the bite mark testimony of Dr. Levine, the State's bite mark expert, a thorough and extensive cross-examination of Ms. Johnson was especially critical. Allred's explanation for failing to challenge the bite mark evidence presented by Dr. Levine was he because he felt Levine was overshadowed by the DNA evidence removed from the bite mark. Yet, despite acknowledging the damaging and prejudicial effect of the Williams rule evidence, Allred made only a half-hearted attempt at cross-examination of Ms. Johnson which fell well below the professional norm and certainly not what was required given his strategy was to attack the DNA component of the bite mark in lieu of aggressively challenging Dr. Levine.

The trial court further denied relief premised on Allred's testimony that he chose not to attack the DNA evidence such as the blood on the sock because he was going to concede the clothing items, including the sock, belonged to Mr. Hodges but had been stolen. The fault with this conclusion is Allred failed to follow through with the requisite evidence or proof that Mr. Hodges' clothing was stolen. Allred's "strategy" was without merit when Allred abandoned that strategy in the middle of trial without an alternative means of establishing that critical component of the defense, the theft of the clothes. If Allred could not establish the theft of the clothes by calling

Mr. Hodges as a witness, he should have utilized a back-up plan to attack the State's evidence with readily obtainable impeachment evidence from an independent defense expert. Allred did none of these things, resulting in performance which fell below the applicable professional norms. As this Court noted in Fitzpatrick, a strategy is not considered reasonable unless it is executed properly. Ibid., at 769. Allred's strategy to not attack the clothes which contained DNA, but to concede ownership to Mr. Hodges, would only work if actual proof of the theft of the clothes had been made and this was not done. Thus, the strategy to forgo aggressively challenging the DNA evidence because of a concession regarding ownership of the sock was not reasonable.

The blood on the sock demonstrated the highest probability of belonging to Mr. Hodges, but the sock itself was not actually tied to the murder. The sock was not found inside the victim's house and was not found in the victim's yard. The sock was found in an area closer the neighbor's house who was related to Mr. Hodges. No evidence linked to the victim or her home was found on the sock. The presence of blood on the sock did not provide conclusive evidence that Mr. Hodges committed the murder. Mr. Hodges was prepared to testify and provide a plausible explanation for how an item with his blood could have been in the area.

Allred also failed to object to the testimony from Dr. Martin Tracy or impeach Tracy on his use of the exclusion principle. Tracy testified to statistics tying Mr. Hodges to the DNA evidence utilizing the exclusion principle, despite his use of the generally accepted inclusion principle in his report. Mr. Noppinger testified at the evidentiary hearing the use of the exclusion principle is not generally accepted within the scientific community and is disapproved by SWGDAM and the FBI because the percentages obtained with the exclusion principle are misleading because the percentage used in the exclusion principle make the rarity of the occurrence in the population appear to be greater than it actually is. The decision of SWGDAM and the FBI to reject the exclusion principle and endorse the inclusion principle was not arbitrary or capricious. The determination by the regulatory bodies for DNA labs to endorse the inclusion principle was made to ensure that juries were not given misleading information and to ensure integrity in the judicial process. Allred failed to impeach Tracy and thus deprived the jury of critical information relevant to the weight of the evidence, the credibility of Tracy, and allowed skewed statistical data to go unchallenged.

Dr. Tracy may not have worked for a DNA lab, but that does not excuse the failure to impeach him on his use of a statistical method that is not generally accepted within the

relevant scientific community. The fact that Tracy did not follow accepted methods in the relevant scientific community affects his credibility and the weight of his testimony. The jury could have chosen to disregard or assign lesser weight to his testimony if Allred revealed that the State chose to use an expert who presented data which was outside the relevant scientific community and chose to ignore standard industry practices. Tracy's unchallenged testimony was in direct contravention of this Court's directive in Murray v. State, 692 So. 2d 157 (Fla. 1997) requiring the same stringent requirements for the statistical analysis of DNA results as is required for the actual testing.

Again, Allred failed to have a contingency plan to impeach the State's expert and salvage the defense when he decided to abandon his earlier decision to have Mr. Hodges' testify. As the trial court noted, Allred was an "experienced criminal trial attorney, having worked as both a prosecutor and a defense attorney over the course of more than three decades".[VII,657] An experienced attorney should never forgo the opportunity to attack the State's most significant evidence and should never fail to have a contingency plan. Allred admitted that as a defense attorney you must be prepared and anticipate that over the course of a trial adjustments to the defense of the case must be made. Allred failed to adhere to his self-acknowledged

duty. Allred's decision to completely change the defense of the case after the State's evidence had been completed, thereby forging an opportunity for effective cross-examination or impeachment is not the type of "hindsight" review that is frowned upon when reviewing the actions of trial counsel.[VII,657] This is not a case where hindsight is twenty/twenty. This is a case where the defense did nothing to challenge the State's most damaging evidence and the strategy employed was not reasonable.

The trial court's finding Allred's decision to forgo any attack on the DNA evidence was a sound strategic reason is incorrect. A sound strategic decision requires alternative courses be considered and rejected. *See*, Hurst v. State, 18 So.3d 975, 1008(Fla. 2009). Allred's decision not to attack the DNA evidence cannot be considered a reasonable strategic decision because Allred did not consider the type of impeachment he could have used with the State's experts prior to trial and then reject that path. Allred had no clue the impeachment evidence Mr. Noppinger outlined existed prior to trial because he completely failed to retain an expert to assist him. Allred proceeded to trial with only a crude understanding of DNA. He took no steps to educate himself and did not consider and reject, for strategic reasons, the attacks on the forensic evidence that could and should have been made in this case.

Allred admitted he did not hire experts because he did not want to be personally liable for the costs. This rationale cannot be considered a reasonable strategic decision, especially when there were avenues available to obtain payments for experts that did not require Allred to sign a JAC contract for his fees.

The failure to call a witness which supports the defense or calls into doubt any portion of the State's evidence can constitute ineffective assistance of counsel. Newland v. State, 958 So.2d 563 (Fla. 2d DCA 2007); Nelson v. State, 875 So.2d 579 (Fla. 2004). Allred failed to call a witness such as Noppinger to raise questions or call into doubt the State's most significant evidence meets both the performance and prejudice prongs of Strickland.

