IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 15-1276
L.T. 16-2003-CF-010182-AXXX

PAUL DUROUSSEAU

Appellant

v.

STATE OF FLORIDA

Appellee

On Appeal from the Circuit Court for the
Fourth Judicial Circuit, Duval County, Florida
Hon. Jack Schemer, Circuit Court Judge

INITIAL BRIEF OF APPELLANT

Richard Kuritz
Florida Bar No. 972540
Attorney for Appellant
200 East Forsyth St.
Jacksonville, FL 32202
Ph. 904-355-1999
e-mail: jaxlaw1999@aol.com

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PRELIMINARY STATEMENT

Citations directed toward the Record on Appeal shall be designated as (____R___). References to the trial transcript shall be designated as (___ Tr.____)

STATEMENT OF FACTS AND THE CASE

Durousseau was tried by jury May 21 -June 8, 2007. His defense was that he did not kill Mack and the state failed to find the real killer by focusing solely on evidence of sexual activity, on the assumption that sexual activity was linked to Mack's death.

After deliberating nine and a half hours, the jury found Durousseau guilty as charged, finding the murder was committed during a robbery and sexual battery. 36 Tr. 3125-3140, 8 Tr. 1418.

A penalty phase proceeding was held June 26-28, 2007. The jury recommended that Durousseau be sentenced to death by a vote of 10 to 2. 8 Tr. 1550.

The court held a Spencer hearing on August 2, 2007, which the defense presented additional testimony and evidence. 16 Tr. 3865-3935. The court also denied appellant's motion for new trial.

On December 19, 2007, the trial judge imposed the death sentence. 9 Tr. 1577-1581. The judge found four aggravating factors: prior violent felony; heinous, atrocious, and cruel; committed during a sexual battery; and pecuniary gain. In mitigation, the judge found and gave weight to the following factors: (l) the defendant was raised in a broken home; (2) the defendant was raised without the benefit of his natural father and lost the love and support of his stepfather at an early age, (3) the defendant grew up in poverty and came from a deprived background, (4) the defendant was raised in a very violent neighborhood and was exposed to violence and the threat of violence to his person on a daily basis, (5) the defendant personally witnessed his stepfather physically abuse his mother, (6) the defendant was disciplined by being beaten as a child, (7) the defendant has worked continuously through his adult life, (8) the defendant enlisted and served in the United States Army for approximately six years, (9) the defendant has supported his two children, Jasmine and Teresa, and was a loving and caring father,(10) the defendant has been a loving and respectful son to his mother, Debra Paige, and cared for her during several periods of illness and incapacitation, (l l) the defendant has been a good brother to his siblings and to other family members, helping to care and watch over his cousins, Edward and Matthew, (12) the defendant saved his cousin's life and his

brother's life, (13) the defendant has the support of family and friends who continue to love him, (14) the defendant has alcohol abuse issues on both his mother and father's side of his family, yet the defendant has never abused either alcohol or illegal drugs, (15) society can be protected by a life sentence without parole, (16) the defendant has exhibited good behavior during the trial of this cause, (17) the defendant has diffuse brain damage, including frontal lobe damage, and is in the borderline range of intellectual functioning, (18) the defendant has thyroid disease (hypothyroidism), which can be damaging to a developing brain, (19) defendant has anemia, which can sometimes prevent sufficient oxygen from reaching the brain, causing brain damage. 9 Tr. 1583-1610

On October 1, 2012, Defendant filed a Motion for Post Conviction Relief to Vacate Judgments of Convictions and Sentences Under Rule 3.850/3.851. (1 R 108-150) An evidentiary hearing was held on April 9 and 10, 2015 on the issue of whether Defendant had effective assistance of counsel (4-5 R 498-712) The specific issue presented at the hearing was whether the defense counsel conducted a meaningful voir dire and whether she adequately screened jurors who may have had a predisposition to impose the death penalty.

Defendant presented two expert witnesses, one attorney (4 R 505-551) and one psychologist (4 R 553-605), whose testimony centered on the

issues of whether the voir dire was adequate when it did not go to any extent into the elements of mitigation and aggravation which would influence the jurors in their deliberations, and which did not focus on individualized questioning of the jurors as opposed to collective questioning.

The State presented only the trial attorney, Ann Finnell, who testified that her primary strategy was to have the Defendant acquitted at trial rather than raise too many issues regarding the death penalty factors, and that she believed that she adequately conducted the voir dire in view of the questioning by herself, the Judge, and the State's attorney. (4-5 R 608-711)

Following written closing arguments (3 R 403-442), the trial court denied Defendant's Motion, citing a number of grounds. Defendant has filed a timely appeal from this denial of the Motion.

SUMMARY OF THE ARGUMENT

ISSUE ONE: Counsel for Defendant was constitutionally ineffective in her representation of the Defendant in that she failed to adequately inquire of the jurors their attitudes towards the aggravating and mitigating factors affecting imposition of the death penalty. She admitted to be primarily concerned with the

"guilt" portion of the trial, and neglected to go into any depth with the jury panel as to their deeply set attitudes towards the death penalty. She did little to root out ADP jurors with her generalized questions. Defendant's expert witnesses testified at the hearing regarding the need to "front load" questions regarding mitigating and aggravating factors to elicit the true feelings of the jurors regarding the death penalty. This includes inquiring of the jurors their attitudes towards specific factors, not just generally asking the jurors whether they would generally consider aggravating and mitigating factors. The failure to do so in this case constituted malpractice, according to Defendant's expert, and constitutionally ineffective assistance of counsel.

