IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-1725

JOHN WILLIAM CAMPBELL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF FIFTH JUDICIAL CIRCUIT FOR CITRUS COUNTY, STATE OF FLORIDA
Lower Tribunal No. 2010-CF-1012

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

This is an appeal of the circuit court's denial of John William Campbell's Amended Motion to Vacate Judgment of Conviction and Sentence brought pursuant to Florida Rule of Criminal Procedure 3.851. Given the gravity of the case and the complexity of the issues, Mr. Campbell requests this Court grant oral argument.

STATEMENT OF THE CASE

1. Statement of Facts Pertaining to the Trial Proceedings

On September 16, 2010, John William Campbell was indicted for one count murder in the first degree. R1/41.[1] The case was tried before the Honorable Richard A. Howard in the Fifth Judicial Circuit in Citrus County. Mr. Campbell was represented by Assistant Public Defenders Daniel Lewan, Devon Sharkey and Michael Lamberti throughout the trial proceedings.[2] The guilt phase took place on January 23–25, 2013. After a one-day penalty phase trial on January 29, 2013, the

[1] The record on direct appeal consists of twenty-four (24) volumes. Page references to the record on direct appeal are designated with R[volume number]/[page no]. The postconviction record on appeal is one (1) volume comprising of 2974 pages. Citations to the postconviction record will be cited as PC/[page number].

[2] Daniel Lewan retired on July 21, 2012 at which time Devon Sharkey replaced him.

jury recommended death by a vote of eight (8) to four (4).[3] R20/324-30. A *Spencer*[4] hearing was held on February 7, 2013. R21/59-81. The trial court imposed the death sentence on March 19, 2013. R21/82-129.

The trial court gave "great weight" to four statutory aggravating circumstances: 1) the defendant was previously convicted of another felony involving the use of or threat of violence; 2) the murder was committed for pecuniary gain; 3) it was heinous, atrocious, or cruel; and 4) cold, calculated and premeditated. The court found two statutory mitigating factors and gave them "little weight": 1) the crime was committed while the defendant was under the influence of extreme mental or emotional disturbance and 2) defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Four non-statutory mitigators were found and also given little weight: 1) family history of depression and difficult childhood; 2) extensive history of drug abuse; 3) depression from the loss of a job and from his relationship with his father; and 4) remorse for the crime.

A timely notice of appeal was filed to the Florida Supreme Court on April 18,

[3] The underlying facts presented at the guilt and penalty phase trials are summarized by this Court in *Campbell v. State*, 159 So. 3d 814 (Fla. 2015).
[4] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

2013. R4/747. Oral arguments were held on April 28, 2014. The following issues were raised on direct appeal:

1) The trial court erred in finding the murder was especially heinous, atrocious, or cruel.
2) The trial court erred in finding that the appellant committed the murder in a cold, calculated and premeditated manner.
3) The trial court erred in finding as an aggravating circumstance that the killing was motivated by financial gain.
4) The death sentence is disproportionate when compared with similar cases where the aggravating circumstances are few and the mitigation is substantial.
5) Florida's death sentencing scheme is unconstitutional under the Sixth Amendment pursuant to *Ring v Arizona.*

The Florida Supreme Court denied each of these claims in *Campbell v. State*, 159 So. 3d 814 (Fla. 2015). A writ of certiorari to the United States Supreme Court was denied on October 5, 2015. *Campbell v. Florida*, 136 S. Ct. 100 (Mem), 193 L.Ed.2d 84 (2015).

2. Statement of Facts Pertaining to Postconviction Proceedings

Mr. Campbell timely filed his original Motion to Vacate Judgment and Sentence on September 19, 2016 asserting eleven claims for relief. PC/292. The State filed its response on October 11, 2016. PC/448. Mr. Campbell filed an Amended Motion to Vacate Judgment and Sentence amending Claims 4, 6 and 7 on January 27,

2017.[5] PC/521. The State filed its Response to the Defendant's Amended Motion to Vacate Judgment and Sentence on February 16, 2017. PC/745.

A case management conference was held on February 21, 2017. PC/1320-39. After hearing argument, the trial court granted Mr. Campbell's request for an evidentiary hearing on his guilt phase claims, namely, Claim 1 and Claim 2 (subsections 1 and six). Claim 5, which argues for relief based upon the cumulative effect of all the errors which occurred during Mr. Campbell's trial, would be ruled upon by the trial court at the conclusion of the evidentiary hearing. In light of *Hurst*

[5] The amended motion contained the following claims: (1) Campbell's initial confessions and *Miranda* waivers were involuntary due to trauma, medications, police misconduct, and ineffective assistance of counsel for failing to provide prompt legal assistance; (2) Counsel was ineffective for failing to object to improper comments by the State; (3) Counsel was ineffective by introducing or opening the door to non-statutory aggravating circumstances, namely: future dangerousness, ASPD, prior bad acts, and lack of remorse; (4) Ineffective assistance of counsel during the penalty phase trial; (5) Cumulative effect of all the trial errors deprived Mr. Campbell of a fundamentally fair trial; (6) In light of *Hurst, Ring, Apprendi,* and *Jones*, Mr. Campbell's death sentence violates the United States and Florida Constitutions; (7) The enactment of HB 7101, a direct result of *Hurst*, demonstrates that society's standards of decency have evolved such that a death sentence cannot constitutionally rest upon a bare majority jury recommendation of death; (8) Florida's capital sentencing statute is unconstitutional under *Furman v. Georgia* for failing to prevent the arbitrary and capricious imposition of the death penalty; (9) Florida's lethal injection method of execution constitutes cruel and unusual punishment; (10) Fla. Stat. 945.10 violates Campbell's constitutional rights by preventing him to know the identity of his execution team members; and (11) Campbell's Eighth Amendment right against cruel and unusual punishment will be violated as Campbell may be incompetent at the time of execution.

v. State, 202 So. 3d 40 (Fla. 2016), and noting that Mr. Campbell's death sentence was final after *Ring v. Arizona* and based upon a non-unanimous jury recommendation, the trial court granted Claim 6, vacating Mr. Campbell's death sentence and granting him a new penalty phase trial. The trial court denied an evidentiary hearing on the remaining claims, specifically Claims 2 (subsections 2-5), 3, 4, 7, 8, 9, 10, and 11, because the court determined these claims to be moot in light of vacating Mr. Campbell's death sentence.[6]

An evidentiary hearing on Claim 1 and Claim 2 (subsections 1 and 6) was held on June 8, 2017. PC/867-1074. Collateral counsel presented witness testimony from trial attorneys Devon Sharkey and Michael Lamberti, as well as, expert testimony from Dr. James Thomas O'Donnell. The State presented no witnesses.

At the conclusion of the taking of evidence, the court permitted the parties to submit written closing arguments in lieu of oral argument. The trial court denied Mr. Campbell's guilt phase claims in an order filed on August 30, 2017. PC/1172. In that order, the trial court denied Claims 1, 2 (subsections 1 and 6), and 5. PC/1192. Claims

[6] Mr. Campbell is not waiving the substance of those penalty phase claims alleged in his Amended Motion to Vacate Judgment and Sentence, i.e. Claims 2 (subsections 2-5), 3, 4, 7, 8, 9, 10, and 11. Those claims are not listed in this Initial Brief as the State of Florida did not appeal the trial judge's rulings pertaining to the granting of *Hurst* relief or the dismissal of the remaining penalty phase claims as moot.

2 (subsections 2-5), 3, 4, 7, 8, 9, 10, and 11 were dismissed as moot. *Id.* Claim 6 was granted and Mr. Campbell's death sentence was officially vacated. *Id.* A notice of appeal was filed on September 27, 2017. PC/1275.

JURISDICTION

This is a timely appeal from the trial court's final order denying an original motion for post-conviction relief from a judgment and sentence of death. Fla. R. Crim. P. 3.851(f). This Court has plenary jurisdiction over death penalty cases. Fla. Const. Art. V, § 3(b)(1); *Orange County v. Williams*, 702 So. 2d 1245 (Fla. 1997).

STANDARD OF REVIEW

Under *Strickland v. Washington*, 466 U.S. 668 (1984), ineffective assistance of counsel claims are a mixed question of law and fact; with the lower court's legal rulings reviewed *de novo* and deference given to factual findings supported by competent and substantial evidence. *Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004). Several claims of ineffective assistance have been raised. General case law will be addressed here.