Mr. Hodges' was prejudiced by Allred's failures. The jury was deprived of considering evidence which clearly went to the weight of the State's forensic evidence and the credibility of the State's expert witnesses. The jury was given skewed statistical information from Levine which created a false impression of rarity linking Mr. Hodges to the DNA evidence. The cumulative effect of Allred's failure to challenge the DNA evidence in any meaningful manner undermines confidence in the outcome of the proceedings below. Even if the data from the DNA was not inaccurate, the linking of that data to Mr. Hodges was. For this very reason the FBI and SWGDAM have determined that the

exclusion principle should not be used. Skewed statistics resulted in an unreliable verdict.

Bite Mark Evidence

If Allred's knowledge of DNA was crude, his knowledge of bite mark evidence was less than crude. Allred acknowledged during the trial he was wholly unprepared to address the bite mark evidence and Dr. Levine's testimony.[V,677] At the evidentiary hearing, Dr. Daniel Spitz testified Dr. Levine's testimony at trial identifying, to a reasonable degree of dental certainty and various other estimations, the mark on the victim as having originated from Mr. Hodge's teeth far overreached what is acceptable in the relevant scientific community.[II,230-232] Dr. Spitz identified numerous deficiencies in the actual photo of the mark and with the overlay Dr. Levine utilized in rendering his opinion. Allred agreed during his testimony that the Williams rule evidence, which included the bite mark evidence, was significant to the case and agreed attacking the bite mark evidence would have had a significant impact on the case.[I,78-9]

The trial court's finding that the Strickland standard had not been met on the failure to challenge the bite mark evidence was error. The trial court's finding was largely premised on Allred's testimony he didn't challenge the bite mark evidence because he didn't think it would matter much to the jury due to

the DNA evidence and he didn't want to pick a fight was not a sound strategic or tactical decision.

Allred testified he didn't seek a ruling on pretrial admissibility and he didn't want to attack the bite mark evidence for fear of alienating the jury on a minor point. Seeking a pretrial determination on admissibility of the bite mark evidence under the then applicable *Frye* standard would not have had any impact on the jury. If Allred had successfully excluded the evidence under *Frye*, the jury would not have known of the challenge and would not have heard the evidence. There was no strategic reason for failing to exclude the evidence, Allred just didn't think of it.

Allred had no idea prior to trial of the current deficiencies in bite mark identification and that the admissibility of bite mark evidence is questionable. Since Allred admitted he had no idea of what challenges he could have employed to exclude the bite mark evidence, his rejection of a strategy to the challenge the bite mark evidence cannot be considered a reasonable tactical strategy. Allred testified he believed the bite mark evidence might be admissible, he never considered a challenge to admissibility. There was no strategy at all.

Even assuming the bite mark analysis evidence was admissible, Allred was not relieved of his duty to challenge the

evidence by impeaching the witness, attacking the credibility of the witness, and attacking the weight of the evidence. Allred had a duty to investigate any potential impeaching evidence that might have assisted the defense. *See*, Bell v. State, 965 So.2d, 48, 62 (Fla. 2007). Allred wholly failed to investigate and impeach Dr. Levine and effectively challenge his testimony and credibility. Since Allred failed to reasonably prepare himself to confront this evidence prior to trial, it cannot be said his decision to forgo challenging the evidence through effective cross-examination was a sound reasonable strategy.

The trial court's determination that Allred's failure to challenge the bite mark evidence was not outside the realm of reasonable professional judgment was error. Allred failed to investigate the current literature outlined in Mr. Hodges' written closing argument which was readily available and assailed the use of bite mark evidence. Allred failed to retain and consult with an independent expert to assist in the impeachment of Dr. Levine and to testify for the defense. Allred failed to present an intelligent or knowledgeable defense to the bite mark evidence as required by Fitzpatrick.[IV,R502-3;505-6] He presented no defense at all. Had Allred challenged the bite mark evidence he may well have succeeded in having Levine's testimony excluded under *Frye* and he would have greatly diminished the weight of the evidence.

The trial court found that even if Allred's performance was deficient, prejudice was not established because the prejudicial impact of the bite mark testimony was militated by the DNA evidence related to the bite mark. However, this analysis fails to take into consideration Allred's deficiencies in dealing with the DNA evidence and specifically with Ms. Johnson, of Orchid Cellmark, who performed the Y-STR testing on the bite mark. According to Mr. Noppinger, Johnson's work failed to meet several significant SWGDAM and FBI requirements such as her failure to write a report, to include statistical data and her failure to render statistical calculations, and neglecting to have her work peer reviewed.[IV,467-68] Instead of diminishing the prejudice attendant to the bite mark evidence, the DNA evidence exacerbated the flaws in Levine's testimony. Once again, a strategy is not considered reasonable unless it is executed properly. Fitzpatrick, 118 So.3d at 769. Allred's alleged strategy to let the bite mark evidence go unchallenged was only reasonable if he attacked the DNA evidence related to the bite mark. Allred failed to do this, rendering his "strategy" unreasonable.

The impact of Allred's failures to attack the DNA and bite mark evidence must be viewed cumulatively. The primary evidence against Mr. Hodges, the forensic evidence, was unchallenged. Allred failed to execute the most basic functions of

representation when he failed to educate and prepare himself to challenge the State's forensic evidence and defend his client. Allred's failure should not be excused. If Allred had attacked the weight of the evidence and the credibility of the state's experts there is a reasonable probability the outcome would have been different.

ISSUE II

THE TRAIL COURT ERRED IN DENYING MR. HODGES' CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO CALL HIM AS A WITNESS WHEN THE ENTIRE DEFENSE CASE, INCLUDING OPENING STATEMENT WAS CONDITIONED ON MR. HODGES' TAKING THE STAND. MR. HODGES' DECISION TO REMAIN SILENT WAS PREMISED ON MISADVICE BY TRIAL COUNSEL.