ISSUE TWO: Counsel was also deficient in asking collective questions of the jurors, many of which were not answered, rather than individualizing the questions. Individualizing the questions forces the jurors to give their true feelings rather than just conform to what they believe is the accepted opinion by the group. According to Defendant's expert, it is far better to ask open-ended questions of the jurors than to simply ask them whether they agree or disagree with a certain proposition. The lack of such questioning leads to conformity and an incomplete picture of the jury.

ISSUE THREE: Defense counsel provided ineffective assistance by failing to use all of her peremptory challenges, failing to preserve objections to the jury

panel, and failing to adequately inquire into jurors who presented red flags. These included evidence of pre-trial publicity, strong support of the death penalty, and friends or family who had been killed. Such failure to follow up in any depth with these jurors led, once again, to an incomplete picture of their attitudes and whether they could render a fair and impartial verdict and sentence recommendation.

ARGUMENT

I. COUNSEL WAS DEFICIENT IN FAILING TO CONDUCT A MEANINGFUL JURY SELECTION BY NOT EFFECTIVELY ELICITING JUROR ATTITUDES TOWARDS MITIGATING FACTORS

A. Background

State Law

Florida Rule of Criminal Procedure 3.300(b) provides for an oral voir dire examination of prospective jurors by counsel. The scope of meaningful voir dire which will satisfy the constitutional imperative of a fair and impartial jury depends on the issues in the case to be tried. Voir dire should be so varied and elaborated as the circumstances surrounding the juror under examination in relation to the case on trial would seem to require.... Lavado v. State, 469 So.2d 917 (Fla 3d DCA 1985). Where a juror's attitude about a particular legal doctrine is essential to a determination of whether challenges for cause or peremptory challenges are to

be made, the scope of voir dire properly includes questions about and references to that legal doctrine. Id. (citations omitted).

In Lavado, supra, the trial court advised defense counsel that it was "not proper on a jury selection to go into law," and permitted counsel only to ask general questions about the ability to follow the court's instructions. Id. at 1322. Quoting the dissenting judge in the court of appeal opinion, the supreme court said that "[i]f he knew nothing else about the prospective jurors, the single thing that defense counsel needed to know was whether the prospective jurors could fairly and impartially consider the defense Id. (citation omitted). It therefore reversed the conviction.

Similarly, in Helton v. State, 719 So.2d 928 (3rd DCA 1998), the court held that it was error to preclude defense counsel from questioning the venire with respect to its understanding of the defense. Id. at 930. The court therefore reversed and remanded, noting that "defense counsel must be allowed the latitude to make sufficient inquiry into jurors' attitudes toward the defense." Id.

In Walker v. State, 724 So.2d 1232 (4th DCA 1999), the court held it was an abuse of discretion to preclude defense counsel from fully inquiring of the jurors as to both their understanding of, and their opinions about, the defense of entrapment.

In Lavado, supra, the court would not permit inquiry into voluntary intoxication. 495 So.2d at 1322. In Mosely v. state, 842 So.2d 279 (3 rd DCA 2003), the trial court prohibited questions about the defense of misidentification. These cases make clear that limitations on questioning about a specific recognized defense are clearly improper.

In Ingrassia v. State, 902 So.2d 357 (4th DCA 2005), the court precluded defense counsel from questioning the jury about the defendant's alleged recanted confession. Id. The trial court evidently believed that defense counsel was improperly "pre-trying" his case and would not permit inquiry into juror bias on the subject of recanted statements. Id. Similarly, in Perry v. State, 675 So.2d 976 (4 th DCA 2006), the court held that restricting inquiry into whether a confession could be false was an abuse of discretion. Id. at 979.

In Moses v. State, 535 So.2d 350 (4th DCA 1988), the court reversed because the trial court restricted defense counsel's questioning about the defendant's status as a convicted felon.

Finding no distinction between questions about legal doctrine and questions designed to undercover bias, the court held that "a defendant must be permitted to conduct a 'meaningful' voir dire and what constitutes a meaningful voir dire varies with each case.' Id. at 351. Thus, the inquiry of counsel may include questions regarding the defense, or questions designed to uncover bias in favor of the state's

view of the evidence. ("[T]he right to inquiry as to bias, . .is not limited to. ..an 'affirmative defense', but is equally applicable to questioning designed to uncover potential bias on a matter critical to the defense of the case." Ingrassia, supra, 902 So. 2d at 359.

In Mosely v. State, supra, 842 So.2d 279, the court held that the trial court cannot preclude the defense from exploring critical issues, even if those areas are covered by the trial court's questioning. "[T]he trial court cannot question prospective jurors on critical areas such as the presumption of innocence, burden of proof, and the right to silence, and then preclude counsel from further individual examination under the guise that it would be repetitive". Id. at 280 (citations omitted). See Ramirez v. State, 90 So.2d 332 (3 rd DCA 2005) (trial court's admonition to counsel not to talk about "reasonable doubt, burden of proof, and all that stuff' before jury selection improper).

In Miller v. State, 683 So.2d 600 (2nd DCA 1996), the court noted that prospective jurors do not respond in the same way to inquiry by a judge as they do to questions by defense counsel. Id., at 600-601. For this reason, the court may not cover "the most important areas of inquiry and then forbid... defense counsel from further exploration." Miller v. State, 785 So.2d 662, 664 (3 rd DCA 2001). Thus, when a trial judge chooses to question potential jurors extensively, it should not do it in such a way as to impair counsel's right and duty to question the venire.