The United States Supreme Court has held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *Strickland*, 466 U.S. 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.

There are two prongs to an ineffective assistance of counsel claim.

> First, a petitioner must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, whose result is unreliable.

Id. at 687. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688. In order to show prejudice, it is not necessary to establish that counsel's deficient conduct more likely than not altered the outcome in the case. *Id.* at 693. Instead, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The court evaluates the totality of the evidence "both that adduced at trial, and the evidence adduced in the habeas proceeding[s]." *Williams v. Taylor*, 529 U.S. 362, 397-398 (2000).

This Court employs a mixed standard of review in post-conviction matters, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing legal conclusions de novo. *King v. State*, 211 So. 3d 866, 880 (Fla. 2017); *Rodgers v. State*, 113 So.3d 761, 767 (Fla. 2013);

State, 883 So. 2d 766, 772 (Fla. 2004). Despite this deference to a trial court's findings of fact, the appellate court's obligation to independently review mixed questions of fact and law of constitutional magnitude is also an extremely important appellate principle. *Stephens v. State*, 748 So. 2d 1028, 1034 (Fla. 1999). This Court has an obligation to carefully review the circuit court's findings to ensure that Mr. Campbell received the effective assistance of counsel and due process to which he is entitled under state and federal law.

SUMMARY OF THE ARGUMENTS

Argument I alleges that the trial court erred when denying Mr. Campbell's claim that his *Miranda* waiver and subsequent five recorded statements were involuntary due to trauma, police misconduct and the high level of narcotics he was receiving while be treated for life-threatening injuries. His trial attorneys rendered prejudicial ineffective assistance of counsel for failing to investigate the circumstances surrounding these statements and for failing to file a motion to suppress. In Argument II, Mr. Campbell argues that based on the facts of his case, prevailing norms and reasonableness standards dictate that his trial attorneys rendered prejudicial ineffective assistance of counsel by failing to provide Mr. Campbell with prompt assistance after his arrest. Further, the trial court erred in denying postconviction counsel from presenting an expert witness in support of this

claim. Argument III contends that the trial court erred in denying Mr. Campbell's claim that trial counsel rendered prejudicially ineffective assistance for failing to object to several improper comments made by the State during the guilt phase trial. In addition, Argument IV states that cumulative error deprived Mr. Campbell of the fundamentally fair trial guaranteed under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution.

ARGUMENT I

THE CIRCUIT COURT ERRED IN DENYING MR. CAMPBELL'S CLAIM THAT HIS INITIAL CONFESSIONS AND *MIRANDA* WAIVERS WERE INVOLUNTARY DUE TO TRAUMA, MEDICATIONS AND POLICE MISCONDUCT, AND THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO SUPPRESS THOSE STATEMENTS, DEPRIVING MR. CAMPBELL OF RIGHTS SECURED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

a. The facts surrounding the five police interrogations and Mr. Campbell's statements

In this case, trial counsel did not hire an appropriate expert to review Mr. Campbell's medical records during the time frame of the five police interrogations nor did they file a motion to suppress statements. As such, the attorneys and the jury never learned about the high level of narcotics Mr. Campbell was prescribed, how he is personally opiate naive, and, most importantly, how those narcotics legally impaired him. The underlying facts about the five interrogations are from the record

on direct appeal. All facts regarding Mr. Campbell's medical condition, specifically the types of narcotics he was prescribed and his impairment from those narcotics, were developed during postconviction.

On the afternoon of Tuesday, August 10, 2010, pursuant to a neighbor's inquiry, Citrus County Sheriff's Officers performed a "well-being check" on the victim's home and found him dead due to blunt trauma to the head. *Campbell v. State*, 159 So. 3d 814, 818 (Fla. 2015). Suspicion immediately fell on Mr. Campbell, his son, who had been living with the victim after his release from prison. On August 11, 2010, a manhunt ensued, which resulted in a high-speed chase where John Campbell removed his seatbelt, slammed the gas pedal to the floor of his vehicle and attempted suicide by ramming a blockade of patrol cars at nearly 100 miles per hour. *Campbell*, 159 So. 3d at 820. Mr. Campbell has numerous serious injuries, including a complex fracture in his leg that caused his bone to stick out. R17/510-11. Mr. Campbell was airlifted to Bayfront Hospital from the scene of the accident. He was accompanied by an officer on the helicopter and at the hospital, and has been in custody ever since. R16/373-75.

The first police interrogation of Mr. Campbell occurred in the intensive care unit of Bayfront Hospital on August 12 from 1:00 to 1:40 p.m., mere hours after emergency surgery. R17/430. The interrogating officers had attempted to interview

Campbell earlier that morning, but were advised by hospital staff that Campbell was not yet medically able to give a statement. R16/412. Postconviction medical records revealed that Mr. Campbell was provided two strong, mind-altering painkillers on the afternoon of August 12 when he made his statements to law enforcement. Initially, Mr. Campbell was provided 192 milligrams per hour of intravenous Diprivan for eight hours before the interview, followed by 12 milligrams of Morphine in three doses between 8 a.m. and 12:15 pm. PC/916-17; *See* Postconviction Defense Exhibit G.[7] Diprivan causes, severe drowsiness, cognitive impairment, confusion, delirium, hallucinations and extreme sedation. PC/917. Even the warning on the Diprivan packaging states, "DO NOT DRIVE OR DO ANYTHING THAT REQUIRES YOU TO BE AWAKE FOR 24 HOURS AFTER TREATMENT." PC/917-18. Mr. Campbell's breathing tube was taken out just moments before the interrogation began. R16/395-96.

The statement begins with the usual recitation by the officer of the date, time, place and participants, followed by *Miranda*[8] warnings, which Campbell

[7] Defense Exhibit G is a three page chart drafted by postconviction expert Dr. James T. O'Donnell which summarizes all of the medications Mr. Campbell was taking before, during, and after each interrogation and the side-effects to each narcotic. PC/1929-31.

[8] *Miranda v. Arizona*, 384 U.S. 436 (1966).

acknowledged. R17/430-31. When asked about one of the robberies Campbell was accused of committing, he declined to answer. R17/434-35. The officer then confronted Campbell with the crime:

> DETECTIVE ATCHISON: Okay. Well, we found your -- we found your father and he's been murdered.
>
> JOHN CAMPBELL: Okay.
>
> DETECTIVE ATCHISON: And I think you know that. I mean, everything's obvious. You know that. You know, you're - the thing about it, John, is you're not – you're not a stupid person and I don't think that, you know, you're any type of monster or anything like that. You know, it is what it is and that's just the bottom line. I'm surprised at the lack of remorse. I thought you and your father was pretty close.

R17/435.

Campbell said, "I'm in a lot of pain right now." When asked if he was "mentally okay" he responded, "No. I want to fuckin' die . . . Until I die, I'm not going to be at peace with myself . . . I won't stop trying to commit - to kill myself." R17/436. The transcript indicates that Campbell was crying and then asked for a lawyer, "anything about my dad, I want a lawyer." R17/438. This was followed by, "Unless y'all give me the death penalty, I don't want to talk." R17/439.

According to the officer's testimony, after the recording was turned off, Campbell asked if he could change his mind and was read his *Miranda* rights again.

R17/440. Curiously, this was not recorded. R17/440. Campbell asked for pain medication for his knee and then said he would tell law enforcement what happened to his dad. R17/441. Campbell stated that he needed pain medications "to stop the pain and stop his head from spinning." R16/398. The officer went to the nurse's station and asked for the medication but the request was denied. R17/441-42. The officer told Campbell that the pain medications were on a schedule. R17/442. When the recording was turned back on, Campbell said "Oh, what's the use?" R17/442. Then he confessed to the crime. R17/448

Law enforcement took two more recorded statements on August 13, starting around 11:00 a.m. R17/461, 481. Medical records show that Mr. Campbell was given 32 milligrams of morphine in four doses between 5:10 am and 10:55 am on August 13 before his statements. PC/919. Morphine, a strong opioid painkiller, causes confusion, amnesia, hallucinations, suspended judgement, disorientation, memory problems, impaired executive function, impaired deliberation, and enhanced impulsivity. PC/919; Defense Exhibit G. While he was under the influence of these drugs, Campbell admitted striking the victim a total of three times, the third and last time after about a five minute pause, because "I didn't want him to suffer." R17/492-96.

