SUPREME COURT OF FLORIDA

LINROY BOTTOSON,	*	
	*	
Appellant,	*	
	*	
v.	*	CASE NO. 81,411
	*	
STATE OF FLORIDA,	*	
	*	
Appellee.	*	
	*	
* * * * * * * * * * * * * * * *	*	

ON APPEAL FROM THE
NINTH JUDICIAL CIRCUIT OF FLORIDA

INITIAL BRIEF

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Bottoson's motion for post-conviction relief, brought pursuant to Fla. R. Crim. P. 3.850. The circuit court denied Mr. Bottoson's claims after an evidentiary hearing.

Citations in this brief shall be as follows: The record on direct appeal shall be referred to as "RD ____." The record on appeal from the denial of the Rule 3.850 motion shall be referred to as "RP ____." The supplementary record on appeal from the denial of the Rule 3.850 motion shall be referred to as "RS ____." Unless otherwise stated, where references are made to exhibits, the exhibits referred to are those introduced into evidence or marked for identification at the evidentiary hearing that took place in April and November 1991. All other references will be self-explanatory or otherwise explained herein.

TABLE OF CONTENTS

Page

Preliminary Statement i

Table of Contents ii

Table of Authorities v

Statement of the Case and of the Facts 1

Summary of Argument 13

Arguments:

I. THE COURT BELOW ORDERED MR. BOTTOSON TO COMPLY WITH DISCOVERY REQUESTS BY THE STATE, IN VIOLATION OF HIS ATTORNEY CLIENT AND WORK PRODUCT PRIVILEGES, AND DESPITE THE LACK OF ANY DISCOVERY PROVISIONS FOR PROCEEDINGS UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.850. 14

II. LINROY BOTTOSON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION. 18

III. LINROY BOTTOSON WAS DENIED A COMPETENT MENTAL HEALTH EXAMINATION, AND COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND ARRANGE FOR SUCH AN EXAMINATION, IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. 33

IV. THE STATE PRESENTED FALSE TESTIMONY AND TEST RESULTS, AND FAILED TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE, IN VIOLATION OF MR. BOTTOSON'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND THE FLORIDA CONSTITUTION. 37

V. MR. BOTTOSON WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. 47

VI. THE COURT AND THE STATE CREATED CONDITIONS IN WHICH IT WAS IMPOSSIBLE FOR COUNSEL TO RENDER EFFECTIVE ASSISTANCE, THEREBY DEPRIVING MR. BOTTOSON OF HIS RIGHT TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, AND UNDER THE FLORIDA CONSTITUTION. 58

VII. THE TRIAL COURT INSTRUCTED THE JURY TO CONSIDER ONLY STATUTORY MITIGATING CIRCUMSTANCES, AND LIMITED HIS OWN CONSIDERATION TO STATUTORY MITIGATING CIRCUMSTANCES, IN VIOLATION OF MR. BOTTOSON'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS AND THEIR FLORIDA COUNTERPARTS. 64

VIII. A NEW TRIAL IS REQUIRED BECAUSE THE TRIAL COURT'S COMMENTS CONCERNING THE JURY'S ROLE IN THE SENTENCING PROCESS, APPELLATE REVIEW AND CLEMENCY RENDERED MR. BOTTOSON'S TRIAL FUNDAMENTALLY UNFAIR. 71

IX. THE SENTENCING JURY AND JUDGE WEIGHED VAGUE AND CONSTITUTIONALLY INVALID AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. 76

X. THE PENALTY PHASE JURY INSTRUCTIONS VIOLATED MR. BOTTOSON'S RIGHT TO A RELIABLE SENTENCING DETERMINATION BY REQUIRING THAT A MAJORITY OF THE JURORS VOTE IN FAVOR OF LIFE, PLACING THE BURDEN ON HIM TO PROVE THAT DEATH WAS NOT THE APPROPRIATE PUNISHMENT, AND PRECLUDING THE JURY FROM CONSIDERING SYMPATHY AND MERCY. 84

XI. THE STATE'S USE OF A PEREMPTORY CHALLENGE TO STRIKE THE ONLY BLACK VENIREMAN, VIOLATED MR. BOTTOSON'S RIGHTS UNDER ARTICLE I, SECTION 16(A) OF THE FLORIDA CONSTITUTION AND UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION. 87

XII. MR. BOTTOSON'S SENTENCE OF DEATH WAS BASED UPON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION AND THEREFORE VIOLATES HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS AND THEIR FLORIDA COUNTERPARTS. 90

XIII. THE RECORD OF THE TRIAL IS INADEQUATE, AND COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE AN ADEQUATE RECORD, IN VIOLATION OF MR. BOTTOSON'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS 93

XIV. CRITICAL STAGES OF THE PROCEEDINGS AGAINST MR. BOTTOSON WERE CONDUCTED IN HIS ABSENCE, IN VIOLATION OF FLA. R. CRIM. P. 3.180 AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS 94

XV. A NEW TRIAL IS REQUIRED BECAUSE THE TWENTY-THREE MEMBER GRAND JURY WHICH INDICTED MR. BOTTOSON WAS ILLEGALLY CONSTITUTED. 96