Id.,, at 664. That duty includes questioning on "core issues," such as the presumption of innocence, burden of proof, and right to silence. Id. at 662, 665.

As stated by Judge Fulmer of the Second District, "lack of adequate voir dire can infringe on the accused's constitutionally guaranteed right to a fair and impartial jury. Jurors' attitude about a legal doctrine or law can be essential in a particular case to a determination of whether challenges for cause or preemptory challenges should be made. The scope of voir dire properly includes questions about and references to such legal doctrines." Nicholson v. State, 639 So.2d 1027 (2 nd DCA 1994) (citations omitted).

In the present case, questions about the juror's views regarding mitigation are proper under state law. Questions concerning the types of mitigation which the prospective jurors may consider and give effect are analogous to questions concerning a "legal doctrine" and questions regarding a "defense" to the death penalty. Moreover, the fact that the Court may choose to ask some of those questions, cannot preclude defense counsel from exploring those topics. As in Ingrassia, supra, so long as the defense is not asking what specific weight the prospective jurors will give mitigation, he is not improperly "pre-trying the case, „ but rather is fulfilling his right and duty to question the venire about the significant issue in the trial — the death penalty.

Federal Law

In Witherspoon v. Illinois, 391 U.S. 510 (1968), the Supreme Court held that venire persons who have qualms about the death penalty in general, and who might be inclined to oppose it, but who can put aside their reservations in a particular case and consider the death penalty according to relevant state law, may not be precluded from serving on a capital case. Id. at 519-23.

Witherspoon made clear that mere hesitation to impose the death penalty should not preclude a venire person from sitting on a capital jury, and that the state may not exclude people with reservations from serving. Were the rule otherwise, said the Court, a death qualified jury would be made up only of those "uncommonly willing to condemn a man to die." Id. at 521.

In Wainright v. Witt, 469 U.S. 412 (1985), the Court explained that those with absolutist views, however, that is, those who would either always or never vote for the death penalty, regardless of the facts in aggravation or mitigation, can be excluded from capital jury service. Id. at 424. Thus, if a juror's views "would prevent or substantially impair the performance of their duties as a juror," the juror may be excluded. Id.

In Penry v. Lynaugh, 492 U.S. 302 (1989), the Court started to discuss the subtleties of "reverse — Witherspoon," as applied to mitigation. Justice O'Connor many times framed the issue in terms of whether, inters alia, the jury was properly

instructed that it could "consider and give effect" to Penry's mitigating evidence. In the first sentence of the opinion, she wrote for the Court, "[i]n this case, we must decide whether petitioner, Johnny Paul Penry, was sentenced to death in violation of the Eighth Amendment because the jury was not instructed that it could consider and give effect to his mitigating evidence in imposing its sentence." Id. at 302.

Later, she wrote that:

> "[w]e granted certiorari to resolve two questions. First, was Penry sentenced to death in violation of the Eighth Amendment because the jury was not adequately instructed to take into consideration all of his mitigating evidence and because the terms in the Texas special issues were not defined in such a way that the jury could consider and give effect to his mitigating evidence in answering them?" Id. at 313.

The Court noted Penry's argument was that "the jury was unable to fully consider and give effect to mitigating evidence.. .," Id. at 3 15, that is, that "the jury was unable to fully consider and give effect to the evidence of his mental retardation and abused background…." Id.

After reviewing Eddings v. Okalahoma, 455 U.S. 104 (1982) ("just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence"), and Lockett v. Ohio, 438 U.S. 586 (1978) (the

sentencer may "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"), the Court clearly stated that capital defendants have the right, not just to present mitigating evidence, but to have the sentencer consider and give effect to mitigation.

> Moreover, Eddings makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. Only then can we be sure that the sentencer has treated the defendant as a 'uniquely individual human bein[g]' and has made a reliable determination that death is the appropriate sentence Penry at 319. (Citations omitted).

"[T]he jury was never instructed that it could consider the evidence offered by Penry as mitigating evidence, and that it could give effect to that evidence in imposing sentence." Id. at 320. Because "the right to have sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration," the Court remanded for a new sentencing hearing. Id. at 321. (Citations omitted).

In rejecting the state's argument that such a rule would lead to unbridled discretion, the Court pointedly stated that:

> [I]t is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a reasoned moral response to the defendant's background, character, and crime. In order to ensure reliability in the determination that death is the appropriate punishment in a specific case, the jury must be able to consider and give effect to any mitigating evidence Id., 327-328. (Citations omitted and emphasis added).

In Morgan v. Illinois, 504 U.S. 719 (1992), the Court discussed the interplay between the Witherspoon/Witt standard, and the requirement that prospective jurors be able to give "consideration and effect" to mitigation under Eddings and Penry. After reiterating the general rule that "jurors who will automatically vote for the death penalty in every case must be disqualified from service because their presence on the jury would violate the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment," Id. at 729 (quotations omitted), the Court discussed how it is to be determined that the prospective jurors are qualified or unqualified. The Court found that the right to an impartial jury cannot be secured without "an adequate voir dire to identify unqualified jurors." Id. An adequate voir dire includes more than "general fairness and follow the law questions," because:

> A juror could in good conscience swear to uphold the law and yet be unaware that [underlying] dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on trial for his life must be permitted on voir dire to ascertain whether his propective jurors function under such misconception. Id. at 734-36. (Footnote omitted).