In Claims IV and X of his Motion for Postconviction Relief Mr. Hodges' alleged Mr. Allred was ineffective in failing to call him as a witness after building the entire defense theory of the case on evidence which could only be presented through his testimony. At the evidentiary hearing Mr. Hodges testified he would have explained to the jury his possessions that were found at the crime scene and in the surrounding area had been stolen just a short time prior to the murder. Mr. Hodges would have testified he was staying with a relative in what was essentially a "crack" house, with many people coming and going from the house.[II,206] Mr. Hodges would have testified he had a single suitcase containing clothes and photographs at the house. His suitcase was stolen from the house.[VII,661]

Mr. Hodges would have also testified he had been at his cousin's house working on a car and had cut his hand. His cousin lived next door to the victim. Mr. Hodges testified at the evidentiary hearing he used something to control the blood and then left the item at his cousin's house. The sock with his blood on it found near the crime scene could have been that item. His socks were also among the items that were stolen.[VII,661]

Mr. Hodges would have denied making any incriminating statements to Debra Silver about the Ohio crime and this crime. Mr. Hodges would have testified there was no phone in the home as Ms. Silvers alleged and would have provided a basis for Ms. Silver to lie because she was angry at him for "messing with her" and he did not take her with to Florida as he had promised.

Allred acknowledged evidence during the trial established Mr. Hodges' clothes and personal belongings were found at the crime scene and in the immediate area. Allred acknowledged some of the clothing items were identified by state witness Jimmy Lee Williams as being Mr. Hodges' actual shoes and jacket and the jacket was also identified by the victim's daughter as being worn by the perpetrator.[II,186]

Allred acknowledged he fully intended to have Mr. Hodges testify when he gave his opening statement. At the time of the opening statement he had represented Mr. Hodges for two years.

Allred knew Mr. Hodges had previously testified at a hearing to determine whether or not he was mentally retarded. Allred had reviewed the earlier testimony and was still committed to having Mr. Hodges testify after ~~having~~ ~~reviewed~~ reviewing the transcript of that hearing. Mr. Allred did not change his strategy until ~~he~~ after he told the jury Mr. Hodges would testify and conceded the incriminating items of clothing and photos at the scene belonged to Mr. Hodges. Mr. Allred did not decide to change his strategy until the State was just ready to rest its case.

Allred acknowledged prior to trial he was aware Mr. Hodges had a prior record. The prior record might have consisted of as few as two prior convictions. The existence of the two priors did not dissuade Allred from planning the entire defense case around Mr. Hodges taking the stand.

Allred acknowledged throughout his pre-trial representation of Mr. Hodges, Mr. Hodges had always indicated he wished to testify.

Allred acknowledged he told the jury in his opening statement Mr. Hodges was going to testify.[II,190] Allred summarized Mr. Hodges' testimony for the jury, telling the jurors Mr. Hodges would explain that his clothing and personal items, which were found at the crime scene, had been stolen prior to the murder.[VII,660-61]

During the trial the State introduced into evidence a jacket and shoes that Jimmy Lee Williams testified were Mr. Hodges' clothes.[VII,659] The victim's daughter testified the same jacket identified by Mr. Williams was worn by the perpetrator as he fled the scene.[VII,659] Tamara Wolf identified a brown braided leather belt found at the crime scene as similar to a belt worn by Mr. Hodges in 2000. Two socks were found near the victim's home. One sock was found next to the back fence of the neighbor's yard and a second sock was recovered from a swampy area a short distance away.[VII,659-60] The sock found at the neighbor's property contained Mr. Hodges' blood and DNA. Photographs belonging to Mr. Hodges were found at the in the yard of the crime scene.[VII,659] Pictures similar to those found in the yard were found in Mr. Hodges' wallet when he was arrested.[VII,659]

The trial court's order found it was undisputed, despite Allred's commitment in opening statements to introduce evidence which would explain the appearance of Mr. Hodges' personal items and clothing at the crime scene through testimony from Mr. Hodges those items were stolen, no such evidence was ever presented.[VII,660] The trial court also found "Allred's defense was built on a theory that Defendant's clothes and other belongings had been stolen prior to the murder, and that the theft of those items was the explanation for the forensic

evidence found at and around the scene of the homicide."[VII,660] Ultimately, "Mr. Allred acknowledged that the items found were the Defendant's, but asserted that Defendant was not the individual wearing those items when the murder occurred."[VII,661] Despite the fact the entire theory of defense was built on Mr. Hodges testifying and Allred conceded that items found at the scene belonged to Mr. Hodges, Mr. Hodges did not testify.[II,207] None of the evidence Mr. Allred assured the jury would be presented to explain the presence of Mr. Hodges' personal belongings at and around the crime scene ever was admitted.

Mr. Hodges testified at the evidentiary hearing he fully intended to testify until he was told by Allred, during a recess in the trial, if he testified the State would be able to impeach him with the facts of his prior record, question him about a homicide charge from Alabama that the trial court had excluded from this trial, and question him about the Ohio case that was the subject of the Williams rule evidence in this case.[VII,662] Mr. Hodges believed the only way to prevent the jury from hearing this very damaging evidence was to forgo testifying.[VII,662] Mr. Hodges testified if he had known the State's questioning would have been limited to how many felony convictions and how many misdemeanor convictions involving fraud or dishonesty he had, and nothing else, he would have testified.

Similar to the lawyer in Fitzpatrick, whose memory failed him, neither Allred nor Mr. Lester could recall the specifics of what they told Mr. Hodges during the trial about whether he should testify.[II,.207] Allred testified he remembered nothing about the conversation, but believed there was only a single conversation.[II,207]

Allred testified he could not recall what he said to Mr. Hodges, but he assumed he would have told him what he tells all his clients. Allred tells his clients they can be impeached with the number of the convictions, but not with the underlying facts. Allred denied telling Mr. Hodges the Alabama offense could be used in any manner. Allred did acknowledge telling Mr. Hodges he could be questioned about Ohio.

Allred testified it was his "intended strategy" to call Mr. Hodges as a witness. He agreed all along Mr. Hodges wanted to testify and tell his story.[VII,662]

The trial court found "both [Lester and Allred] were concerned during the guilt phase that the evidence of guilt was overwhelming and they attempted to take appropriate steps to minimize any potential damage which might result in the penalty phase."[VII,663] The trial court further concluded "… that the decision about whether the Defendant should testify was discussed at length."[VII,664] The trial court's factual conclusions are not supported by the evidence.