On August 16th, Mr. Campbell was released from the hospital and transported

to the Citrus County Jail where the fifth and final police interrogation occurred at 3:51 p.m. R17/499, 503. Mr. Campbell was given 20 milligrams of high dose continuous release oxycodone and 10 milligrams of high dose oxycodone in two doses before he left the hospital. PC/920-21. These are strong opiate painkillers with long duration. *Id.* Continuous release high dose oxycodone can cause confusion, amnesia, hallucinations, disorientation, memory problems, suspended judgement and clouded thinking for more than 12 hours. *See* Postconviction Defense Exhibit G. While Mr. Campbell was taking high dose oxycodone, he admitted that he had been thinking about committing the crime for a few days. R17/504-05. That admission, decisive as to heightened premeditation if believed, was never corroborated by any other evidence in the case.

On August 17, 2010, the trial attorneys were appointed to the first of Mr. Campbell's cases, an unrelated robbery (2010-CF-892). PC/962, 964-65. *See* Defense Exhibit I at the Post-Conviction Hearing. Trial Attorney Michael Lamberti was present with Mr. Campbell at this first appearance hearing and testified that he only had a brief conversation with Mr. Campbell. PC/969. Later on the same day, an email was exchanged between trial counsels regarding Mr. Campbell, which stated: "We were appointed on Mr. Campbell's case . . . We need to see him ASAP . . . Apparently, CCSO interviewed him at the hospital (Bayfront) while he was on pain

killers." PC/963. *See* Defense Exhibit H. It was not until August 20th, nearly nine days after Mr. Campbell's arrest, when he finally speaks with trial counsel in any substantive manner regarding his capital or noncapital cases. PC/973-74. *See* Defense Exhibit L, Handwritten Notes dated August 20, 2010 from 1:40 to 2:14 p.m.

During the numerous days between Mr. Campbell's arrest and his first contact with any attorney on his behalf, he provided police with five incriminating statements. Campbell testified at trial and admitted killing his father, but denied that it was something he had planned. R16/544. He said he had falsely claimed to have been thinking about committing the murder for a few days beforehand because he was suicidal at the time of the statement and believed admitting premeditation was the only way to get the death penalty. R16/550-51.

b. <u>Relevant Facts From the Post-Conviction Evidentiary Hearing</u>

Michael Lamberti and Devon Sharkey tried Mr. Campbell's case. Lamberti had been at the public defender's office for a little over a year when he was assigned to work with Mr. Campbell. PC/951, 954. Lamberti was the second chair attorney in charge of mitigation because he was not yet death qualified. PC/955. Lamberti immediately recognized that impairment might be an issue with Mr. Campbell's interrogations and he memorialized his impression after his first meeting with Campbell, "[a]pparently CCSO interviewed him at the hospital while he was on

painkillers. He says he had to be extubated in order to have them talk to him." PC/963; Defense Exhibit H. Lamberti did not follow up on this concern. Lamberti thought that Mr. Campbell's medical records were obtained by "someone" but never reviewed them personally. PC/982-83.

Lamberti testified that Sharkey was lead counsel and decided not to file a motion to suppress any of Mr. Campbell's statements. PC/983. Lamberti said the last statement at the jail on August 16, 2010 was "very different" and we "didn't think we could suppress the statement when he was at the jail . . . and we wanted to use his hospital statements to kind of temper . . . show how he was . . . how remorseful he was." PC/983-84. Lamberti thought there was no basis for moving to suppress the August 16 statement. PC/984.

Devon Sharkey had been second chair counsel in two death penalty cases before he was assigned to Mr. Campbell's case. PC/991-92. He became active in the case in December 2012 after prior first chair attorney, Daniel Lewan, retired. PC/996. Sharkey received Campbell's medical records and asked his personal sports-medicine doctor, Marc Hilgers, to review them. PC/1000. Hilgers was intended to "go through the paperwork and give me some kind of an idea of what was going on." PC/1001-02. Sharkey maintained there was a "paper trail" in the defense files for formally retaining Dr. Hilgers, but postconviction counsel found no such evidence. PC/1001-

02. Sharkey testified, "If we were going in that direction, I certainly would have retained a toxicologist. I wasn't going to rely on Dr. Hilgers' opinion." PC/1001.

Sharkey conceded that the worst evidence in the case was Campbell's statement taken at the Citrus County Jail on August 16. PC/1003, 1018. Campbell had to take the stand at trial to counter this statement. PC/1019. However, neither Sharkey nor Lamberti hired a toxicologist or a pharmacologist to review Mr. Campbell's extensive prescriptions or entertained a motion to suppress based on Mr. Campbell's impairment on August 12, 13, and 16 from significant doses of opiates including: Diprivan, Morphine, High Dose Oxycodone and OxyContin. In fact, defense counsel announced pre-trial that they were electing not to file a motion to suppress in this case without any further explanation. R21/54-55. Sharkey and Lamberti also never learned a critical fact revealed in the postconviction hearing: Mr. Campbell has an unusual sensitivity to opiates since he is "opiate naive."[9] PC/897-99.

[9] Dr. O'Donnell testified that being "opiate naive" means that the person has not developed a tolerance for opiates. PC/898. Although Mr. Campbell had prior experience with other drugs, as described during the penalty phase trial, he never abused opiates. *Id.* Thus, in analyzing Mr. Campbell's condition during these interrogations, "we're starting at the lowest threshold in the treatment." *Id.*

Collateral counsel presented testimony at the evidentiary hearing of Dr. James T. O'Donnell, an expert pharmacologist, who testified in detail that Mr. Campbell's judgement was impaired by large doses of opiate painkillers during all five of his statements to police. Dr. O'Donnell prepared charts of drugs, dosages and effects that were admitted into evidence as Exhibit G. PC/913-14. Dr. O'Donnell received his Doctor of Pharmacy degree from the University of Michigan in 1971. Curriculum Vitae of James T. O'Donnell. *See* Defense Exhibit A. He is an Associate Professor of Pharmacology at Rush University Medical Center and he has had more than forty years of experience as a practicing pharmacist. *Id*. He serves on an Institutional Review Board with a group of clinicians and scientists who meet to evaluate risks and informed consent in investigational drug studies. PC/883. Dr. O'Donnell is the editor and primary contributor to six textbooks and has published more than 300 articles over the course of his career. PC/884. The circuit court found, "after listening to his curriculum vitae and reviewing the vitae of him, you'd be hard pressed to find a more qualified person in the United States other than Dr. James O'Donnell." PC/893.

Dr. O'Donnell was a course director at Rush Medical College and was very involved in the development of the curriculum for medical students. PC/879. He explained that a medical student gets one year of training in pharmacology and a

physician in practice usually has a shallow understanding of pharmacology because physicians only work with a handful of drugs. PC/880-81. Unlike Dr. Hilgers, trial counsel's personal sports medicine doctor who has no known expertise with toxicology, Dr. O'Donnell has substantially greater experience than a physician because of the depth of his training and evaluation of thousands and thousands of patients. PC/880-82.

c. <u>Ineffective Assistance of Counsel for Failure to File a Motion to Suppress Statements When Statements Made Were Involuntary Due to Trauma, Medications and Police Misconduct</u>

Mr. Campbell was legally impaired by opiates during each of his five interrogations by law enforcement. His counsel never attempted to suppress any of the five statements he made while he was under the influence of Diprivan, Morphine, and Oxycodone. Trial counsel also never consulted with an expert pharmacologist who would have discovered Mr. Campbell's impairment during each interrogation. Since there was no other evidence presented at trial to suggest heightened premeditation, aside from Mr. Campbell's drugged confessions, counsel's errors were grievously prejudicial.

In *DeConingh v. State*, 433 So. 2d 501 (Fla. 1983), *cert. denied* 465 U.S. 1005 (1984), the Florida Supreme Court held that, "waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient

awareness of the relevant circumstances and likely consequences." *Id.* at 503 (holding that the defendant's statements, which was made while she was hospitalized and on medication, should be suppressed because it was not voluntary), citing *Brady v. United States*, 397 U.S. 742, 748 (1970). Confessions given while under the influence should be suppressed when "the confessor is intoxicated to the degree of mania or is unable to understand the meaning of his statements." *Id.* (citing *Lindsey v. State*, 66 Fla. 341, 63 So. 832 (Fla. 1913)). Florida Standard Jury Instructions reflect these constitutional protections: jurors must disregard a defendant's statement if it is not freely and voluntarily made. F.S. Std. Crim. Jury Instr., 3.9(b). In *DeConingh*, the court noted that a hospitalized subject under the influence of narcotics may not be able to fully appreciate the significance of his admissions. *See State v. Mikulewicz*, 462 A.2d 497 (Me. 1983) (statements made while intoxicated suspect permitted to continue drinking heavily during a seven-hour interrogation were involuntary and violated due process). Likewise, in *Reddish v. State*, 167 So. 2d 858, 863 (Fla. 1964), confessions from a critically injured man on narcotics were deemed to be not freely and voluntarily made.