> The Court noted that without adequate voir dire, "the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. Id. at 730. Thus, despite the standard of deference which trial judges get in non-capital cases, the Court has "not hesitated, particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections."

A juror to whom "the presence or absence of aggravating or mitigating circumstances is . . irrelevant" may not sit on a capital jury.

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. Id. at 729.

In other words, jurors who will fail to consider and give effect to mitigation "by definition are ones who cannot perform their duties in accordance with law,

their protestations to the contrary notwithstanding." Id. at 735. This is true because:

> [s]uch jurors obviously deem mitigation evidence to be irrelevant to their decision to impose the death penalty: they not only refuse to give such evidence any weight, but are also plainly saying that mitigating evidence is not worth their consideration, and they will not consider it.
> Id. at 735-36.

Under the Illinois statute at issue in Morgan, like Florida statute 921.141, a sentence of life in prison is available "in every case where mitigating evidence exists; thus any juror who would invariably impose the death penalty. . . [or who would] not give mitigating evidence the consideration the statute contemplates" is unfit to serve. Id. at 738.

Thus, Morgan "indicates that a broad range of mitigation-impaired jurors are constitutionally unqualified." See Blume, et.al, supra, at 1217. This "class of mitigation-impaired — and constitutionally unqualified — jurors include not only those who are unable or unwilling to ever consider any form of mitigation, but also those who are unable or unwilling to ever consider a particular mitigating factor." Id'2 (emphasis in original). As pointed out by Justice Scalia, "it is impossible.. .to distinguish between a juror who does not believe that any factor can be mitigating from one who believes that a particular factor.. .is not

mitigating. Id., at 744, n..3 (Scalia J., dissenting) (citations omitted, emphasis in original).

B. The Reality of Capital Jury Composition

1. ADP Jurors

Data from many sources have shown that "the starkest failure of capital voir dire is the qualifications of jurors who will automatically impose the death penalty (ADP jurors) regardless of individual circumstances of the case." (See Blume, et. al, supra, at 1220, listing data from several death penalty states, and finding that "Jurors [in those states] behave much like jurors in other states." Id. at 1220, n. 53).

An even larger problem is that a "majority of capital jurors believe that if certain aggravating circumstances are present then death is the only acceptable punishment." Blume, "Lessons from the Capital Jury Project, " in The Modern Machinery of Death: Capital Punishment and the American Future (2001). Substantial minorities of jurors believe that they are required to impose a death sentence if the defendant's conduct was heinous, vile, or depraved, or if they found dangerousness. See Eisenberg, Garvey, and Wells, Jury Responsibility in Capital Sentencing: An Empirical Study, 44 BUFF. L. Rev. 339 (1996); Bowers,

The Capital Jury Project.' Rationale, Design, and Preview of Early Findings, 70 IND.

L. J. 1043, 1091, n. 32 (1995). One Florida study of death penalty jurors found a significant of jurors believed that the death penalty was mandatory or presumed for first degree murder. Geimer and Amsterdam, Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Trials, 15 AM. J. CRIM. L.

10989).

> A significant number of jurors in death penalty cases believed that the death penalty was mandatory or presumed for first degree murder. In the death recommendation cases, over half of the jurors believed that death was to be the punishment for first degree murder, or at least that death was to be presumed appropriate unless the defendant could persuade the jury otherwise.

This data is consistent with other studies. "Astonishingly, more than half of the jurors said that they personally felt death is the only appropriate punishment for.. ….premeditated murder and multiple murders." Bowers, Sandys, and Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Attitudes, and Decision Making,* 83 CORNELL L. REV. 1476, 1504 (1998). "A substantial percentage of jurors believed the death penalty is the only appropriate punishment for convicted murderers." Garvey, the Emotional Economy of Capital Sentencing, 75 N.Y.L. SCH. L. REV. 26, 38 (2000). "There appears to be a presumption that

clear unequivocal proof of guilt justifies the death penalty." Bowers, Sandys, and Steiner, supra 83 CORNELL L. REV. at 1497-98.

This "presumption of death" is based on data suggesting that "the sentencing phase of capital trial commences with a substantial bias in favor of death.' ,Eisenberg, Garvey, and Wells, Deadly Confusion: Juror Instructions in Capital cases, 79 CORNELL L. REV. 1, 38, n. 12 (1992). Amazing, "[w]hen jurors report pre-deliberation indecision about either guilt or sentence, the undecided jurors tend to vote for death." Id. at 13.

2. Mitigation-Impaired Jurors

As noted above, a qualified capital juror must be able to consider and give effect to mitigating evidence. See Morgan, supra, at 728-29. Data from the Capital Jury Project demonstrates, however, that a substantial number of empanelled capital jurors are mitigation impaired, in that they are "unable or unwilling to consider particular mitigating factors and thus, constitutionally unqualified." Blume, et.al, supra, Probing Life Qualification, at 1228-29. "For most of these jurors, the problem is not that they are unable to consider any form of mitigation, but that they are unable to consider certain forms of mitigation." Id at 1229. Unfortunately, "classically mitigating factors are not seen as mitigating by substantial numbers — often heavy majorities of actual jurors…." Id.