XVI. A NEW TRIAL IS REQUIRED BECAUSE OF THE HISTORICAL DISCRIMINATION IN APPOINTING GRAND JURY FOREMEN IN ORANGE COUNTY, FLORIDA. 97

Conclusion 100

Certificate of Service 101

Appendix

Appendix A — State v. Lewis, Petition for Writ of Common Law Certiorari, filed November 5, 1993 (Fla. 4th DCA)

Appendix B — Unrecorded bench conferences

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Adams v. Wainwright, 764 F.2d 1356 (11th Cir. 1985), cert. denied, 474 U.S. 1073 (1986) 91

Ake v. Oklahoma, 470 U.S. 68 (1985) 33

Alcorta v. Texas, 355 U.S. 28 (1957) 40

Arave v. Creech, 113 S. Ct. 1534 (1993) 79, 80

Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1987) 20

Batson v. Kentucky, 476 U.S. 79 (1986) 87, 90

Beck v. Alabama, 447 U.S. 625 (1980) 56

Blake v. Kemp, 758 F.2d 523 (11th Cir.), cert. denied, 474 U.S. 998 (1985) 18

Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991), cert. denied, 112 S. Ct. 1477, 119 L.Ed.2d 207 (1992) . 26

Bottoson v. Florida, 469 U.S. 962 (1984) 89

Boyde v. California, 494 U.S. 370 (1990) 71

Boykin v. Alabama, 395 U.S. 238 (1969) 91

Brady v. Maryland, 373 U.S. 83 (1963) 42, 44

Brewer v. Williams, 430 U.S. 387 (1977) 45

Caldwell v. Mississippi, 472 U.S. 320 (1985) 71, 73, 84

California v. Brown, 479 U.S. 538 (1987) 86

Castaneda v. Partida, 430 U.S. 482 (1977) 98

Chapman v. California, 386 U.S. 18 (1967) 84

Darden v. Wainwright, 477 U.S. 168 (1986) 53

Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989), reh'g denied, 898 F.2d 160 (11th Cir.), cert. denied, 496 U.S. 929 (1990) 69, 70

Eddings v. Oklahoma, 455 U.S. 104 (1982) 64, 86

Espinosa v. Florida, 112 S. Ct. 2926 (1992) . . . . . *passim*

Furman v. Georgia, 408 U.S. 238 (1972) 81

Geders v. United States, 425 U.S. 80 (1976) 58

Giglio v. United States, 405 U.S. 150 (1972) 40

Godfrey v. Georgia, 446 U.S. 420 (1980) 82

Griffith v. Kentucky, 479 U.S. 314 (1987) 89, 90

Guice v. Fortenberry, 661 F.2d 496 (5th Cir. 1981) . 97, 98, 99

Harris v. Dugger, 874 F.2d 567 (11th Cir. 1989) 18

Hernandez v. Texas, 347 U.S. 475 (1954) 98

Herring v. New York, 422 U.S. 853 (1975) 58

Hill v. Lockhart, 474 U.S. 52 (1985) 91

Hitchcock v. Dugger, 481 U.S. 393 (1987) 1, 64, 65

Holloway v. Arkansas, 435 U.S. 475 (1979) 58

Illinois v. Allen, 397 U.S. 337 (1970) 94

Jackson v. Dugger, 837 F.2d 1469 (11th Cir.), reh'g denied, 842 F.2d 339 cert. denied, 486 U.S. 1026 (1988) 85

Johnson v. Mississipppi, 486 U.S. 578 (1988) 90, 93

King v. Strickland, 714 F.2d 1481 (11th Cir. 1983), cert. granted and vacated on other grounds, 467 U.S. 1211 (1984) 18, 27

Lewis v. Jeffers, 497 U.S. 764 (1990) 80

Lockett v. Ohio, 438 U.S. 586 (1978) 64, 86

Maine v. Moulton, 474 U.S. 159 (1985) 46

Maleng v. Cook, 490 U.S. 488 (1989) 90

Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), cert. denied, 489 U.S. 1071 (1989) 73, 76

Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984) . . 18, 33

Maynard v. Cartwright, 486 U.S. 356 (1988) 79, 82

McMann v. Richardson, 397 U.S. 759 (1970) 92

Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988) . . . 24, 49

Miller v. Pate, 386 U.S. 1 (1967) 40, 43

Mooney v. Holohan, 294 U.S. 103 (1935) 40

Napue v. Illinois, 360 U.S. 264 (1959) 40

North Carolina v. Alford, 400 U.S. 25 (1970) 91

Parker v. Dugger, 498 U.S. 308 (1991) 93

Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988), rev'd on other grounds sub. nom. Saffle v. Parks, 494 U.S. 484 (1990) 86