The trial court's determination a lengthy discussion was held between Mr. Hodges and his lawyers was based on some comments made by Allred during the trial and not from testimony at the evidentiary hearing.[VII,664] At the evidentiary hearing Allred testified he remembered "…nothing about the conversations themselves", did not remember anything about the conversation that occurred with Mr. Hodges during a break when the trial court offered an opportunity for consultation after the colloquy began, and believed there was only a single conversation during the trial.[II,207-8]

Lester testified he could recall no conversations with Allred and Mr. Hodges about whether he would testify before trial. Lester did not talk to Mr. Hodges at all about testifying until there was a conversation during a court recess in a holding cell area. Mr. Lester knew this conversation occurred after opening statements, but could not recall what was actually said and he had no idea how long the conversation lasted.

Allred first claimed to have no recollection of talking with Mr. Hodges during trial about whether he should testify.[II,207] Allred could only recall one discussion with Mr. Hodges and Mr. Lester that took place on a recess while Mr. Hodges was in a holding cell.[II,207] The combined testimony of Allred and Lester does not support a factual finding that the

discussions with Mr. Hodges were extensive and occurred at length. The testimony indicates just the opposite- all three persons, Mr. Hodges, Lester and Allred all testified there was only a single meeting, during a break in the trial, while Mr. Hodges was in a holding cell. No one testified this meeting involved extensive discussions. Lester's testimony was this was the *only* discussion he recalled. Allred did not testify there were any pretrial discussion on the matter, he only testified he knew Mr. Hodges wanted to testify. No one described lengthy or extensive discussions. Thus, the trial court's conclusion the decision was discussed at length is not supported the evidence.

The trial court's conclusion both Allred and Lester were very concerned whether Mr. Hodges would do "too good" in guilt phase if he testified and cause harm in penalty phase is also incorrect and not supported by the evidence.

Lester testified he didn't believe Mr. Hodges should testify based on his performance at the mental retardation hearing because he had hurt himself in that hearing by doing a good job.[II,290-1] Lester did not explain why the entire trial strategy was built upon Mr. Hodges testifying, only to be changed at the last minute, based upon a hearing that he and Allred had been aware of during the entire pre-trial period. Lester did not explain why being a good witness would be harmful to Mr. Hodges in guilt phase. Lester testified this was his

concern, but he did not testify he communicated this concern to Allred or Mr. Hodges. Lester testified he couldn't even recall what the pros and cons were in relation to Mr. Hodges testifying.[II,289]

Allred did not testify his concern was Mr. Hodges would do too good - he unequivocally testified he went into the trial with a strategy and defense theory contingent upon Mr. Hodges' testifying. Allred testified he was concerned Mr. Hodges would not do well on cross-examination.

Allred clearly made the decision to have Mr. Hodges testify knowing how Mr. Hodges' had performed in the prior hearing. The mental retardation hearing had occurred before Allred was appointed to represent Mr. Hodges, but Allred was aware of what had occurred, had access to the transcript, and had ample time to consider the prior testimony since he represented Mr. Hodges for two years prior to trial. There is no excuse or reasonable strategy for Allred to have suddenly changed his mind about Mr. Hodges doing "too good" at the point in time he decided it would be bad for Mr. Hodges to testify.

The record reflects Allred spoke with Mr. Hodges a single time, during trial, at or near the end of the State's case, and only then advised Mr. Hodges to remain silent. Allred's decision to abandon the only defense theory of the case after committing to this defense in opening statements to the jury was

not a reasonable strategic decision. The defense hinged on Mr. Hodges' testifying and explaining the presence of his clothes at the crime scene. Allred's decision to abandon the defense almost at the conclusion of the trial, with no back-up or alternative defense, and with no ability to introduce evidence to support his opening statement absent Mr. Hodges' testifying fell below reasonable professional norms.

Allred offered no explanation why, when the trial was almost over, he had a sudden epiphany Mr. Hodges would not make a good witness. Allred offered no reason for this ill-taken change of course. Allred did not testify he made the decision to convince Mr. Hodges to remain silent because Mr. Hodges had done "too good" at the retardation hearing.

Allred did not specify any occurrence during trial which made him change his mind. In fact, Allred claimed at the evidentiary hearing when defending against Claim V he did not cross-examine witnesses such as Jimmy Williams, Deborah Taylor and Tamara Wolf because *at that time during the trial* he was planning to have Mr. Hodges testify and did not have a back-up plan. Allred offered no reasonable justification for his decision to absolutely abandon the entire theory of defense during trial when it was too late to salvage the case with a new theory or with an alternate means of presenting evidence to support the defense theory which would not require Mr. Hodges to

testify. Allred had no alternative plan to present evidence which explained to the jury how Mr. Hodges' personal effects and clothes were found at the crime scene without calling Mr. Hodges as a witness.

Mr. Hodges testified the only reason he did not take the stand was because he followed his lawyer's advice. Mr. Hodges testified he decided to forgo testifying because he believed the State's impeachment could include questions about the uncharged Alabama murder, questions about the Ohio case, and the facts of his prior convictions based on what he was told by Allred. When counsel misinforms a defendant regarding the use of a prior conviction as impeachment, specifically that the jury can hear the facts or specific nature of the other offenses, the deficiency prong of Strickland is satisfied. *See*, Ferrer v. State, 2 S.3d 111 (Fla. 4th DCA 2000); Tyler v. State, 793 So.2d 137 (Fla. 2d DCA 2001); Everhart v. State, 773 So.2d 78, 79 (Fla. 2d DCA 2000).