For example, despite the fact that intoxication by drugs and alcohol is, in

almost every state, a statutory mitigating circumstance, to many jurors it is actually aggravating. Id. See also Garvey, Aggravating and Mitigation in Capital Cases: What do Jurors Think? 98 COLUMBIA L. REV. 1538 (1998). Research has also shown that absence of a prior record, well behaved inmate, youth, and even serious abuse are not considered mitigating by a majority of jurors. Id. Even having a history of mental illness is viewed by a substantial minority of jurors as not being mitigating. Given the conflict between the law on mitigation and the weighing process on the one hand and the juror's actual views on the other, extensive voir dire on mitigation is extremely important.

3. The Processing Effect

In voir dire, jurors are repeatedly asked if they can follow the law and impose a sentence of death. "Although this question on its face inquires into a juror's capacity to return a death sentence, jurors are likely to infer that a death verdict is required by the law, at least under some, as yet unspecified, circumstances." See Blume, supra at 1231 (emphasis added in original). As stated by one commentator, "it gets the juror to think "Oh, I get it. They're asking me if I can kill this guy. Yeah, I'll do that if that's what I'm supposed to do." Id. Or, put another way,

> [D]eath qualification may come to resemble a kind of "obedience drill" in which jurors feel they are voluntarily relinquishing the power to deviate from the outcome "the law" seems to favor. [T]he personal characteristics of death-qualified jurors render them especially receptive to

> arguments that they must follow the implicit "promise" made to the court.

Haney, " Violence and the Capital July.' Mechanisms of Moral Disengagement and the Impulse to Condemn to Death, " 49 STAN. L. REV. 1447, 1482 (1997).

Not only does the death qualification process produce juries predisposed to convict, see Cowan, et. al, "The Effects of Death Qualification on Jurors , Predisposition to Convict and on the Quality of Deliberation, " 8 Law and Human Behavior, 53, 55-75 (1984), but the process also makes jurors assume that the defendant should be sentenced to death.

> Exposure to the death penalty qualification process makes a juror more likely to assume the defendant will be convicted and sentenced to death; more likely to assume that the law disapproves of persons who oppose the death penalty; more likely to assume that the judge, prosecutor, and defense attorney all believe the defendant is guilty and will be sentenced to die; and more likely to believe the defendant deserves the death penalty.

Blume, et. al, supra, at 1232.

This processing effect begins at the inception of jury selection, when "the judge's initial questioning, rather than illuminating the juror's beliefs, often suggests desired answers." Id. at 1233. Inasmuch as many jurors are intimidated by the unfamiliar and formal setting of the courtroom or anteroom, "they are subject to subconscious pressure to respond to the authority figure — the judge —

by replying in conformity to what [they believe] their answer should be." Blume, et. al, supra, at 1233-34; See also Miller v. State, supra, 683 So.2d at 600-601 (noting that jurors do not respond the same way to inquiry by a judge as they do to counsel).

As noted by many commentators and courts, as well as the Supreme Court, the fact that the jurors are under oath does not mean that their answers will be reliable. That assumption "blithely ignores the psychological dynamics at play — and the invisible but lethal currents of prejudice latent in the venire." Blume, et. al, supra, citing A.B.A. Guidelines (1989); See Geimer, "Death at Any Cost: A Critique of the Supreme Court's Recent Retreat from It's Death Penalty Standards," 12 FLA. ST. U. L. REV. 737 779 (1984); see also Gold, "Voire Dire: Questioning Prospective Jurors on Their Ability to Follow the Law," 60 IND. L. J. 163, 178 (1984); Morgan, supra, 504 U.S. at 734-736. As sharply stated by one commentator, a typical judge's idea of voir dire is to simply ask the prospective juror whether he can be fair, "even though Adolph Hitler himself would have answered that question in the affirmative." Garry, "Attacking Racism in Court Before Trial," in Minimizing Racism in Jury Trials, XXII (Ann Fagan Ginger ed. 1969). Thus, even though data shows that ADP jurors are "in reality abundant on capital juries," Blume, et. al, at 1237, it is uncommon to hear a juror admit to being excludable, especially after the prosecutor's attempt at rehabilitation.

Blume, supra, at 1237. See also Dees, "The Death of Voir Dire " 20 Litig, 14 n. I (1993) ("Put simply prospective jurors lie. Put more generously, jurors give socially acceptable answers.") Moreover, given the fact that the juror may not be aware of his or her own biases, see Morgan, supra, at 734-736, and the "unassailable truth that direct and general inquiries about juror bias cannot be expected to uncover all forms of partiality," see People v. Williams, 628 P. 20 869, 873 (Cal. 1981), a "restrictive and wooden approach to voir dire is unsupportable." Id. The bottom line is that, in light of the Supreme Court's statement in Morgan that the jurors must be able to consider and give effect to mitigation, the trial court must make efforts to avoid the psychological insinuation in "the assumption that death is the optimal outcome." Blume, et. al, supra, at 1238.

Accordingly, "neutral, non-suggestive questioning by the judge is essential,' as is the opportunity for detailed follow-up questioning by defense counsel. Blume, supra, at 1247 (citing Bush, "The Case for Expansive Voir Dire, 2 Law and Psychol. Rev. 9, 12-14 and n. 14 (1976). This is true because "the structure of the questioning process encourages ADP jurors, in particular, to describe their beliefs inaccurately." Blume, supra, at 148. Instead, the judge can and should begin the inquiry by asking open ended questions such as "How would you describe your attitude toward the death penalty?" "How do you feel about the death penalty?" and "When, if ever, do you think the death penalty is

appropriate?" Given the wealth of data on the effect of suggestive questioning, and the fact that the Court is the authority figure in the courtroom, this way of questioning is not only wise, but is destined to lead to significantly more candid responses.