Proffitt v. Florida, 428 U.S. 242 (1976) 80

Pyle v. Kansas, 317 U.S. 213 (1942) 40

Richmond v. Lewis, 113 S. Ct. 528 (1992) 81

Rose v. Mitchell, 443 U.S. 545 (1979) 97

Schneider v. Estelle, 552 F.2d 593 (5th Cir. 1977) 41

Shell v. Mississippi, 498 U.S. 1 (1990) 78, 79

Skipper v. South Carolina, 476 U.S. 1 (1986) 64

Smith v. Florida, 410 F.2d 1349 (5th Cir. 1969) 42

Sochor v. Florida, 112 S. Ct. 2114, 119 L.Ed.2d 326 (1992) 76, 77

Strickland v. Washington, 466 U.S. 668 (1984) . . 18, 49, 58, 91

Stringer v. Black, 112 S. Ct. 1130 (1992) 77, 81, 83, 84

Sullivan v. Louisiana, 124 L.Ed.2d 182 (1993) 84

Taylor v. Louisiana, 419 U.S. 522 (1975) 98

Tollett v. Henderson, 411 U.S. 258 (1973) 91

United States v. Antone, 603 F.2d 566 (5th Cir. 1979) 40

United States v. Bagley, 473 U.S. 667 (1985) 49

United States v. Cabrera-Sarmiento, 533 F.Supp. 799 (S.D. Fla. 1982) 100

United States v. Cronic, 466 U.S. 648 (1984) . . 28, 58, 61, 63

United States v. Diecidue, 448 F.Supp. 1011 (M.D. Fla. 1978), rev'd in part on other grounds, 603 F.2d 535 (5th Cir. 1979) 41

United States v. Henry, 447 U.S. 264 (1980) 44

United States v. Jenison, 485 F.Supp. 655 (S.D. Fla. 1979) 100

United States v. Pate, 226 F. Supp. 541 (N.D. Ill. 1963), rev'd, 342 F.2d 646, cert. denied, 384 U.S. 998, rev'd, 386 U.S. 1 (1967) 43

United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982) 98

United States v. Schappel, 445 F.2d 716 (P.C. Cir. 1971) . . 92

United States v. Tate, 419 F.2d 131 (6th Cir. 1969) 92

United States v. Taylor, 437 F.2d 371 (4th Cir. 1971) 92

Walton v. Arizona, 497 U.S. 639 (1990) 79

Zant v. Stephens, 462 U.S. 862 (1983) 79, 90

STATE CASES

Aldridge v. State, 503 So. 2d 1257 (Fla. 1987) 74

Alvord v. State, 322 So. 2d 533 (Fla. 1975) 27

Amazon v. State, 487 So. 2d 8 (Fla.), cert. denied, 479 U.S. 914 (1986) 68

Anderson v. State, 420 So. 2d 574 (1982) 45

Andrews v. State, 443 So.2d 78 (Fla. 1983) 98, 100

Arango v. State, 467 So. 2d 692 (Fla.), cert. denied, 457 U.S. 1140 (1982) 42

Bertolotti v. State, 534 So. 2d 386 (Fla. 1988) 73

Blackwell v. State, 79 So. 731 (Fla. 1918) 73, 75

Bottoson v. State, 443 So. 2d 962 (Fla.), cert. denied, 469 U.S. 873 (1984) 1, 2

Brown v. State, 206 So. 2d 377 (Fla. 1968) 56

Buckrem v. State, 355 So. 2d 111 (Fla. 1978) 68

Burr v. State, 466 So. 2d 1051 (Fla.), cert. denied, 474 U.S. 879 (1985) 100

Burr v. State, 518 So. 2d 903 (Fla. 1987), vacated on other grounds, 487 U.S. 1201 (1988) 89

Combs v. State, 525 So. 2d 853 (Fla. 1988) 65, 74

Dade County v. Strauss, 246 So. 2d 137 (Fla. 3d DCA), cert. denied, 253 So. 2d 864 (Fla. 1971), cert. denied, 406 U.S. 924 (1972) 62

Darden v. State, 475 So. 2d 217 (Fla. 1985) 74

Davis v. State, 624 So. 2d 282 (Fla. 3d DCA 1993) 16

Delap v. State, 350 So. 2d 462 (Fla. 1977) 93

Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987) 64

DuBoise v. State, 520 So. 2d 260 (Fla. 1988) 68

Duest v. Dugger, 555 So. 2d 849 (Fla. 1990) 42

Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991) 82

Engle v. State, 438 So. 2d 803 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984) 28

Ferry v. State, 507 So. 2d 1373 (Fla. 1987) 30

Foster v. State, 518 So. 2d 901 (Fla. 1987), cert. denied, 487 U.S. 1240 (1988) 66

Francis v. State, 413 So. 2d 1175 (Fla. 1982) 94

Garcia v. State, 622 So. 2d 1325 (Fla. 1993) 42

Gibson v. State, 351 So. 2d 948 (Fla. 1977), cert. denied, 435 U.S. 1004 (1978) 81

Gladden v. State, 12 Fla. 562 (1869) 96

Grossman v. State, 525 So. 2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989) 74

Hall v. State, 541 So. 2d 1125 (Fla. 1989) 29

Hallman v. State, 560 So. 2d 223 (Fla. 1990) 32

Hansbourough v. State, 509 So. 2d 1081 (Fla. 1987) 68

Hargrave v. State, 366 So. 2d 1 (Fla.), cert. denied, 444 U.S. 919 (1979) 80

Harich v. State, 437 So. 2d 1082 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984) 84

Harmon v. State, 527 So. 2d 182 (Fla. 1988) 68

Harvard v. State, 414 So. 2d 1032 (Fla. 1982), cert. denied, 459 U.S. 1128 (1983) 80