In *Mincey v. Arizona*, 437 U.S. 385, 396–402 (1978), for example, suppression was appropriate when the accused was questioned in the intensive care unit of a hospital a few hours after being shot, and while he was "depressed almost to the point

of coma." When police in *Townsend v. Sain*, 372 U.S. 293, 297–99 (1963) *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), interrogated the accused when he was withdrawing from heroin, and after administering him a drug that acted as a truth serum, the Supreme Court ordered a new hearing to determine if his confession was "voluntary." In *Blackburn v. State of Ala.*, 361 U.S. 199, 204–05 (1960), suppression was appropriate when a legally insane suspect was interrogated for nine hours in a small room, and his confession was composed by a deputy sheriff. These cases all demonstrate that Mr. Campbell's' five statements, all given under the influence of mind-altering drugs, should have been legally suppressed as involuntary,

If trial counsel would have retained an expert pharmacologist or toxicologist, like Dr. O'Donnell, they would have learned that Mr. Campbell had no tolerance for opiates because he was opiate naive. PC/897-99. Campbell was given Fentanyl, Diprivan, Morphine, and high-dose Oxycodone between August 11 and August 16, 2010. PC/901-11. During each interrogation, Mr. Campbell was taking strong opiates, a cocktail of medications that Dr. O'Donnell testified causes cognitive impairment, including impaired deliberation, consideration, and judgement. PC/1929-31.

From Dr. O'Donnell's experience on Institutional Review Boards, he explained, "in a clinical situation, we would never allow a patient to consent to

surgery or a procedure while they're on high-dose opiates." PC/908. "If they are on a drug that we know causes impairment, they can't consent." PC/908. The risk of Campbell's impairment only increased with the combination of drugs, mental distress, and injury. PC/910. If Mr. Campbell could not knowingly and voluntarily consent to medical treatment, he could never have properly understood the *Miranda* warnings provided by police prior to his interrogations or knowingly waived his right to remain silent and have counsel present.

When police interrogated Mr. Campbell on August 12 between 1 and 2 pm, he was impaired and recovering from a serious injury. Medical professionals had, moments earlier, removed his breathing tube. Mr. Campbell had been given three doses of four milligrams of intravenous Morphine at 8 am, 10:34 am, and 12:15 pm, immediately before his statements to police and had been on a 192 milligram per hour Diprivan drip. PC/916-17; Defense Exhibit G. These drugs would have impaired Mr. Campbell, interfered with his ability to think clearly and appreciate consequences as they cause clouded thinking, suspended judgement, confusion, amnesia, hallucinations, disorientation, memory problems, enhanced impulsivity, impaired executive function and impaired deliberation. Defense Exhibit G; PC/919. Even opposing counsel would concede that freely and voluntarily waiving *Miranda* rights would require a patient to be awake. Mr. Campbell was impaired by strong opiates

on August 12 when he waived his rights and was interrogated. PC/919. Under the *DeConingh* and *Reddish* standards, these statements were not freely or voluntarily made, and they should have been suppressed by his counsel.

The August 13 statements were much more detailed and damaging. R17/461, 481. This time Campbell admitted striking the victim a total of three times, the third and last time after about a five-minute pause. R17/492-96. Prior to this interrogation, Mr. Campbell was given high-dose Morphine intravenously, eight milligrams per hour. PC/919. Dr. O'Donnell testified that Morphine causes clouded thinking, suspended judgement, confusion, amnesia, hallucinations, disorientation, memory problems, enhanced impulsivity, impaired executive function and impaired deliberation. Defense Exhibit G. Campbell was given doses at 5:10 am[10], 6:15 am, 9:40 am and 10:55 am. PC/53-54. Mr. Campbell was impaired when he was interrogated on August 13, and his statements could have been suppressed, if his attorneys had argued *DeConingh* and *Reddish*. PC/919-20.

Mr. Campbell's last statement was taken in the medical wing of the Citrus County Jail on Monday, August 16 between 3 and 4 pm. R17/503. Mr. Campbell

[10] The transcript of Dr. O'Donnell's testimony states that Mr. Campbell was, "given doses at 5:00, 10:00, 6:15, 9:40 and 10:55 am." PC/919. Defense Exhibit G is clear that either Dr. O'Donnell misspoke or that his statement was improperly transcribed as the first dose was given at 5:10 (not two doses at 5:00 and 10:00).

admitted that he had been thinking about committing murder a few days. R17/504-05. This admission could be decisive as to heightened premeditation because heightened premeditation was not corroborated by any other evidence in the case. Lamberti explained the August 16 statement was "very different." PC/983-84. Sharkey conceded that the August 16 statement was the "worst evidence in the case." PC/1003, 1018.

Yet, Mr. Campbell's statement on August 16 was no different from the statements on August 12 and 13 in one critical respect. Mr. Campbell's thinking, judgement, and deliberation were impaired by opiates. Mr. Campbell was given a 20-milligram dose of continuous release high-dose OxyContin with a twelve hour duration at 8:34 am and ten milligrams of high dose OxyContin with an eight hour duration at 8:35 and 11:24 am. PC/921-22. When police interrogated Mr. Campbell at the Citrus County Jail, Mr. Campbell was impaired because he was experiencing the "full effect" of these three doses. PC/921. Dr. O'Donnell explained that he would never recommend any patient make decisions under the influence of opiates as a person "cannot decide . . . they can't deliberate clearly [t]hese drugs inhibit the ability to make decisions and people make bad decisions because they're not exercising judgement, they're not exercising controls." PC/922. "We don't allow them to do that in a clinical situation and we don't allow them to do that in a research situation." Dr.

O'Donnell further explained that many chronic pain patients will cut back on their pain medications if they are going to see a lawyer, have to go to court, or have to make decisions. PC/922-23.

The trial court denied this claim in part by stating that trial counsel strategically chose not to file a motion to suppress because they believed the defendant's statements showed remorse and they did not think they would be able to suppress the fifth statement. PC/1183. However, strategic decisions must still be based on informed judgment of ***all*** the facts. "[T]he principal concern . . . is not whether counsel should have presented a mitigation case. Rather, [the] focus [should be] on whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . was itself reasonable." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). The undisputed facts in this case show that the trial attorneys never hired a toxicologist or a pharmacologist to review Mr. Campbell's extensive medications during August 12, 13, and 16, including significant doses of Diprivan, Morphine, and High Dose Oxycodone. By failing to hire a qualified expert, trial counsel also never learned a critical fact revealed in the post-conviction hearing: Mr. Campbell has an unusual sensitivity to opiates since he is "opiate naive." PC/897-99. By failing to hire a qualified expert, trial counsel never learned the effects that each of these narcotics has on Mr. Campbell in particular and that he was impaired during all five

confessions. Thus, trial counsels' strategic decision was based purely on speculation that they could not get the fifth statement suppressed. The trial court cannot assess whether counsel made a reasonable strategic decision not to file a motion to suppress because counsel did not take all the necessary steps to make an informed decision. It is always thoughtful strategy to move to suppress questionable evidence and reassess after an unfavorable ruling. In this case, the lawyers failed to take even the first basic step toward protecting Mr. Campbell's right against self-incrimination while under the influence of mind-altering drugs.

Dr. O'Donnell's testimony was clear – patients with serious opiate-induced effects on judgement and memory do not always show outward signs of impairment. T/910. Interrogating detectives Breedlove and Atchison testified at trial that John Campbell showed no signs of impairment before his interrogations. R16/400, 415-16. Counsel never challenged this testimony. Laymen, law enforcement personnel, and even trial attorneys have no expertise is assessing the effects of mind-altering substances on a person's ability to plan, think, or consent.

Dr. O'Donnell demonstrated how effective expert analysis and testimony could have been in supporting a motion to suppress as Mr. Campbell's case is similar to *DeConingh* and *Reddish*, in which confessions made under the influence of mind altering drugs and extreme pain made confessions involuntary. Mr. Lamberti and Mr.