Allred first claimed he did not specifically recall talking to Mr. Hodges about what prior offense could be used as impeachment.[II,209-10] When recalled by the State after Mr. Hodges testified, Allred claimed he would not have advised Mr. Hodges he could be impeached with the facts of his prior convictions because that is not what he always tells his clients. Allred believed he would have corrected any

misunderstanding by Mr. Hodges about whether the Alabama case could be used if he had recognized that Mr. Hodges didn't understand.[II,210-12]

Both Allred and Lester believed Mr. Hodges is mentally impaired.[II,213] Lester, in particular, believes Mr. Hodges is mentally retarded.[II,290] Lester testified he felt Mr. Hodges pretends to understand more than he actually comprehends.[II,291] Despite both attorney's belief their client operated under an intellectual deficit, neither took the time to ascertain whether Mr. Hodges truly understood what he was being told about how the State could impeach him and whether or not he should testify. When trial counsel knows his client has mental health issues, "an attorney has expanded duties." Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986).

The testimony from the evidentiary hearing supports the conclusion Mr. Hodges did not understand what he was told about how the State could impeach him in the single, brief meeting in the holding cell during trial. It is more than likely he was misadvised. It was clear from the colloquy between the trial court and Mr. Hodges when he gave up his right to testify Mr. Hodges did so because he was doing what his lawyers told him to do and not because he fully understood the implications of not testifying after what had occurred at trial and how he could be impeached.

The trial court further found Mr. Hodges was not prejudiced by the abandonment of the defense theory which was built entirely on Mr. Hodges' testifying in favor of no defense theory and with no way to explain to the jury why promised evidence had not been presented. This finding of no prejudice is erroneous. The trial court acknowledged the effect of Allred's opening statement was to admit the clothing and personal effects at the scene belonged to Mr. Hodges.[VII,661] Allred told the jury the items belonged to Mr. Hodges, but were stolen from him prior to the murder.[VII,661] The trial court further found the record was *devoid* of any testimony to support the theft assertion. The trial court further found the entire defense theory of the case was premised on the theft scenario.[VII,661] Allred's opening statement, without testimony from Mr. Hodges, amounted to a concession of guilt. This was certainly not agreed to on the record by Mr. Hodges.

Mr. Hodges was clearly prejudiced. Mr. Hodges gave up his constitutional right to testify due to misleading advice from Allred. The effect of his failure to testify vitiated the only defense in the case. The jury was told by defense counsel Mr. Hodges clothing and very personal items were found at the murder, but that did not make him the perpetrator because the perpetrator had stolen Mr. Hodges' belongings. The only defense disappeared when Mr. Hodges did not testify. Allred failed to

produce the evidence he promised the jury he would present. Allred's failures undermined his and Mr. Hodges credibility with the jury and effectively guaranteed a guilty verdict. Mr. Hodges is entitled to relief on these two claims.

ISSUE III

THE TRIAL COURT ERRED IN DENYING RELIEF ON CLAIM VII WHICH ALLEGED TRIAL COUNSEL WAS INEFFECTIVE WHEN HE CALLED WITNESS WILLIE McCASKILL, WHO THEN IDENTIFIED MR. HODGES IN AN INCRIMINATING MANNER, AND THEN COULD NOT IMPEACH MR. McCASKILL.

In Claim VII of the Motion for Postconviction Relief Mr. Hodges alleged Mr. Allred was ineffective by calling Mr. Willie McCaskill as a witness. Mr. McCaskill proceeded to identify Mr. Hodges as the man who came into his yard on the morning of the murder. Mr. Allred further compounded this error by calling Mr. McCaskill's wife, Delores McCaskill, in a failed effort to impeach Mr. McCaskill. Allred failed to have a third party witness his pre-trial interview of Mr. McCaskill, thus he was unable to call any witnesses to impeach Mr. and Mrs. McCaskill about his interactions with them.

During opening statements Allred told the jury he was going to call a witness named Willie McCaskill. Mr. McCaskill lived near the crime scene. Allred told the jury "when the perpetrator came out of the woods he entered Mr. McCaskill's back yard." Mr. McCaskill saw the man jump the fence into his yard and he confronted him. Allred told the jury Mr. McCaskill

would testify the man was not wearing shoes, his socks and pants were soaking wet and he had "shed his jacket". Mr. McCaskill would testify the man said he had been "jumped". Allred stated Mr. McCaskill would testify that the man left briefly, then returned and asked for a ride. Mr. McCaskill refused and watched the man leave in a direction away from some police vehicles that had amassed at the end of the street. Mr. McCaskill called the police to report his encounter when he learned a murder had occurred. Allred told the jury "They asked McCaskill to do a composite for them about what the guy looked like… It doesn't look a thing like Willie Hodges… McCaskill is asked to view… a photographic lineup. He picked someone else out. He does not and has never to this day identified Willie Hodges as that person." [II,194;VII,670-71] The effect of Allred's opening statement was to inform the jury that the man Mr. McCaskill saw was the perpetrator. For the second time in this case Allred made statements to the jury that ultimately became a concession of guilt.

Allred testified at the evidentiary hearing his opening statements were true at the time he gave them, but they did not remain so.[II,194] Allred was aware the police had interviewed Mr. McCaskill not too long after the crime occurred.[II,193] Mr. McCaskill had contacted the police after learning about the crime. Mr. McCaskill assisted in the creation of a composite

drawing of the perpetrator and had been shown a photopak containing Mr. Hodges' picture.[II,193] Mr. McCaskill did not select Mr. Hodges from the photopak.[II,193]

At some point after the trial had started Allred went to the home of Mr. and Mrs. McCaskill in the evening. Allred went alone. Allred showed Mr. McCaskill a photopak, but could not recall exactly how that occurred.[II,194-5] Allred left the McCaskill home believing Mr. McCaskill would not identify Mr. Hodges.[II,195;199]

Allred, based on his thirty years of experience, agreed it is important to have a third party present during interviews in order to have an impeachment witness if the interviewee makes statements which are contradictory with the interview.[II,196-7] Allred had no witness to impeach Mr. McCaskill because he failed to take a third person with him. Allred did not have an investigator who could have served as the third party because he did not sign a JAC contract and took no steps to secure due process costs from JAC.[II,197-8] Allred agreed that he could not be called as a witness for impeachment.[II,200]