Heiney v. State, 620 So. 2d 171 (Fla. 1993) 26, 29, 68

Herzog v. State, 439 So.2d 1372 (Fla. 1983) 78

Holsworth v. State, 522 So. 2d 348 (Fla. 1988) 68

Jackson v. State, 498 So. 2d 406 (Fla. 1986), cert. denied, 483 U.S. 1010 (1987) 100

Jacobs v. State, 396 So. 2d 713 (Fla. 1981) 68, 69

Johnson v. State, 393 So. 2d 1069 (Fla.), cert. denied, 454 U.S. 882 (1981) 80

Keen v. State, 504 So. 2d 396 (Fla. 1987) 53

Kight v. Dugger, 574 So. 2d 1066 (Fla. 1990) 75

King v. State, 514 So. 2d 354 (Fla. 1987), cert. denied, 487 U.S. 1241 (1988) 67

Kirk v. State, 227 So. 2d 40 (Fla. 4th DCA 1969) 55

Knight v. State, 338 So. 2d 201 (Fla. 1976) 81

Mack v. State, 537 So. 2d 109 (Fla. 1989) 94

Magill v. State, 428 So. 2d 649 (Fla.), cert. denied, 464 U.S. 865 (1983) 80

Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986), cert. denied, 479 U.S. 1043 (1987) 58, 62, 63

Mason v. State, 489 So. 2d 734 (Fla. 1986) 34, 35

Meeks v. State, 336 So. 2d 1142 (Fla. 1976) 81

Metropolitan Dade County v. Bridges, 402 So. 2d 411 (1981) . 62

Mikenas v. State, 460 So. 2d 359 (Fla. 1984) 88, 89

Morgan v. State, 515 So. 2d 975 (Fla. 1987), cert. denied, 486 U.S. 1036 (1988) 66

Pait v. State, 112 So. 2d 380 (Fla. 1959) 71, 73, 75

Pentecost v. State, 545 So. 2d 861 (Fla. 1989) 68

Perry v. State, 522 So. 2d 817 (Fla. 1988) 68, 69, 78

Peterson v. State, 376 So. 2d 1230 (Fla. 4th DCA 1979),

cert. denied, 386 So. 2d 462 (Fla. 1980) 54

Pope v. State, 441 So. 2d 1073 (Fla. 1983) 80

Pope v. Wainwright, 496 So. 2d 798 (Fla. 1986), cert. denied, 480 U.S. 951 (1987) 74

Procacci v. Seitlin, 497 So. 2d 969 (Fla. 3d DCA 1986) . . . 16

Provence v. State, 337 So. 2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977) 78

Rhodes v. State, 547 So. 2d 1201 (Fla. 1989) 53

Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987) 64, 65

Roberts v. State, 568 So. 2d 1255 (Fla. 1990) 82

Rose v. State, 425 So. 2d 521 (Fla. 1982), cert. denied, 461 U.S. 909 (1983) 84

Ross v. State, 386 So. 2d 1191 (Fla. 1980) 28

Smith v. State, 598 So. 2d 1063 (Fla. 1992) 89

State v. Castillo, 486 So. 2d 565 (Fla. 1986) 89

State v. Cherry, 257 S.E.2d 551 (N.C. 1979), cert. denied, 446 U.S. 941 (1980) 82

State v. Ervin, 435 So. 2d 815 (Fla. 1983) 97

State v. Gray, 435 So. 2d 816 (Fla. 1983) 97

State v. Neil, 457 So. 2d 481 (Fla. 1984) 87

State v. Sireci, 536 So. 2d 321 (Fla. 1988) 34

State v. Slappy, 522 So. 2d 18 (Fla.), cert. denied, 487 U.S. 1219 (1988) 87, 88

Stevens v. State, 552 So. 2d 1082 (Fla. 1989) 18, 26, 28

Surf Drugs, Inc. v. Vermette, 236 So. 2d 108 (Fla. 1970) . . 17

Swan v. State, 322 So. 2d 485 (Fla. 1975) 27

Tedder v. State, 322 So. 2d 908 (1975) 29, 61, 76

Teffeteller v. State, 439 So. 2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984) 53

Tennessee v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), cert. dism'd as improvidently granted,

126 L.Ed.2d 555 (1993) 82

Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987), cert. denied, 485 U.S. 960 (1988) 66

Thompson v. State, 456 So. 2d 444 (Fla. 1982) 69

Tillman v. State, 522 So. 2d 14 (Fla. 1988) 88

Turner v. State, 530 So. 2d 45 (Fla. 1987), cert. denied, 489 U.S. 1040 (1989) 16

Valle v. State, 474 So. 2d 796 (Fla. 1985), cert granted and judg. vacated on other grounds, 476 U.S. 1102 (1986) 71, 100

Vaught v. State, 410 So. 2d 147 (Fla. 1982) 80

Waitkus v. Mauet, 757 P.2d 615 (Ariz. App. 1988) 16

Wakulla County v. Davis, 395 So. 2d 540 (1981) 62

Walsh v. State, 418 So. 2d 1000 (Fla. 1982) 69

Washington v. State, 86 Fla. 533, 98 So. 605 (1923) 54

Wasko v. State, 505 So. 2d 1314 (Fla. 1987) 69

White v. Board of County Commissioners, 537 So. 2d 1376 (Fla. 1989) 58, 62

Williamson v. State, 459 So. 2d 1125 (Fla. 3rd DCA 1984) . . 55

Willie v. State, 600 So. 2d 479 (Fla. 1st DCA 1992) 97

Witt v. State, 387 So. 2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980) 74

Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988) 65

FEDERAL STATUTES

18 U.S.C. § 2113(a) 91

18 U.S.C. § 3006A 92

STATE STATUTES

Art. I, Sec. 15(a), Fla. Const.; Amend. V, XIV 96

Fla. Stat. § 40.013(6) 95

Fla. Stat. § 90.502(4)(c) (1993) 16

Fla. Stat. § 921.141 (1980) . . . . . *passim*

Fla. Stat. § 925.036 (1980) 61, 62

OTHER AUTHORITIES

American Bar Association, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 44-49 (1989) 60

ABA Standards for Criminal Justice 3-5.8(b)(2d ed. 1980) . . 54

Bonnie and Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va. L. Rev. 427, 508-10 (1980) . . . 35

Ehrhardt, Florida Evidence, § 502.07 at 79 n.7.5 (2d ed. 1989 supp.) 16

Model Rules of Professional Conduct, Rule 3.4(e) (1984) . . . 54

STATEMENT OF THE CASE AND OF THE FACTS

On November 15, 1979, the grand jury for the Ninth Judicial Circuit indicted Mr. Bottoson on a single count of first-degree murder. Trial began March 16, 1981, before Circuit Judge Frank Kaney, and Mr. Bottoson was convicted on April 6, 1981. The jury recommended death on April 10, which sentence the court imposed on May 1. RD 2168, 2343-54, 3363-70. This Court affirmed. Bottoson v. State, 443 So. 2d 962 (Fla.), cert. denied, 469 U.S. 873 (1984).

Mr. Bottoson filed a motion in the circuit court to vacate judgment and sentence under Rule 3.850, Florida Rules of Criminal Procedure, on December 23, 1985. RP 1756-1810. On December 4, 1987, Mr. Bottoson filed his "First Amendment to Ground 'H' of Mr. Bottoson's Motion to Vacate Judgment and Sentence," raising a claim under Hitchcock v. Dugger, 481 U.S. 393 (1987). RP 1948-1957. On February 6, 1990, a warrant for Mr. Bottoson's execution was signed. RP 2005. After the circuit court entered a stay of execution, RP 2040-2042, Mr. Bottoson filed a "Supplement to Motion to Vacate Judgment and Sentence," on April 30, 1990, pursuant to court order. On March 29, 1991, the circuit court entered an Order purporting to summarily deny some of Mr. Bottoson's claims. RP 3120-40. On April 5, 1991, Mr. Bottoson objected to the Order, requesting that the Court reconsider it, RP 3143-53, and filed a "Supplement to Claims E and I of Motion to Vacate Judgment and Sentence," RP 3154-3191. On April 8, 1991, Mr. Bottoson filed a "Supplement to Claims E-II and I of Motion to Vacate Judgment and Sentence." RP 3204-3216.

Hearing was held on the motion, as amended and supplemented, on April 8-12, 1991, November 13-15, November 18, and November 20, 1991. The trial court, per Circuit Judge Gary L. Formet, Sr., denied all relief on February 5, 1993. RP 3597-3614. That Order was entered

after reconsideration of the prior Order, and expressly supersedes it. RP 3597. Appeal was timely taken on March 8, 1993. RP 3632-33.

Evidence presented at trial

On direct appeal, this Court summarized the evidence presented at trial by the State. Bottoson v. State, 443 So. 2d 962, 963-64 (Fla. 1984).

At penalty phase, the State presented a single witness who testified that Mr. Bottoson had been convicted in 1971 on a federal bank robbery charge in California, and that the court there had recommended that a psychiatric evaluation of Mr. Bottoson be conducted. RD 2115-17. The defense presented three witnesses who provided testimony concerning nonstatutory mitigating circumstances, including Mr. Bottoson's good and nonviolent character; sincere religious beliefs and work with a local church; entry into the ministry in his early teens; and the fact that he was a father. RD 2122-32, 2135-39. The trial court instructed the jury to consider only the statutory mitigating circumstances, RD 2157-58, and itself considered only those circumstances in its findings imposing the death sentence. RD 3363, 3367-69.

Facts presented at the evidentiary hearing:

Linroy Bottoson's life history

Linroy Bottoson was born on February 28, 1939, in Cleveland, Ohio, the son of Martha West and a man named Albert McKinney or Kenny, who abandoned his family and was considered to be strange and probably retarded. RP 53-4, 100. Martha later married Joseph Bottoson. Martha, who was the dominant force in the household, was obsessed with religion and forced Linroy from a very young age into religious activities, such as constantly reading the Bible, praying and preaching, and away from normal childhood activities such as playing with other children. RP 56-7.

Those who knew Linroy as a child all agree that Linroy acted different from other children and appeared to have serious mental problems. Linroy preached on street corners from the time that he was seven to nine years old. Everybody in the community thought that he was strange, RP 58, not only because of the fact that he was preaching at such a young age, but because he babbled incoherently and was unable to string his thoughts together in any kind of consistent fashion. RP 59, 189-90, 192; Def. Ex. 2. Linroy also had visions and held conversations with both God and the devil. RP 59-60.