Sharkey are both trained as lawyers, rather than medical professionals. Dr. O'Donnell explained that they misperceived the level of Mr. Campbell's impairment throughout the course of his treatment, especially on August 16 at the Citrus County Jail. If they had considered binding precedent in *DeConingh* and *Reddish*, in which statements by patients hospitalized with severe injuries under the influence of mind-altering drugs were suppressed as involuntary and unknowing, they would have been more effective advocates.

Trial counsel rendered prejudicial ineffective assistance of counsel under *Strickland* because a reasonably competent attorney would have obtained a qualified expert to review Mr. Campbell's medical records and provide an opinion as to his mental and physical state at the time each interrogation took place. Instead, Mr. Lamberti failed to recognize this issue and Mr. Sharkey casually inquired about it from an unquailed friend. But for this error, Mr. Campbell's trial would have had a different result. There is a reasonable chance that had the statements been properly suppressed, Mr. Campbell could have received a verdict to a lesser included charge, which was trial counsel's admitted strategy. Trial attorney Sharkey testified that the defense guilt phase strategy was to attack the premeditation element of first degree murder in order to "get a crack at second degree murder." PC/1002. In his view, the worst evidence the State had on both counts was the statement the police took from

Campbell when he was at the Citrus County Jail on August 16. PC/1003; PC/1018. He agreed that that statement was a sort of "tipping point" between premeditation and heightened premeditation. PC/1018. The defense decision to put Mr. Campbell on the stand was made in part to "counter that statement, to try to give a version of events that reduced premeditation" PC/1019.

Aside from Mr. Campbell's impaired confessions, there was no other evidence presented at trial to suggest heightened premeditation. Since the defense strategy was to attack the premeditation element, any reasonable attorney in that case would have done anything to suppress all of Mr. Campbell's confessions pre-trial. Trial counsel rendered prejudicial ineffective assistance by not hiring an expert which would have supported a motion to suppress based on trauma, medication and impairment. But for counsels' errors, there is a reasonable probability that Mr. Campbell would have had his statements suppressed and would have obtained a lesser included charge at trial. Because of this, the court's confidence in the outcome is undermined and the trial counsels' performance was deficient under *Strickland.*

ARGUMENT II

THE TRIAL COURT ERRED IN DENYING MR. CAMPBELL'S CLAIM THAT TRIAL COUNSEL PROVIDED PREJUDICAL INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO PROVIDING PROMPT ASSISTANCE AND ERRED IN EXCLUDING THE TESTIMONY OF A DEFENSE EXPERT AT THE EVIDENTIARY HEARING IN SUPPORT OF

THIS CLAIM

This case involved a sensational murder on August 10, 2010, followed by a high speed chase ending in a massive collision with a patrol car and Campbell's one day later. It hit the news at latest the evening of the day after. The location of the murder in Citrus County, the identification of the defendant by name, his status as a "person of interest," his location at the Bayfront Medical Center a relatively short drive away, and other indications that the case was headed for the Fifth Circuit Public Defender's Office were common knowledge by August 12. Counsel failed to make contact with Campbell or otherwise provide him with any assistance until a week after that, on August 17. During the time that Mr. Campbell was at the hospital and then transferred to the Citrus County Jail he was repeatedly questioned by the police and made admissions that were devastating to innocence and his ability to avoid a capital sentence. All relevant authority and attorney testimony presented in these proceedings and anywhere else in the practice of criminal defense agree that a reasonably competent lawyer would and should advise the defendant not to speak to the police under these circumstances. When Mr. Campbell eventually did receive the advice of counsel, he signed forms invoking his rights to counsel and remain silent when they were offered to him. Unfortunately, due to the ineffectiveness of his trial counsel, legal assistance came to John Campbell a week too late.

a. Trial Counsel Rendered Prejudicial Ineffective Assistance of Counsel for Failure to Provide Prompt Assistance When Required to By Law

Article I, Section 16 of the Florida Constitution guarantees the right to assistance of counsel in all criminal prosecutions. Fla. R. Crim. P. 3.130 in turn, states that the right to assistance of counsel attaches at least as early as the defendant's first appearance which should occur within twenty-four hours of arrest. Fla. R. Crim. P. 3.130(a) requires that "every arrested person shall be taken before a judicial officer . . . within 24 hours of arrest . . . The state attorney or an assistant state attorney and public defender or an assistant public defender shall attend the first appearance proceeding either in person or by other electronic means."

"An arrest is legally made when there is a purpose or intention to effect an arrest, an actual or constructive seizure or detention is made by a person having present power to control the person arrested, and such purpose or intention is communicated by the arresting officer to, and understood by, the person whose arrest is sought." *Kearse v. State*, 662 So. 2d 677, 682-83 (Fla. 1995). By that standard, Campbell was under arrest from the moment of the car crash and has been in custody ever since. As trial counsel Lamberti testified at the evidentiary hearing, "When I watched the video and the police officer had his foot in Mr. Campbell's back, I think that was the point where he was being detained." PC/982.

The ABA Guidelines for the Appointment and Performance Of Defense Counsel in Death Penalty Cases, reprinted at 31 Hofstra L. Rev. 913 (2003) (ABA Guidelines) provides:

> GUIDELINE 10.5--RELATIONSHIP WITH THE CLIENT
>
> A. Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client.
> B. 1. Barring exceptional circumstances, an interview of the client should be conducted within 24 hours of initial counsel's entry into the case.
> 2. Promptly upon entry into the case, initial counsel should communicate in an appropriate manner with both the client and the government regarding the protection of the client's rights against self-incrimination, to the effective assistance of counsel, and to preservation of the attorney-client privilege and similar safeguards. . . .
>
> Commentary
> The Problem
> Immediate contact with the client is necessary not only to gain information needed to secure evidence and crucial witnesses, but also to try to prevent **uncounseled confessions or admissions** and to begin to establish a relationship of trust with the client. Anyone who has just been arrested and charged with capital murder **is likely to be in a state of extreme anxiety**. Many capital defendants are, in addition, severely impaired in ways that make effective communication difficult: they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they may be mentally retarded or have other cognitive impairments that affect their judgment and understanding; **they may be depressed and even suicidal**; or they may be in complete denial in the face of overwhelming evidence. In fact, the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that "[i]t must be assumed that the client is emotionally and intellectually impaired."

ABA Guidelines (emphasis added). Likewise, ABA Standards for Criminal Justice: Defense Function Standard 4-3.6 ("Prompt Action to Protect the Accused"), in ABA Standards for Criminal Justice: Prosecution Function and Defense Function (3d ed. 1993) provides: "Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights."

The United States Supreme Court has referred to the ABA standards as "guides to determining what is reasonable." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting *Strickland*, 466 U.S. at 688). Almost all of the concerns listed in the Guidelines are implicated in this case. Counsel needed to "try to prevent uncounseled confessions or admissions." Campbell was obviously "in a state of extreme anxiety." He had "mental illnesses or personality disorders" that made him "highly distrustful" and that impaired his reasoning and perception of reality; and he was highly "depressed and even suicidal." The contention here is that the local Public Defender's Office had an obligation according both to Florida law and as reasonably competent capital defense counsel to make contact with Campbell and take other appropriate

action the evening of August 12, or at latest the first thing next morning, with or without a court order.

Assistant Public Defender and second chair counsel in this case, Mr. Lamberti, was the first attorney to meet with Mr. Campbell, which he did at a first appearance hearing in the Citrus County Jail on August 17. PC/969. He was there handling first appearances for other clients and as a matter of routine, because of the seriousness of the case, he stepped in and handled Mr. Campbell's as well. PC/963. He already knew the circumstances of the car crash and said that "we had some knowledge of that in the office." PC/968. He acknowledged regularly reading the Citrus County Chronicle and reading about this case there. PC/968.

Campbell was in a stretcher "and "did not look comfortable." PC/963. Later that day he sent an email to relevant persons in the Public Defender's Office, including Mr. Lewan, describing this encounter. *See* Defense Exhibit H. "We were appointed on Mr. Campbell's case . . . We need to see him ASAP . . . Apparently, CCSO interviewed him at the hospital (Bayfront) while he was on pain killers." *Id.*

Mr. Lamberti was questioned about conducting first appearance hearings outside of the jail or courtroom. He admitted that doing so was "very rare" but he has participated in one or two occasions where a Hernando County judge held a first appearance hearing at a hospital. PC/966. He testified, "The one I specifically

remember the person [not Mr. Campbell] was significantly injured and it was . . . a high-profile type case, meaning first-degree felony or murder or something to that effect." PC/967.