Similarly, the Court should attempt to avoid phrases that imply to the prospective jurors that their task is to sentence the defendant to death. As stated by one learned judge:

> In a typical death qualifying voir dire, the judge and the attorney repeatedly instruct the jurors about the steps leading to the penalty trial and question each prospective juror, oftentimes at considerable length, concerning his or her attitudes about capital punishment. These repeated displays of concern about the death penalty before any evidence of guilt has been presented may prompt the jurors to infer that the court and counsel assume the penalty trial will occur.

Howe. v. Superior Court, 616 P.2d 1301, 1348 (Cal. 1980), superseded by statute. It is a small leap to go from belief that the penalty phase will occur to belief that "the judge, prosecutor, and defense attorney all believe the defendant is guilty and will be sentenced to die. Blume, supra, at 1232.

Given the unavoidable necessity when there is but one trial jury of discussing the penalty phase before the defendant has been convicted, it seems only fair to ask the court to use language that speaks in the alternative about the penalties that might be imposed.

> Thus, rather than describing the bifurcation of the trial as first deciding whether the defendant is guilty and then deciding whether to impose the death penalty, a judge should refer to deciding whether the defendant is guilty or innocent, and if she is found guilty, then deciding whether to sentence him to death or to life imprisonment.
>
> Or, to take another example, the judge should not ask a juror whether she can follow the law and impose the death penalty, but whether she can follow the law and impose the appropriate sentence, either death or life imprisonment as the case may be.

Blume, supra, at 1251.

In this way, the Court can limit some of the most blatant consequences of the "processing effect," and can attempt to avoid "entrust[ing] the determination of whether a man should live or die to a tribunal organized to return a verdict of death." Witherspoon, supra, 391 U.S. at 520-523.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversary testing process. Id., at 688. Specifically, counsel has a duty to investigate in order to make the adversarial testing process work in the particular case. Id at 690."An ineffective assistance of counsel claim has two components: A petitioner must show that counsel[]s performance was deficient and that the deficiency prejudiced the defense.

To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 687-688, 104 Sup. Ct. 2052, 80 L.Ed.2d 674 (1984) (internal citations omitted). Prejudice is defined as "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."ld. at 694.

"The right to a jury trial guarantees the criminal accused a fair trial by a panel of impartial, indifferent jurors." Irvin v. Dowd, 366 U.S. 717,722 (1961).

B. Defense Counsel's Deficiencies in the Voir Dire in this Case Relating to the Imposition of the Death Penalty and Aggravating and Mitigating Factors

Defense counsel repeatedly asked the jurors if they could follow the law but never discussed with the jury that under the law they "are never compelled nor required to recommend a sentence of death."

Defense Counsel never advised the jury that even in the absence of mitigating factors they are still "are never compelled nor required to recommend a sentence of death." Counsel never advised the jury that even in the total absence of mitigating factors they "may recommend a sentence of death" but are not required to recommend a death sentence. Morgan v Illinois, 504 U.S.719 (1992).

Defense counsel was ineffective for failing to advise the jury that the only thing that is mandatory in a death case is that they "MUST recommend an imposition of a life sentence" if no aggravators are proven or even if an aggravator is proven the aggravating factors are not sufficient.

Defendant's expert witness, Terrence Lenamon,, a licensed Florida attorney who had tried twelve death penalty cases in Florida since 2013, with a high rate of success, who had written and lectured extensively on jury selection in capital cases, and who had founded the Florida Capital Resources Center, specializing in providing education and resources in regard to capital cases.

Lenamon discussed the "Colorado method" of voir dire, a method widely endorsed by capital case practitioners and used on a national level. Under the Colorado method, according to Lenamon, it is important to ask "front loading" questions regarding the statutory aggravating and mitigating factors in capital cases to guage the jurors' true attitudes towards the death penalty. Both the factors themselves and the weight jurors give to such factors needs to be determined.

Lenamon opined that it was malpractice for defense counsel not to discuss aggravating factors with all the jurors. Since Florida, like Colorado, has specific aggravating and mitigating factors to be considered, the Colorado method, according to Lenamon, is equally applicable to Florida attorneys.

Further, according to Lenamon, it is very important to ask "open-ended" questions to the jurors to cause them to reveal their true feelings about the death penalty. This will avoid the "restrictive and wooden approach to voir dire, which has been found to be unsupportable in cases such as People v Williams, 628 P. 2d 869, 873 (Calif. 1981)

Lenamon's testimony is in accord with the learned opinions of Blume, Johnson, ad Threlkeld, *Probing Life Qualification Through Expanded Voir Dire*, 29 Hofstra Law Review 1209 (2001). Such questioning encourages Automatic Death Penalty (ADP) jurors to express their true feelings and leads to more candid responses.

In light of this standard, Counsel was ineffective at voir dire when asking the jury about their consideration of mitigation. Counsel asked if the jury could weigh mitigating circumstances against aggravating circumstances but never once discussed what a mitigating circumstance is.

Defense counsel was deficient in failing to ask if the jurors could consider brain damage as a potential mitigator. Defense counsel did not discuss with the jury what mitigation is and that mitigation is not an "excuse". It is well settled that a juror who states they can't consider mitigation is subject to a challenge for cause. Morgan v Illinois, 504 U.S. 719 (1992).