In addition to his mental limitations, Linroy suffered from serious physical problems. He had seizures or fits in which he would holler and yell and his mother would have to hold him down. Sometimes his mother would take him away for two or three days until he got over the fits. RP 61-63. When Linroy was nine years old, he put his arm through a plate glass door. He cut his hand and arm severely, requiring emergency surgery and subsequent corrective surgeries, despite which his arm remained painful, disfigured and barely functional. RP 66-68.

As he grew up, it became apparent that Linroy was unable to cope with the demands of school or of everyday life. He got poor grades in school and dropped out of school in the ninth grade. RP 53, 574; Def. Ex. 25. Incapable of functioning as a normal adolescent or as an adult, he entertained fantasies in which he demonstrated unusual powers, as a wrestler, RP 69-70[1], or a singer, RP 269, but more typically as a preacher endowed with magical powers by God. He repeatedly claimed that he had the powers to heal the sick, raise

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[1]Linroy had a cape made for himself to hide his real identity and dreamed of making millions as a professional wrestler. Instead, when he wore his cape people made fun of him and chased him.

people from the dead, forecast the future, and drive out demons. RP 72-73, 128, 268-69, 273-74. Those who witnessed Linroy's bizarre behavior and incoherent preaching, including many of the same religious faith, were convinced that he had serious mental problems. RP 127-8, 167-69, 178-79, 192, 272, 297-99.

At the age of 19, Linroy married a young woman from Florida. He enlisted in the Army, but was discharged from the Army because of physical problems resulting from the old injury to his arm. Def. Ex. 11, item 16. Linroy returned to civilian life and attempted to support what was soon a large family. Then and later, Linroy was unable to keep any job for long, although he never stopped trying -- his Social Security records show that over a twenty-year period he held, usually for very short periods, over fifty-six jobs. Def. Ex. 4. As a result, Linroy was unable to support his family financially. Moreover, like Linroy and like his father, Linroy's children suffered from emotional or mental problems. One of them suffered brain damage at birth, another receives SSI disability payments because of his mental limitations, and a third has been hospitalized and diagnosed as schizophrenic. RP 81, 104, 597; Def. Ex. 7. Despite his limitations, Linroy was a loving father who is loved by his children. RP 116.

Linroy suffered a breakdown. On one occasion, his minister found him lying on the altar, praying and beating on the floor. RP 167; Jt. Ex. 2. Finally, in the summer of 1962, Linroy took a knife and a bottle of poison to his church, where he attempted to commit suicide. He was picked up by the police and committed to Fair Hill Psychiatric Hospital. RP 79; Def. Exs. 8, 11. He was diagnosed as having experienced an "acute schizophrenic episode," and was treated with anti-psychotic medication. Def. Exs. 8, 11.

Linroy's marriage did not survive long after this breakdown. After a very brief second marriage he married for a third time and had another child. Unable to support his wife and child in Cleveland, Linroy moved to Fresno, California, but was no more able to support them there. On June 22, 1971, under severe financial pressure, Linroy heard voices encouraging and ordering him to rob a bank. With a gun in his pocket, Linroy walked into a bank and wrote a note saying, "I want $20,000 in large bills. I have a gun. I have a bomb." He accepted some $250, and was quickly apprehended. RP 620; Def. Ex. 5. Linroy pled guilty and received a preliminary sentence of twenty years, but the court required a psychiatric examination before passing final sentence. The evaluator gave Linroy a diagnosis of "Paranoid schizophrenia, latent type," and recommended that he be placed on probation, given the mental illness that was present when the crime was committed. Def. Ex. 5. The court rejected that recommendation, but reduced Linroy's sentence to five years.

Linroy's wife divorced him, and he returned to Cleveland, where he married his fourth wife, Dorothy Jones. After a short time, they moved to the Orlando area. There, the problems that had dogged Linroy throughout his adult life recurred: marital discord, financial difficulties, and the reemergence of psychotic symptoms. RP 631; Def. Ex. 11. In the opinion of psychiatrist Dr. Robert Phillips, Linroy was mentally ill, under the influence of an extreme emotional disturbance and had a substantially impaired capacity to conform his conduct to the law at the time of the offense. RP 632, 650-51, 749.

Linroy's mental health

As set forth above, numerous lay witnesses who witnessed Linroy's behavior and demeanor during his childhood and adolescence felt that he had some sort of serious mental health problem. RP 58-60 (Joseph Bottoson Scott); RP 127-28 (Stanley Tolliver); RP 169 (Rev. Ronnie

Robinson); RP 178 (Jesse Davis); RP 189-90 (Gertrude Bronson); RP 272, 276 (Lawrence Boone); RP 298-99 (Clarence Gaines); see generally Def. Ex. 11.

In his early 20s, Linroy attempted to commit suicide, was committed to a mental hospital, and was diagnosed as having suffered an acute schizophrenic episode. Def. Ex. 8. Nine years later, after he had pled guilty to a bank robbery, the sentencing judge was sufficiently concerned about his mental health to order an extensive mental health evaluation. Def. Ex. 5. The examining psychiatrist diagnosed Linroy as suffering from "Paranoid schizophrenia, latent type." He recommended psychiatric treatment and further psychological testing for Mr. Bottoson. Def. Ex. 40.