Mr. Lamberti testified that he attended almost every Florida based death seminar since 2010. PC/976. In particular he remembered a presentation titled "Rapid Response", although he didn't remember when it was given. PC/977. He described its message as the following:

> Get to the person as soon as you can . . . It gives you the opportunity to begin looking for evidence . . . like cell phones and things like that, that may get lost through time. It gives you the opportunity to discuss with the client some of the circumstances surrounding the event, as well as making sure [the clients] don't talk to law enforcement.

PC/977. Mr. Lamberti said that at the time of Mr. Campbell's arrest in 2010 the public defender's office did not have any formal mechanism for tracking high profile cases, including homicides that might be coming into the office. PC/978. Now, in the bigger counties, the supervisors "keep an eye on things." PC/978. In 2010, the office policy was that a member of the public defender's office would contact a client within 72 hours of his arrest, but Lamberti clarified that that would only be after a formal court appointment. PC/979. Lamberti testified that "in a rare circumstance . . . I have gone out to talk to a client before we've been appointed and those circumstances are where we know we're going to be appointed." PC/980-81.

Devon Sharkey eventually became the lead trial attorney in this case after Daniel Lewan retired in 2012, so his direct knowledge of the circumstances surrounding Campbell's arrest, interrogation, and any response by the Public Defender's office was limited. PC/997. Nevertheless, his experience and position within the office provides insight into office policies and the standard of practice in cases like this one in 2010.

Sharkey testified that the defense guilt phase strategy was to attack the premeditation element of first degree murder in order to "get a crack at second degree murder." That guilt phase strategy was consistent with the penalty phase attack on the element of heightened premeditation for CCP. PC/1002. In his view the worst evidence the State had on both counts was the statement the police took from Campbell when he was at the Citrus County Jail on August 16. PC/1003; 1018. He agreed that that statement was a sort of "tipping point" between premeditation and heightened premeditation. PC/1018.[11] The defense decision to put Mr. Campbell on the stand during the guilt phase was made in part to "counter that statement, to try to

[11] The fifth and final police interrogation occurred in the medical wing of the Citrus County Jail. R17/499, 503. This statement is different from the others in that this time Campbell admitted that he had been thinking about committing the murder for a few days. R17/504-05. That admission, decisive as to heightened premeditation if believed, was never corroborated by any other evidence in the case.

give a version of events that reduced premeditation." PC/1019. The decision not to file a motion to suppress in this case was made because Mr. Sharkey felt that the earlier statements in the hospital "contradicted or kind of rebutted the heightened premeditation of the last statement." PC/1020.

Mr. Sharkey testified that he also has made contact with potential clients prior to their first appearance hearing. In high publicity cases his general practice is that, "If I'm aware of somebody we can get access to, I will try to send an investigator out there to have them sign an invocation of rights forms and things like that. . . as soon as practical." PC/1004. Mr. Sharkey has routinely attended capital defense CLE courses and agreed that they teach contacting a potential capital defendant as quickly as possible. PC/1004-05. "That has been something that has been taught at these seminars. They talk about trying to get . . . a doctor or a psychologist out to see them as soon as possible, see if you can get a blood sample, thing like that. . . that's something that I've heard and I've taken to heart and tried to act upon." Mr. Sharkey agreed that obtaining an "invocation of rights in order to prevent the kinds of statements that occurred here" was "a sound practice, if practical." PC/1005. He further stated:

> If somebody's picked up for a homicide, even before we've been appointed, I will try to send an investigator out there or I'll go out there myself or another attorney will go out there and say. You know "sign

> these forms, don't talk to anybody. We'll do that if we . . . know about the case and know that we can reach them.

PC/1016-17.

Mr. Sharkey recalled that due to the rule change [3.130(a)] in 2009, a public defender attorney was required to attend all first appearance hearing for the first time. Before that, they did not have to do so. PC/1006. Mr. Sharkey also said that his office was routinely required to cover hearings that were conducted outside the courtroom, such as those conducted at the jail, and Baker and Myers Act hearings. PC/1007. Mr. Sharkey also denied that there were any internal restrictions or office policies on an attorney or public defender investigator speaking with a potential client about as yet uncharged crimes. PC/1016 He also denied that there were any external restrictions such as limited budgets or staff. PC/1016. Sharkey continued:

> I'm not aware of anything that would prohibit us from doing that. . . I've had cases where I've had murder suspects who've sat in jail on non-murder charges for months before the state files an information and we'll certainly discuss what might be coming and start to work on that. . . I've had cases where people have been in custody without bonds or on very high bonds on one charge and we are pretty sure a murder charge might be coming and we'll start to work on the murder case and talk to them about it. That does happen.

PC/1015.

A *Strickland* claim of ineffective assistance ordinarily requires a showing of both deficiency and prejudice. While prejudice often requires a complex analysis, in

this case it is simple. Any reasonably competent defense attorney, or staff investigator acting on one's behalf, would have advised Mr. Campbell not to speak to the police. Every bit of evidence in this case shows that if Mr. Campbell had been so advised he would have heeded that advice. If all of the five statements had not been given, but even if the last and most damaging statement at the jail alone were removed from consideration, there would have been a reasonable probability of a different outcome. In this case, without Mr. Campbell's confessions, there is a reasonable probability that he would have been convicted of a lesser included offense to capital murder.

The circuit court found that the defense attorneys were under no obligation to do anything for Mr. Campbell until the first appearance hearing. PC/1184. Assuming without agreeing that that may be so under the Florida statutory scheme, this claim must still be analyzed under the reasonableness and prevailing norms doctrine of *Strickland*. The defense is not arguing for a broad new standard of practice to be followed in all cases, or even in all capital cases. Instead, the unique circumstances of this case involving the highly publicized details of the murder; the high-speed chase ending in a dramatic crash; Mr. Campbell's known location at Bayfront Medical Center, and the concentration of all of the relevant events within Fifth Judicial Circuit placed greater responsibility on the Office of the Public Defender. It was a virtual certainty that the public defender would be appointed to represent Mr.

Campbell. Day after day elapsed with continued publicity and counsel did not arrive to help protect Mr. Campbell's rights. At least, the Public Defender's Office, and Mr. Lewan in particular, had a professional obligation to initiate contact sooner than they did, six days after the car crash. The unchallenged testimony in this case is that preemptive early contact is the prevailing norm of capital defense practice in highly-publicized murder cases. The trial attorneys testified that there existed no impediment to making early contact prior to a formal appointment. PC/980-81, 1016. In fact they testified that they themselves have done so on other occasions. *Id*.

Under these unique circumstances, the circuit court erred in holding that deficient performance did exist in counsel's failure to make earlier contact with Mr. Campbell. Prejudice is manifest, and therefore Mr. Campbell's conviction of guilt should be vacated.

b. The Trial Court Erred in Excluding the Expert Testimony of Norman Tebrugge at the Evidentiary Hearing

Norman Adam Tebrugge ("Tebrugge") was tendered as an expert witness at the evidentiary hearing in support of the claim asserting ineffective assistance of counsel for failure to provide prompt assistance with Mr. Campbell. PC/1029; *see also supra* Argument II(a). Tebrugge graduated from law school with high honors in 1984, defended over one hundred homicide cases and twelve cases involving the

death penalty over the course of a thirty year career. *See* Attachment 3 to Defense Witness List; PC/829-33. From 1995 to 2008, Tebrugge was on the Death Penalty Steering Committee of the Florida Public Defender Association and he planned the annual Florida "Life Over Death" training conference for hundreds of capital defenders statewide, often delivering the keynote presentation on Florida's capital punishment scheme. *Id*.; PC/1033-34. He teaches a death penalty seminar at Thomas Cooley Law School. PC/1030. Tebrugge is intimately familiar with counsel's duties in capital cases as well as the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. PC/830-33, 1035. Further, Tebrugge has testified six times as an expert witness in cases in which ineffective assistance of counsel was an issue. PC/1030-31.