Prior to calling Mr. McCaskill as a witness, Allred had Mr. McCaskill come to the courthouse during the trial. Mr. McCaskill saw Mr. Hodges in the courtroom and then made statements to the State Attorney and Allred indicating he believed Mr. Hodges to be the man who had been in his

backyard.[II,198-9] As a result, a stipulation was entered into by the State and Allred and read to the jury. The stipulation informed the jury Mr. McCaskill had observed Mr. Hodges in open court and then left the courtroom with both attorneys. Mr. McCaskill stated that Mr. Hodges "looked familiar" but was not sure if it was the person, but "he resembles him".[II,199-200]

Even with this knowledge Allred still called Mr. McCaskill as a witness at trial.[I,35] Mr. McCaskill's trial testimony proved even more damaging than the stipulation. Mr. McCaskill outlined the events on the morning of the murder and provided a description of the man in his yard.[I,35-36] Mr. McCaskill testified about his trip to the courthouse the previous day and testified that when he looked at Mr. Hodges "in the person, that same guy I seen come through my yard."[I,36] Mr. McCaskill noted that looking at a real person was different from looking at pictures.[I,38]

Mr. McCaskill acknowledged that defense counsel had come to his home only a few days previous. Mr. McCaskill claimed that he identified two photos from those he was shown by Allred who had similarities in hair style or face to the man he saw.[I,37] Another picture looked similar in the face, but he did not mark that picture.[I,38] Mr. McCaskill claimed he didn't mark all the pictures that were marked.[I,37]

Allred's attempt at impeachment failed when he called Mrs. McCaskill as a witness. Mrs. McCaskill corroborated her husband's quasi-identification of Mr. Hodges just a few days earlier when Allred had come to their home alone and shown Mr. McCaskill a photopak.[I,38-9] Mrs. McCaskill testified that she had marked some of the photos her husband was shown for him, thus explaining Mr. McCaskill's statement that someone else had marked some photos. Allred had no other means to impeach Mr. and Mrs. McCaskill.

Allred's actions vitiated any guarantee of reliability in the outcome of the proceedings. By calling Mr. McCaskill as a witness, Allred's performance was so deficient and the prejudice so great, the act was tantamount to an abdication of trial counsel's responsibilities to his client. Clark v. State, 690 So.2d 1280, 1282 (Fla. 1997). Allred told the jury in opening statements Mr. McCaskill had seen the perpetrator in his back yard on the morning of the murder. Allred orchestrated Mr. McCaskill's out of court identification of Mr. Hodges in the presence of the prosecutor, which resulted in the stipulation. Allred still called Mr. McCaskill as a witness, which resulted in a positive identification of Mr. Hodges by Mr. McCaskill. Allred had no way of impeaching Mr. McCaskill.

By calling a witness who affirmatively identified Mr. Hodges as the perpetrator coupled with the repeated failures to

advance any defense through cross-examination and by failing to call Mr. Hodges as a witness, Allred entirely failed to subject the State's case to the adversarial testing required under the Sixth Amendment and rendered the adversarial process unreliable. U.S. v. Cronic, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). When counsel's performance is so deficient that the State's case was not subject to adversarial testing, the law will presume prejudice. Allred's deficiencies, when viewed cumulatively, and in particular with regards to Mr. McCaskill, rise to this level. Mr. Hodges was entitled to have counsel who acted as an advocate. *See*, Anders v. California, 386 U.S. 738, 743, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Allred did not do this. Allred called a witness who indelibly linked Mr. Hodges to the murder. Mr. Hodges is entitled to relief on this claim.

ISSUE IV

THE TRIAL COURT ERRED IN DENYING RELIEF ON CLAIM VI WHICH ALLEGED TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO PROCURE THE PHONE RECORDS OF IDA MAY LEWISHIBLER IN ORDER TO IMPEACH WITNESS DEBRA SILVER. SILVER CLAIMED MR. HODGES CALLED HER AT THE HOME OF MS. HIBLER AND CONFESSED TO HER IN MAY 2003.

During the trial the State called Debra Silver as a witness. Ms. Silver testified that her mother is Ida Mae Lewis Hibler. Ms. Silver claimed to know Mr. Hodges. Ms. Silver claimed in May 2003 she was living at her mother's house in Boligee, Alabama. Ms. Silver claimed Mr. Hodges called her on the telephone at Ms. Hibler's home and made incriminating

statements to her. Ms. Silver claimed Mr. Hodges told her he had killed a woman in Ohio and stabbed a woman in Florida after breaking into her house.

During the post-conviction proceedings a subpoena was served on the only phone service provider, AT&T Southeast, for Boligee, Alabama.[IV,634] The subpoena requested records of all outgoing long distance calls, records of all incoming calls, records of all collect calls, and any records regarding cancellation or disruption of service to Ida Mae Lewis Hibler during the month of May 2003.[VI,643] AT&T served a response stating there were no phone records for Ida Mae Lewis Hibler during May 2003.

Mr. Hodges testified at the evidentiary hearing that he did not call Debra Silver in May 2003 at her mother's house. Mr. Hodges denied making any incriminating statements to Ms. Silver.

Mr. Allred did not obtain the information from AT&T prior to trial. Nor did he impeach Ms. Silver.

The trial court found neither deficient performance or prejudice was established.[V,669] The trial court opined that the subpoena response from AT&T could be interpreted several ways, one of which was Ms. Lewis might have had a phone during that period, but AT&T just didn't have records any longer. Thus, there was still no evidence that Ms. Lewis lacked a phone in May 2003.[V,669]

The trial court further found that even if was established Ms. Lewis did not have a phone, that fact would not significantly diminish Ms. Silver's testimony.[V,670] The trial court did not think the jury would have been swayed by such evidence, especially since another witness gave testimony similar to Silver.[V,670]

The trial court's conclusions regarding the subpoena are speculative. AT&T was asked to provide specific evidence through regularly maintained business records of telephone activity from the residence of Ida Mae Lewis Hibler for May 2003. AT&T responded the company had no record of incoming or outgoing calls, no record of collect calls, and no records that service was disrupted or cancelled in May 2003. AT&T did not say they had no records because records had not been kept or had otherwise been destroyed, as the trial court speculates might have occurred. AT&T has no records establishing active telephone use for the residence of Ida Mae Lewis Hibler in May 2003.

Mr. Hodges testified at the evidentiary hearing he did not call Debra Silver in May 2003 and he could not have called her at her mother's home because her mother did not have phone service. Debra Silver admitted in her testimony that her mother did not always have phone service.