Prior to his trial, Mr. Bottoson was examined for competency by two psychiatrists. One of these, Dr. Lloyd Wilder, has since died and rendered only an extremely brief report stating that Mr. Bottoson was in his opinion competent and sane, but providing no supporting analysis or diagnosis. Def. Ex. 15. The other, Dr. Robert Kirkland, also opined that Mr. Bottoson was competent to stand trial, but noted Mr. Bottoson's self report of prior psychiatric treatment, a diagnosis of schizophrenia, and auditory hallucinations. Def. Ex. 6.

Dr. Kirkland elaborated on his findings in his testimony at the evidentiary hearing. He described Mr. Bottoson's belief that he had special powers, including the power to heal the sick and the ability to raise the victim from the grave. He also recounted Mr. Bottoson's experience of auditory and visual hallucinations. RS 411. He described his impressions as to Mr. Bottoson's mental condition as follows:

> I suspected that Mr. Bottoson had a mental disorder, probably schizophrenia.
>
> . . . .

> If somebody had asked me at that time, "Do you think that Mr. Bottoson is schizophrenic," I likely would have replied, "Yes."

RS 437. Dr. Kirkland did not, however, have sufficient information to make a diagnosis or to determine Mr. Bottoson's mental state at the time of the offense, because he was provided no information other than that which he gleaned from his interview of Mr. Bottoson. RS 437, 439, 449.

Psychiatric expert Dr. Robert Phillips testified concerning his diagnosis and evaluation of Mr. Bottoson. Dr. Phillips reached his conclusions after review of extensive background materials, including affidavits from persons who had observed Mr. Bottoson; school, military and employment records; and the prior psychiatric diagnoses and evaluations. Def. Ex. 11. Dr. Phillips concluded that Mr. Bottoson suffers from a psychosis known as schizoaffective disorder, which is used to "describe an individual who suffers from a mental disease that has symptoms consistent both with schizophrenia, bipolar disorder or manic depressive disorder." RP 568. In Dr. Phillips' opinion, this mental illness has been present for most of Mr. Bottoson's life, at least from early adulthood and probably earlier. RP 571-2, 632. Among the symptoms of Mr. Bottoson's mental illness are his beliefs that he has special powers; magical thinking; auditory and visual hallucinations; delusions; excessive religiosity and grandiosity; and bizarre behavior. RP 570-71, 587-90, 593-4. Among the factors supporting Dr. Phillips' diagnosis, in addition to his own examination of Mr. Bottoson, are his history of bizarre and delusional behavior, RP 590-91; the presence of mental disorders in family members, including his schizophrenic daughter, Michelle, RP 595-99, Def. Ex. 7; his work records, RP 600, Def. Ex. 4; his attempted suicide and treatment with anti-psychotic medication thereafter, RP 602-05; letters written by Mr. Bottoson, RP 623-27,

Def. Exs. 12, 13; and the prior diagnoses. RP 601-02, 619-20, Def. Exs. 5, 8. Finally, it was Dr. Phillips' opinion that Mr. Bottoson was in an active phase of his psychosis both at the time of the murder and at the time of his prior robbery offense. RP 619-20, 650-1, 656.

Trial counsel's representation of Mr. Bottoson

Mr. Bottoson's defense counsel was William Sheaffer, at the time an inexperienced attorney barely out of law school. He had never previously handled a capital case. RS 117. Mr. Sheaffer was appointed to represent Mr. Bottoson less than six months before the trial started, after the public defender's office was forced to withdraw. RS 118-19. Mr. Bottoson's trial counsel has admitted that he did virtually no penalty phase investigation prior to the verdict; that he barely talked to Mr. Bottoson about penalty phase; that he made no effort to obtain crucial records concerning Mr. Bottoson's life history and history of mental illness; and that he had no reasons for these failures. Pertinent portions of his testimony were as follows:

> Q. Can you assign where the greater portion of your efforts were devoted in preparing and implementing your representation of Mr. Bottoson?
>
> A. Guilt/innocence phase.
>
> Q. And if you were to assign percentages, what would be the percentage of your [total] preparation and effort that you put to the guilt/innocence phase?
>
> . . . .
>
> A. Yes. Probably a good 80 percent plus, as to the guilt/innocence phase. The remaining, minus one percent as to the penalty phase. Perhaps one percent as it relates to efforts to persuade the Judge to override the jury's recommendation.
>
> . . . .
>
> Q. All right. Now, did [Mr. Bottoson] tell you anything about his personal background, his life history as it were? ....
>
> A. I don't recall as to any great depth that he reported that information, nor that I really explored in great depth the intimate details of his past.
>
> . . . .

Q. On direct examination you were asked whether [defense investigator] Morris actually went to Cleveland, physically to look for evidence. You said, no. But you left me with the impression that he did do some out-of-state investigation.

Was that the phone calls to Cleveland that you told us about a moment ago?

A. Well, I know that he traveled to south Florida. And I will say this, his investigation was not toward the penalty phase at all.