Tebrugge was tendered by the defense to give expert testimony on the prevalence and importance of attorney rapid response in capital cases. This is a significant part of Mr. Campbell's first claim for relief. *See* Claim 1 of the Amended Motion to Vacate Judgement and Sentence; PC/535-40. In his report, Tebrugge stated that he always stressed the need for "rapid response" in capital cases in his presentations. PC/830-33. "Once an arrest is made in a homicide case . . . a member of the public defender staff, preferably an attorney, should make contact with the defendant." PC/833. Immediate contact is critically important to advise a defendant

of his constitutional rights and to determine if a defendant is indigent or in need of an attorney. *Id*. Tebrugge's expert testimony regarding the prevalence and necessity of attorney "rapid response" in capital cases was barred by the court. PC/1043-44.

Florida has a broad standard for the admissibility of evidence. *King v. State*, 89 So. 3d 209, 227 (Fla. 2012). All relevant evidence is admissible except when prohibited by law. Fla. Stat. Ann § 90.402. Relevant evidence is any evidence tending to prove or disprove a material fact. Fla. Stat. Ann § 90.401. The admission of relevant expert testimony is governed by Section 90.702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
> (2) The testimony is the product of reliable principles and methods; and
> (3) The witness has applied the principles and methods reliably to the facts of the case.

Fla. Stat. Ann § 90.702. Florida's rules do not prohibit expert testimony on any particular subject matter, including ineffective assistance of counsel.

In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 588-589 (1993), the United States Supreme Court explained the parameters of expert testimony

governed by Fed. R. Evid. 702.[12] The Court cited the "liberal thrust" of Rule 702 which was enacted to relax the traditional barriers to opinion testimony. *Daubert*, 509 U.S. at 588. "The inquiry envisioned by Rule 702 is, we emphasize, a flexible one." *Daubert*, 509 U.S. at 595. Under *Daubert*, a court must determine if opinion testimony is based on sufficient facts or data and is the product of reliable principles. *Andrews v. State*, 181 So. 3d 526 (Fla. Cir. Ct. 2015). Florida amended Section 90.702 in 2013 with explicit purpose of codifying the liberal and flexible *Daubert* standard. *Booker v. Sumter County Sherriff's Office*, 166 So. 3d 189, 191 (Fla. Cir. Ct. 2015).

Tebrugge's testimony would have been relevant and admissible under Sections 90.402 and 90.702. As a thirty-year veteran with immense experience in the field of

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[12] Fla. Stat. Ann § 90.702 is nearly identical to Fed. R. Evid. 702. The federal rule states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702 (2011).

capital defense, Tebrugge had specialized knowledge that would have assisted the trial court in understanding the prevalence and necessity of rapid response in homicide cases throughout the State of Florida. Tebrugge's testimony was based on his extensive knowledge of capital defense from decades of practicing and teaching. He thoroughly reviewed Mr. Campbell's records and has a deep understanding of the ABA Guidelines. There was nothing unreliable about Tebrugge's principles or methods and his testimony meets the standard in Section 90.702.

Counsel for the State objected to Tebrugge's testimony on the basis that it would address ineffectiveness of counsel. PC/1036. The objection was sustained, and the court refused a proffer of Tebrugge's testimony. PC/1039. The trial court explained that Tebrugge's testimony would, "invade the province of the trier of fact as a mixed issue of fact and law." PC/1041. This rationale does not comply with the Florida's Evidence Code.

Section 90.702 does not bar an expert who might address a mixed question of law and fact. There is no reason why an expert witness cannot testify about the prevalence and necessity of attorney rapid response in capital cases. In fact, Section 90.703 specifically permits expert testimony on an ultimate issue of fact as, "[t]estimony in the form of an opinion or inference otherwise admissible is **not** objectionable because it includes an ultimate issue." Fla. Stat. Ann § 90.703

(emphasis added). Tebrugge's testimony would have been probative, relevant, and completely permissible under Florida's Evidence Code and it was improperly barred by the circuit court.

ARGUMENT III

THE CIRCUIT COURT ERRED IN DENYING MR. CAMPBELL'S CLAIM THAT TRIAL COUNSEL RENDERED PREJUDICIAL INEFFECTIVE ASSISTANCE FOR FAILING TO OBJECT TO IMPROPER COMMENTS BY THE STATE, DENYING MR. CAMPBELL HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

The prosecutor in this case made several statements in both the guilt and penalty phase trials which constituted prosecutorial misconduct. Trial counsel failed to object to five of these statements and in the sixth instance, failed to take the necessary precautions to ensure the jury was not tainted from hearing the improper comment. Claim 2 of the amended motion to vacate addresses these six instances where trial counsel rendered prejudicial ineffective assistance of counsel. The trial court ruled that any inaction taken towards improper statements made during the penalty phase were now moot due to the granting of a new penalty phase based on *Hurst*.[13] PC/1187. Thus, the trial court only granted an evidentiary hearing for

[13] The comments made during the guilt phase were listed as Claim 2, subsections 2-5 in the Amended Motion to Vacate Judgment and Sentence.

statements which occurred during the guilt phase, specifically, subsections 1 and 6. PC/1179.

Prosecutorial misconduct occurs when the remarks are not only improper, but have prejudicially affected the defendant's substantive rights. *See Brown v. State*, 754 So. 2d 188 (Fla. 5th DCA 2000), citing *United States v. Wilson*, 149 F.3d 1298 (11th Cir. 1998). "A defendant's substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome of the trial would be different." *United States v. Wilson*, 149 F.3d at 1301 (internal quotations and citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *United States v. Eyster*, 948 F.2d 1196, 1207 (11th Cir. 1991). *See also Ross v. State*, 601 So. 2d 1190 (Fla. 1992). The Florida Supreme Court has stated that a trial attorney has rendered ineffective assistance of counsel if counsel did not object to improper comments which would constitute reversible error. *See Gordon v. State*, 863 So. 2d 1215, 1220 (Fla. 2003). These failures, individually and collectively, constituted deficient performance by trial counsel, and prejudiced Mr. Campbell.

First, during the guilt phase trial, Mr. Campbell testified in his own defense. Trial counsel testified at the evidentiary hearing that part of the reason for his testimony was to attack the heightened premeditation element. PC/1012-13. During

the State's closing arguments, the following statement was made in reference to Mr. Campbell's trial testimony:

> It's been proven that the witness was convicted of a felony. Well, we know that defendant is not a one-time convicted felon or a four-time convicted felon, he's a seven-time convicted felon. But he was stressed and he was depressed, he was in a fog, he was in a daze, he was in shock, it didn't register, he couldn't piece it together.
>
> If you want to believe that, go right ahead. I can't stop you. *Let him walk out the back of that courtroom door.*"

R18/617-18 (emphasis added). Trial counsel did not object to this improper statement.

The trial court denied this claim in part because "Mr. Sharkey's strategic decision was not to object but to address it at closing argument to counter the State's statements." PC/1190. However, trial counsel never testified that his failure to object was a strategic decision. During the post-conviction evidentiary hearing, trial attorney Devon Sharkey testified that he was the lead attorney for Mr. Campbell's guilt phase proceedings. When asked specifically why he failed to object to the above statement, Mr. Sharkey stated: "if it was objectionable, I was not aware and I did not think it was one of his stronger statements that he made during closing." PC/1012. Mr. Sharkey further stated that the comment during the closing arguments "seemed like a sort of absurd thing for him to say." PC/1013. However, Mr. Sharkey did agree

that the statement was misleading to a jury because it was not reasonable to believe Mr. Campbell's testimony and also believe he would "walk out the back of that courtroom door." PC/1013.

Trial counsel should have objected to this improper comment which shifted the burden of proof to Mr. Campbell. Failure to object constituted ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 688 (1984) and if objected to, the statement would have caused reversible error. "The state cannot comment on a defendant's failure to produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence." *Jackson v. State*, 575 So. 2d 181, 188 (Fla. 1991). *See also Rodriguez v. State*, 753 So. 2d 29, 37 (Fla. 2000) (the "State may not comment on a defendant's failure to mount a defense because doing so could lead the jury to erroneously conclude that the defendant has the burden of doing so."). "The standard for a criminal conviction is not which side is more believable, but whether, taking all the evidence into consideration, the State has proven every essential element of the crime beyond a reasonable doubt. For that reason, it is error for a prosecutor to make statements that shift the burden of proof and invite the jury to convict the defendant for some reason other than that the State has proved its case beyond a reasonable doubt." *Gore v. State*, 719 So. 2d 1197 (Fla. 1998), *citing*

Northard v. State 675 So. 2d 652, 653 (Fla. 4th DCA), *review denied,* 680 So. 2d 424 (Fla.1996). A prosecutor is also not permitted to denigrate the theory of the defense. *Jackson v. State*, 147 So. 3d 469, 486 (Fla. 2014). "[T]his type of excess is especially egregious in a death case, where both the prosecutors and courts are charged with an extra obligation to ensure that the trial is fundamentally fair in all respects." *Brooks v. State*, 762 So. 2d 879, 904-05 (Fla. 2000).