It is important to acknowledge defense's counsel's duty is to challenge the State's evidence and impeach the State's witnesses. When a witness takes the stand, the witness is subject to cross-examination on matters that affect the truthfulness of the witness. *See*, Chandler v. State, 702 So.2d 186, 195 (Fla. 1997). Allred should have obtained the information from AT&T that there were no records of phone usage for Ida Mae Lewis Hibler in 2003 and impeached Ms. Silver with that information. The jury could certainly have weighed Ms. Silver's credibility differently if evidence had been presented showing that AT&T had no record of any incoming or outgoing or collect calls for May 2003. This error, when considered cumulatively with the other errors alleged in this case entitles Mr. Hodges to relief.

ISSUE V

THE TRIAL COURT ERRED IN DENYING RELIEF ON CLAIM V WHICH ALLEGED TRIAL COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO CROSS-EXAMINE STATE WITNESSES JIMMY WILLIAMS AND DEBRA TAYLOR ON THEIR IDENTIFICATION OF A JACKET AND SHOES FOUND NEAR THE SCENE.

During the trial the State called Jimmy Lee Williams and Debra Taylor to identify items found at or near the crime scene. Mr. Williams was asked to identify a jacket and shoes. Ms. Taylor was asked to identify a jacket.

Mr. Williams testified at the evidentiary hearing that he is related to Mr. Hodges. Mr. Williams acknowledged during trial he stated a jacket and pair of Timberland shoes admitted into evidence belonged to Mr. Hodges and he "used to wear" the jacket and shoes. At the evidentiary hearing Mr. Williams admitted neither item had any unique features which permitted him to state these items actually were those belonging to Mr. Hodges.[III,266] Mr. Williams admitted he could only state jacket and shoes were similar to a jacket and shoes Mr. Hodges owned.[III,262-4]

Likewise, Ms. Taylor admitted she could not testify the jacket admitted into evidence was the actual jacket she saw the perpetrator wearing as he ran from her mother's house.[III,257] If she was shown several similar jackets she would not be able to tell them apart.[III,257] She remembered only the color and length of the jacket.[III,258]

Mr. Allred testified at the evidentiary hearing he had no independent recollection of Mr. William's trial testimony.[II,186] Allred agreed Mr. Williams could have been cross-examined on the lack of unique features of the jacket and shoes.[II,187-8] Absent this type of cross-examination, the jury was left to believe the jacket and shoes belonged to Mr. Hodges.[II,188]

Allred claimed he did not cross-examine either witness because he expected Mr. Hodges to testify the items could have belonged to him, but the items had been stolen prior to the crime.[II,189-90] Allred acknowledged he did not call Mr. Hodges, so no testimony was admitted to establish the theft. Allred felt the jury could rely on his opening statement and conclude there had been a theft even if no evidence had been admitted to establish that as a fact.[II,190-1]

The trial court determined "Without question, it would have been a legitimate cross-examination tactic to ask such questions. However, the Court does not find that deficient performance or prejudice has been established."[V,667] The trial court's determination was premised on the assumption the jury knew that more jackets and shoes than the ones found at the scene had been manufactured.[V,667] The trial court also relied on Allred's intent to rely on the defense that the items were stolen from Mr. Hodges to justify the failure to use legitimate cross-examination tactics.[V,668] Contrary to the trial court's conclusion, Allred's performance was deficient and sufficient prejudice was present to justify relief.

The trial court's conclusion the jury knew that more jackets and shoes were manufactured is speculative and does not take into consideration that the jury *did not know* the jacket and shoes they were asked to consider as evidence that Mr.

Hodges was the perpetrator had no unique characteristics that would permit Mr. Williams and Mrs. Taylor to tie them directly to Mr. Hodges and the crime. The jury did not know the jacket and shoes in evidence fell into a generic category. Both Mr. Williams and Mrs. Taylor testified those specific shoes and jacket could be identified as belonging to both Mr. Hodges and the perpetrator, leaving the inevitable conclusion they were one and the same. The jury did not hear the jacket and shoes they were asked to consider did not have anything unique which would unequivocally establish Mr. Hodges' ownership.

Again, the effect of Allred's failed and unreasonable strategy resulted in evidence indelibly pointing to Mr. Hodges as the perpetrator was unchallenged. When this error is considered in conjunction with the other errors in this case, there is a reasonable probability that the outcome at trial would have been different if Allred had used all available means to challenge the State's evidence.

ISSUE VI

THE TRIAL COURT ERRED IN DENYING RELIEF ON CLAIM IX WHICH ALLEGED TRIAL COUNSEL WAS INEFFECTIVE WHEN CROSS-EXAIMING CST JANICE JOHNSON LEADING TO THE INTRODUCTION OF TESTIMONY THAT WAS CONTRARY TO THE DEFENSE AT TRIAL.

The State called crime scene technician Janice Johnson as a witness during trial. Ms. Johnson processed the victim's home

and collected evidence. Mr. Allred elicited testimony from Johnson during cross-examination Johnson was not qualified to give and which undercut the defense theory of the case at the time of her testimony.

Allred had told the jury in opening statements the defense theory of the case was the sock which contained Mr. Hodges' DNA found in the adjacent area had either been stolen from him prior to the murder or sock had been left there after Mr. Hodges had used the sock to wipe off blood when Mr. Hodges' injured his hand while working on a car at his relatives home prior to the murder. The defense theory rested on Mr. Hodges' blood being on the sock prior to the crime.