Defense counsel did not ask the panel any questions at all about any specific mitigation that they would accept or reject. It is unknown what specific mitigation would be considered or ignored by the jury as a whole because the question was never posed.

Defense counsel did not even ask about what particular aggravating circumstances would be such that the jurors would automatically vote for death. For instance, some jurors may feel the death penalty should automatically be given in a case in which the victim was a police officer, a baby killer, multiple victims or where the allegations were particularly brutal or involved torture. This was a case wherein the State would offer evidence of multiple victims. Defense counsel did not ask that based on that allegation alone they could not sit and be fair and impartial.

Several jurors stated that they would view the pregnancy of the victims presented under the *Williams* rule as a decisive factor in imposing the death penalty. (22 Tr. 502, 509, 549, 23 Tr. 631,636) Although cautionary instruction were given, the followup on this was cursory at best, with defense counsel seemingly wishing to avoid this topic rather than weed out jurors who may have the same feelings.

Defense counsel did not ask why the jurors were for or against the death penalty, whether it was due to economic reasons, eye for an eye, philosophical reasons, religious reasons etc. . Certain jurors may be more easily swayed than others depending on their reasons for their position. It may be easier to sway a juror who is against the death penalty due to economic reasons than it would be for a juror whose religious beliefs are against the death penalty.

Defense Counsel did not ask if any of the jurors were in favor of the death penalty for crimes other than first degree murder. Defense counsel did not ask all of the jurors what their feelings were on the death penalty on a scale of 1-5 or 1-10 so effectively asses how strongly a juror felt about the death penalty. Defense counsel failed to ask if they could consider mercy. All of these questions would have led to defense counsel, and the client being able to make intelligent fully informed decisions on what jurors to strike and what jurors to keep for the panel.

This was particularly the case in light of the fact that the vast majority of the jury panel was in favor of the death penalty, with only a few opposed. Some of those few opposed were challenged and excused for cause. Of the ones remaining, it was imperative to search into the jurors' minds to discover what aggravating factors and what mitigating factors might come into play in their ultimate decision whether or not to impose the death penalty.

Attorney Finnel testified that, based on her client's wishes, she was picking jurors primarily for the guilt phase rather than focusing on the penalty phase (4 R 664). It is submitted that it is not possible to pick for "guilt" only, as the ADP juror, according to research, is much more likely to find a Defendant guilty. Thus, the picking of jurors for the guilt phase cannot be logically separated from the picking of jurors for the penalty phase.

In summary, Ms. Finnell's voir dire was seriously lacking in individualized questioning designed to elicit the jurors' deep-seated feelings about aggravating and mitigating factors in deciding on Defendant's sentence. The Supreme Court in Penry v. Lynaugh, 492 U.S. 302 (1989) made clear the importance of a jury's proper consideration of mitigating and aggravating factors in their deliberations. In light of Penry and cases following Penry an attorney's failure to emphasize such factors in his or her voir dire any meaningful way has, ipso facto, rendered ineffective assistance of counsel. The prejudicial effect of such failure is obvious.

II. DEFENSE COUNSEL WAS INEFFECTIVE IN ASKING PRIMARILY COLLECTIVE QUESTIONS RATHER THAN ELICITING JURORS' INDIVIDUAL OPINIONS.

Defense counsel was ineffective during jury selection in failing to make specific inquiries of the jury panel, instead actually announced that counsel would attempt to primarily ask "collective questions" (22 Tr. 470).

Not only did defense counsel not effectively inquire as to the individual juror's beliefs on the topics, counsel did not even get answers from the panel as to the collective questions posed to the panel.

For example, Ms. Finnell asked the following questions with little or no response and little or no followup:

1. Is there anyone here that thinks — that doesn't think that searching for the truth and finding the truth is the ultimate job of a juror. (22 Tr. 487). Not a single juror answered the question.

2. Is there anyone here who would give it that kind of energy? (22 Tr. 488). Not a single juror answered the question.

3. Ok now you are going to be able to physically---you're going to have to see photographs and exhibits and be able to study them and look at them, is there anybody here who just can't do that, anybody at all. (22 Tr. 488). Only one juror answered the question

Defense counsel continued to ask questions that the jury did even answer, and

counsel was ineffective for asking questions and then not even getting an answers see (22 Tr. 489-490, 496, 519).

According to Defendant's expert witness, Terry Lenamon, extensive individual questioning rather than group questioning is necessary to elicit deeply held juror attitudes. Lenamon expressed his opinion that "group questioning is the biggest failure of the jury system."

Lenamon noted that defense counsel only asked individual questions of jurors who had already self-reported strong feelings about the death penalty on their questionnaire, thus not eliciting information from the jurors whose feelings might have been more hidden, even from themselves. In this respect, Lenamon opined that Ms. Finnell's questioning was "below the standards" for an effective capital case voir dire. (4 R 90-91)

Lenamon concluded that when all jurors are not properly challenged because the attorney didn't ask the right questions, an "incomplete picture" of the jury is the result. As a consequence, the information on which to base the jury strikes will also be incomplete.

Defendant's other expert witness, Brook Butler, a psychologist with a Ph.D. in psychology and specializing in issues relating to jury selection in capital murder cases, went through the jury selection transcripts of this case, the supplemental jury questionnaire appellate briefs in the case, and background information concerning pre-trial publicity.