In this case, Mr. Campbell's substantial rights were prejudicially affected because there exists a reasonable probability that, but for the remarks, the outcome of the trial would be different. First, the statement suggests that reasonable doubt does not exist because Mr. Campbell did not create the doubt, and ignores the fact that reasonable doubt can exist due to the State's failure to produce sufficient evidence. Thus, the statement improperly shifts the burden of proof to Mr. Campbell. Further, as trial counsel testified, this statement is incredibly misleading to a jury. PC/1013. The statement discredits the existence of the jury finding any lesser included crime, arguing that the jury's decision to believe Mr. Campbell's version of events would only result in an out-right acquittal. Rather, the finding of a lesser included crime by the jury could and would result in Mr. Campbell's continued incarceration. "The failure to raise a contemporaneous objection when improper argument comments are made waives any claim concerning such comments for appellate review." *Card v.*

State, 803 So. 2d 613, 622 (Fla. 2001). In this case, trial counsel failed to make the appropriate objection when this comment was made and rendered prejudicial ineffective assistance of counsel under *Strickland*.

The second statement constituting prosecutorial misconduct occurred during Mr. Campbell's testimony. During the direct examination, trial counsel requested a sidebar with the court after overhearing the prosecutor state: "What a manipulative ass" to his co-counsel. R17/534-36. During the sidebar, trial counsel stated that Assistant State Attorney whispered the inappropriate comment in a loud enough voice that Mr. Sharkey could clearly hear it. R17/534-35. Mr. Sharkey argued his concern that a juror heard the comment as well, especially considering the prosecutor's proximity to the jury box. R17/535. Trial counsel requested a mistrial. R17/535. The prosecutor admitted that he did in fact make the statement to his co-counsel and apologized. R17/535. The trial court denied the mistrial.[14] R17/535. However, trial counsel did not request an inquiry into the jury panel to determine whether any jurors heard the statement.

During the post-conviction evidentiary hearing, Attorney Sharkey testified that he clearly recalled the incident when this inappropriate and offense comment was

[14] The trial court's denial of the defense objection and request for mistrial were not raised on direct appeal.

made. PC/1013. Attorney Sharkey testified: "I heard it and I was not pleased." PC/1013-14. However, Attorney Sharkey stated he did not request an individual inquiry into the jury panel. PC/1014.

"It is clearly improper for the prosecutor to engage in vituperative or pejorative characterizations of a defendant or witness." *Gore*, 719 So. 2d at 1201 (prosecutor's statement, "[i]f you believe he's lying to you, he's guilty," was nothing more than an exhortation to the jury to convict Gore if it found he did not tell the truth. Thus, it was a clearly impermissible argument); *see* also *Lewis v. State*, 377 So. 2d 640 (Fla. 1979) (improper to put the character of the accused in issue); *Donaldson v. State*, 369 So. 2d 691 (Fla. 1st DCA 1979). "While prosecutors should be encouraged to prosecute cases with earnestness and vigor, they should not be at liberty to strike 'foul blows.'" *Gore*, 719 So. 2d at 1202, *citing Berger v. United States*, 295 U.S. 78, 88 (1935). "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger*, 295 U.S. at 88. Further, to seek juror interviews there must be a showing that the error, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings. See *Johnson v. State*, 840 So. 2d 1218, 1225 (Fla. 5th DCA 2001).

Once again, Mr. Campbell's substantial rights were prejudicially affected because there exists a reasonable probability that, but for the remarks, the outcome of the trial would be different. Trial counsel still rendered ineffective assistance of counsel for failing to request that the jurors be individually questioned as to whether they comment was heard. This is especially egregious because Attorney Sharkey testified at the post-conviction evidentiary hearing that the overall guilt phase strategy was to "try to reduce the premeditation aspect to see if we could get a murder 2 out of it, and at the same time try to win as many jurors over for potential life folks in the future if it came down to that." PC/1002. The decision for Mr. Campbell to testify at the trial was made "to give a version of events that reduced premeditation." PC/1019. Thus, the offensive comment comes during a vital part of the trial – Mr. Campbell's personal testimony regarding the crime, which trial counsel used as their main source of evidence to argue for a lesser conviction. The risk that even one juror overheard this comment, essentially calling into question the veracity of the overall defense theory, was too prejudicial not to explore through questioning the jury.

The trial court denied this claim because "there was no evidence to show the jurors heard the statement. The statement was made while the Defendant was at the witness stand and the jurors' attention was towards the witness." PC/1191. The trial court is simply speculating when it assumes that a juror did not hear the inappropriate

comment based solely on the fact that their attention was towards Mr. Campbell at the time. During the side bar, trial counsel Sharkey stated "If I could hear it and I'm not far from the jury and I'm not – I can't be certain that a juror didn't hear that and I think that's extremely inappropriate and I'd ask for a mistrial at this time." R17/535. Mr. Sharkey, who conducted the direct examination, was able to hear the comment while he had his attention towards his client on the witness stand. This assumption is based on no evidence at all. It was completely inappropriate for trial counsel to not further investigate the potential impact this statement had on the jury.

Trial counsel rendered deficient performance under *Strickland* for failing to object, moving for a mistrial, and requesting individual jury *voir dire* for the statements listed above. "A defendant's substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome of the trial would be different." *United States v. Wilson*, 149 F.3d 1298, 1301 (11th Cir. 1998) (internal quotations and citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Eyster*, 948 F.2d at 1207. While one of these errors alone are sufficient to warrant reversal, they must be considered both in the context of the other multitude of failures to object to impermissible statements by the State, and the litany of additional instances of ineffective assistance of counsel on the part of trial counsel. As such, Mr. Campbell received prejudiced

ineffective assistance of counsel under *Strickland v. Washington* and should be granted a new guilt phase trial.

ARGUMENT IV

THE CIRCUIT COURT ERRED IN DENYING MR. CAMPBELL'S CLAIM THAT CUMULATIVE ERROR DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

In Claim 5 of his amended motion to vacate, Mr. Campbell argues that cumulative error deprived him of his constitutional right to a fundamentally fair trial, which is guaranteed under the Sixth, Eighth and Fourteenth Amendments. *See Heath v. Jones*, 941 F.2d 1126 (11th Cir. 1991); *Derden v. McNeel*, 938 F.2d 605 (5th Cir. 1991). "[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695-96. Cf. *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996) ("[W]hen we consider the cumulative effect of the testimony presented at the rule 3.850 hearing and the admitted *Brady* violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined and that a reasonable probability exists of a different outcome"), citing *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995) (cumulative effect of numerous errors

in counsel's performance may constitute prejudice); *Harvey v. Dugger*, 656 So. 2d 1253 (Fla.1995) (same).

The cumulative effect of the number of types of errors involved in Mr. Campbell's trial dictated the conviction he received. *See supra* Arguments I-III. Even if the Court is not persuaded that relief should not be granted on any one of them, the Court must consider their cumulative effect. The trial court erred in denying this claim. PC/1191. In considering all aspects of defense counsel's deficient performance as part of a cumulative analysis, Mr. Campbell respectfully requests a new guilt phase trial.

CONCLUSION

Based on the arguments in this brief and the record on appeal, the circuit court improperly denied Mr. Campbell's Amended Motion to Vacate Judgment and Sentence. Mr. Campbell requests this Court reverse the circuit court's order denying his guilt phase claims, vacate his conviction, and grant him a new trial, or such other relief as this Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF OF APPELLANT has been transmitted to this Court through the Florida Courts E-Filing Portal, which will send a notice of electronic filing to Doris Meacham, Assistant Attorney General, at Doris.Meacham@myfloridalegal.com and capapp@myfloridalegal.com, and mailed via United States Postal Service to John William Campbell, DOC #D35843, Florida State Prison, P.O. Box 800, Raiford, Florida 32083 on this 16th day of February, 2018.

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I hereby certify that a true copy of the foregoing Initial Brief of Appellant was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210(a)(2).

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