During cross-examination Allred asked Johnson if she had identified any similar socks in the victim's home. Johnson responded she had seen similar socks in the dresser drawer in the victim's bedroom.[IV,609] Allred then asked Johnson if she had an opinion whether the perpetrator entered the home bare-handed or with his hands covered.[I,47] Johnson opined the perpetrator entered bare handed and obtained socks from the victim's house.[I,47] Allred then asked Johnson what her opinion was on whether the perpetrator covered his hands before or after the murder.[I,47] Johnson stated she believed it was after "… because there was a blood stain on one of the socks."[I,47] Allred asked Johnson why she thought the

perpetrator got the socks and Johnson opined "Maybe he didn't want to cut his hands breaking the window. I have no idea. I have no opinion."[I,47] On re-cross Allred asked Johnson if it was possible, but not probable, the blood was on the sock prior to the crime and Johnson responded "It would be unlikely."[I,48]

Allred testified at the evidentiary hearing he didn't recall his cross-examination of Johnson.[IV,610] Allred agreed the record would reflect what questions he asked.[IV,611]

Allred stated he didn't think evidence from Johnson establishing the sock with Mr. Hodges' blood on it came from the victim's house was "inconsistent with a defense conceptualization that he had cut his hand repairing—in the process of assisting someone repairing an automobile engine sometime earlier."[IV,611] Allred could not explain why he would want the jury to think Mr. Hodges' had used a sock from the victim's house to wipe off blood prior to the murder or how Mr. Hodges' could have gotten a sock from the victim's house prior to the murder.[IV615]

Allred stated Johnson would have had no basis to believe the sock came from inside the house and Johnson had no training or experience which would allow her to reach that conclusion.[IV,613] Allred thought Johnson's credibility would be undermined if she gave her opinion on when the blood got on the sock because she really couldn't say for sure when it

happened.[IV,612-13] Allred thought if Johnson overstated the evidence the jury might believe she was a "hired gun".[IV,614;616]

Allred agreed on direct examination Johnson had only testified she saw socks in the victim's dresser drawer, but had not insinuated or testified that the socks in the victim's house matched the sock containing Mr. Hodges' blood.[IV,613]

The trial court found Mr. Hodges was not prejudiced by the admission of Johnson's cross-examination testimony because a logical inference existed, absent her testimony, the socks were from the victim's home and were used to protect the hands of the perpetrator and the tactic to portray Johnson as a hired gun was not unreasonable.[V,681] The trial court's conclusions were erroneous.

While it may have been the State's *theory* the socks came from the victim's home and were used as protection, the State had not introduced sufficient evidence to support this theory. The only evidence on this point prior to Allred's cross-examination was there were white socks in the victim's dresser and the questioned socks were white. The State presented no evidence establishing the questioned socks had any unique features or could be identified as the same type of socks that were in the victim's home. The State asked no questions and presented no evidence suggesting the blood got on the sock when

the window was broken or when the blood was deposited on the sock.

The State didn't have to present this evidence because Allred did when he cross-examined the State's witness. It is not the defense lawyer's duty to fill up the holes in the State's case, but that is exactly what Allred did. Allred's cross-examination guaranteed the jurors had far more than a weak inference the socks might have come from inside the home by the time he was finished with cross-examination of Johnson. At the conclusion of his cross, the jurors did not need to hunt for inferences, those inferences were crystal clear and there was opinion testimony to support them.

The purpose of cross-examination is to subject the State's case to adversarial testing and challenge the State's evidence, not prove the case for them. *See*, Davis v. Alaska, 415 U.S. 308, 319 (1974); Perez v. State, 949 So.2d 363 (Fla. 2d DCA 2007); Tomengo v. State, 864 So.2d 525 (Fla. 5th DCA 2004). Allred's cross did not serve the intended purpose, it had just the opposite effect. Allred's cross-examination fell outside the bounds of reasonable professional norms.

Allred's strategy to convince the jury that Johnson was not credible and was overreaching was unreasonable. Allred claimed he was trying to discredit Johnson by showing she was a "hired gun." The problem with this strategy is Johnson did not provide

particularly damaging evidence on direct exam which could have been construed as overreaching and Johnson was not a "hired gun."

Johnson was a crime scene technician. She was not hired by the State Attorney. She was a law enforcement employee who was performing the duties of her job in collecting evidence and photographing the crime scene. If Allred had left her testimony on direct alone, Johnson would have been a routine State witness who provides chain of custody information and documentary evidence related to the crime scene. Nothing more, nothing less. Instead, Allred transformed Johnson into a quasi-expert witness who gave opinion testimony which was extremely damaging to Mr. Hodges.

Johnson's cross-examination testimony was particularly harmful. Allred's strategy to convince the jury Johnson was a "hired gun" failed. Instead, Johnson was a witness the jury could conclude was an experienced officer who was capable of forming a hypothesis of where the socks came from, why the perpetrator used the socks, and when the blood got on the socks. Johnson did not come across as a "hired gun" who was overreaching. She stated she could speculate on why the socks were used, but really couldn't say exactly. Johnson came across as trying to answer Allred's questions, but not as an expert who was paid to say whatever the State wanted.

Mr. Hodges was prejudiced by Allred's deficient performance. After Johnson's testimony on cross, the State had evidence to argue persuasively to the jury Johnson's hypothesis was correct. Mr. Hodges did not testify, so the jury had no evidence of an alternative theory to consider. The only testimony the jury had to consider was from an experienced crime scene technician who believed the socks came from the house, were used for protective purposes, and it was unlikely the blood was deposited on the socks prior to the crime. The defense provided no other explanation for the blood on the socks besides it having been deposited on the sock during the crime. When this error is considered in conjunction with the other errors in this case, it is apparent that Mr. Hodges is entitled to relief.

CONCLUSION

Based upon the forgoing arguments, citations of law, and other authorities, and in considering the cumulative effect of the proven deficiencies coupled with the prejudice resulting from them, Mr. Hodges respectfully requests that the order of the trial court denying relief be reversed.

Respectfully submitted,

/s/Robert A. Norgard
ROBERT A. NORGARD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing INITIAL BRIEF has been furnished to the Office of the Attorney General, ASA Charmaine Millsaps at capapp@myfloridalegal.com The Capitol, PL-01, Tallahassee, FL 32399 through e-filing using the portal on this 20th day of October, 2014.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style font used in the preparation of this Initial Brief is Courier New 12-point in compliance with Fla. R. App. P. 9.210.

/s/Robert A. Norgard
ROBERT A. NORGARD
Norgard and Norgard
P.O. Box 811
Bartow, FL 33831
(863)533-8556
Fax (863-533-1334
Norgardlaw@verizon.net

Fla. Bar No. 322059

Counsel for Appellant