Ms. Butler testified that group questioning played into the jurors' tendency to conformity and that individual questioning of the jurors led to a better understanding of the jurors' true feelings about the death penalty. Sequestering individual jurors is frequently necessary to inquire into their true feelings without being influenced by the group.

She testified further that open-ended questions with front-loaded mitigating and aggravating factors is the professional standard in death penalty cases. It is important to let the jurors do most of the talking and to explore what mitigating factors each juror will be receptive to.

A fair reading of the voir dire leads to the conclusion that Ms. Finnell did not do much individualized questioning but primarily collective questioning. She admitted as such at the hearing. It was only those with blatant red flags that counsel went into any depth with individualized questioning. So, there was no real way for her to elicit the true feelings of a majority of the jurors who weren't questioned in depth towards the death penalty and the statutory aggravating and mitigating factors affecting its imposition.

Ms. Butler opined that there wasn't sufficient questioning by Ms. Finnell to "exercise her challenges in an informed way." (4 R 544) Her collective questioning without significant individualized questioning of particular jurors made it impossible to determine which jurors should remain on the panel and

which should be excused. In a death penalty case, this deficiency was highly significant and highly prejudicial, and constituted ineffective assistance of counsel under the Strickland v. Washington standards..

II. DEFENSE COUNSEL'S REPRESENTATION WAS INEFFECTIVE IN THAT SHE FAILED TO PROPERLY QUESTION, CHALLENGE, OR EXCUSE JURORS WHO PRESENTED RED FLAGS.

Counsel was deficient in failing to exhaust all peremptory challenges, requesting more and then preserving the objections made by refusing to accept the panel, or only accepting the panel pursuant to all objections made during the jury selection process. Failing to do so effectively waived any and all objection and errors committed during jury selection.

Defense counsel was ineffective by no thoroughly inquiring of Juror Norie. The Trial Court advised that he received a telephone call from a local attorney, Mr. Ken Norie, the husband of the potential juror Ms. Norie. The court advised that the judge's son was beginning work and the law firm of the husband of one of the potential jurors. (20 R 62). Not only does counsel not inquire further into this; she congratulates the judge. (20 R 63). When allowed to individually inquire defense counsel fails to ask a single question on the topic. The juror advised that she had been exposed to publicity related to the case but defense counsel failed to

effectively inquire as to the juror's knowledge. During the Court inquiry said juror advised that "it's a cab driver and they are trying to related two different situations on the news". (20 R 63). Defense counsel never inquired as to the details of the "two different situations". What two different situations was the juror referring to? Defense counsel never even inquired if she could set aside what she heard, defense counsel never inquired as to whether the juror believed the defendant to be guilty of either of the "two situations".

Juror Norie further answered that she possibly knew one of the potential witnesses and that the juror's sister had been killed. (21 Tr. 389). Defense counsel fails to effectively inquire as the juror's feelings about her sister being killed. Juror Norie testified that she indeed supported the death penalty. (22 Tr. 438). Defense counsel failed to effectively inquire as to juror Norie's support of the death penalty to determine the level of support and involvement in any anti-crime organizations. (22 R 567).

Knowing that Juror Norie had heard about the case in the media, had a sister who was killed, possibly knew a witness in the case, was in favor of the death penalty and whose husband employed the judge's son defense counsel failed to effectively inquire of the juror in an attempt to obtain and/or use a cause challenge, did not even use a peremptory challenge, and allowed Juror Norie to sit in judgment of the defendant. (20 Tr. 65)

Counsel was ineffective by not effectively inquiring of and following up with juror Cummings who testified that she was for the death penalty. (22 Tr. 358). Juror Cummings remained on the jury panel for both the guilt and penalty phase.

Counsel was ineffective by failing to effectively inquire as to Markley's feelings about her friend's killing and whether Markley was a member of any anti-crime or anti-violence organizations. (22 Tr. 408 & 448) Ms. Finnell allowed juror Markley to remain on the panel without an effective interrogation.

In the cases of all three of the above jurors, it is impossible to know whether another juror, not seated, would have been more likely to acquit or not impose the death penalty because counsel simply did not elicit enough information from them to find this out. It is submitted that the rationale in Caratelli v. State, 961 So. 312 (Fla. 1997) does not apply to this situation, where the reason that it is unknown whether another juror would have been better for the defense is directly due to defense counsel's failure to elicit specific information. Based upon what is known, a presumption certainly arises that other jurors may have been better for the defense.

Summary

Even if each individual claim is not sufficient to set aside Mr. Durousseau's convictions, cumulative error in the Court's failure to find that defense counsel's

performance was constitutionally ineffective was reversible error. In considering all aspects of the defense counsel's deficient performance as part of a cumulative analysis, Mr. Durousseau would not have been found guilty of first degree murder and sentenced to death.

CONCLUSION AND RELIEF SOUGHT

Mr. Durousseau requests the following relief, based on the evidentiary hearing establishing the violation of his constitutional rights:

1. That his judgments of convictions and sentences, including his sentences of death, be vacated.
2. That he be granted a new trial, or alternatively, that his death sentence be commuted to life imprisonment.

Respectfully Submitted:

/s/Richard Kuritz
Richard Kuritz
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 3, 2015, a true and correct copy of the foregoing Initial Brief of Appellant was served upon Carlene Emplit, Assistant Attorney General via electronic filing.

/s/Richard Kuritz
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document is in Compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2). This document is submitted in Times New Roman 14 point font.

/s/Richard Kuritz
Attorney for Appellant