Q. Right.

A. Until after the conviction came in, and then it was probably minimal....

Q. All right. Now, did you ever discuss with Mr. Bottoson the penalty phase, what things might be important in the penalty phase if you got to that point?

This is before the trial.

A. In all probability, if there were discussions, they were minimal and negligible. And there is a good chance that our discussions occurred when the jury came back.

Q. What was relayed by Mr. Bottoson as to the incident which triggered that evaluation?

A. Mr. Bottoson indictated that there had been a robbery in California. He was purportedly involved in it and that during the course of those proceedings or after those proceedings he was treated for depression, in California.

. . . .

Q. Did you make any effort to obtain records from the United States District Court for the Eastern District of California, with respect to that prior conviction of that bank robbery, of Mr. Bottoson?

A. No.

Q. Did you have any tactical or strategic reason for not seeking to obtain those records?

A. No.

Q. In addition to Mr. Bottoson's self report of depression, were there other documents within your possession at the time of the penalty phase or trial in 1908 (sic) and 1981 which indicated to you that Mr. Bottoson had, in fact been hospitalized or evaluated while in the custody of the Federal Bureau of Prisons?

A. I believe in the Wilder/Kirkland report, I was not aware of any other documents.

RS 130-31, 152-53, 308-11.

The jury verdict of guilt was rendered on April 6, 1981. The trial court scheduled the penalty phase for April 9. On that date, Mr. Sheaffer asked for more time to get witnesses, and was given until April 10. If he had not been given the extra day, he would have had no witnesses whatsoever. RS 135-38. Mr. Sheaffer presented Mr. Bottoson's mother and two members of his church in Florida to provide character evidence. RD 2122-39. At the time of the penalty phase, Mr. Sheaffer did not know where Mr. Bottoson was from; what his father's name was; whether Mr. Bottoson had any siblings; whether Mr. Bottoson had any children; how many times Mr. Bottoson was married; whether Mr. Bottoson had ever served in the military; that Mr. Bottoson had a good record in prison during his prior incarceration; anything about Mr. Bottoson's employment history; or who Joey Bottoson was. RS 138-42, 181, 241, 341-42.

After jury selection had begun, two psychiatrists were appointed to assess Mr. Bottoson's competence and sanity. RD 3238. Mr. Sheaffer did not provide them with any documents regarding Mr. Bottoson's claims to have the powers to heal the sick and raise the dead. RS 167-70. Mr. Sheaffer may have talked to one of the psychiatrists briefly, but never asked either of them to assess mitigating circumstances. RS 174, 312. Mr. Sheaffer had a motion for a confidential psychologist for use at the penalty phase granted, but never obtained such a psychologist. RS 176-77.

The dog handler evidence

At trial, the State presented the testimony of John Preston, who testified as an expert dog handler. RD 1347. Mr. Preston testified that his dogs had linked Mr. Bottoson's scent to the scene of the abduction of the victim and the place where her body was found,

and that they had linked the victim's scent to cars that were respectively rented by and owned by Mr. Bottoson. RD 1349-57.

The trial court noted during the hearing that it was "amply demonstrated" that Preston was not a competent dog handler. RP 1033. Mr. Bottoson presented and proffered the testimony of numerous witnesses, based both on personal observation and expertise, that Preston had made false claims both in the Alexander case and in other cases, that it was physically impossible for his dogs to have traced the scents that he claimed they had traced in the Alexander case, and that Preston had falsified the qualifications and abilities both of himself and of his dogs. See generally RP 152-57, 778-815, 830-66, 883-1003, 1021-59, 1133-77. This evidence was summed up by the testimony of Orange County Sheriff's Office deputy and dog handler Bernard Greer, that Preston was not a "righteous dog handler." RP 855.

Mr. Sheaffer did not depose Preston, did nothing beyond talking to Mr. Bottoson's prior counsel to investigate Preston's qualifications or the validity of his claims, did not do any research on the subject of dog handling, and did not consult any expert dog handlers. RS 220-22, 241, Def. Ex. 38.

SUMMARY OF ARGUMENT

I. The court below erred in ordering Mr. Bottoson to produce to the State the trial attorney's files, in allowing the State to conduct discovery depositions, and in ordering Mr. Bottoson to waive his attorney client and work product privileges. No discovery is provided for in Rule 3.850 proceedings, and Mr. Bottoson was entitled to assert his privileges in those proceedings.

II. Defense counsel conducted virtually no investigation of Mr. Bottoson's life history or of his substantial history of mental illness. As a result, counsel presented virtually no mitigating

evidence. That failure was unreasonable and prejudicial, given the extensive mental health and background evidence that was available and counsel's lack of any reason for the failure to investigate, develop and present that evidence. The capital sentencing proceeding was not individualized or reliable, and Mr. Bottoson was deprived of his right to the effective assistance of counsel.

III. Counsel failed to investigate and arrange for a competent mental health evaluation, and the mental health examinations actually conducted failed to meet the standard of care. Mr. Bottoson was deprived of his rights to due process and to the effective assistance of counsel.

IV. The State presented false testimony and false test results on the part of dog handling expert John Preston. The State also presented false testimony from jail inmate Pertrell Kuniara, and failed to disclose the existence of a deal with Kuniara. Mr. Bottoson was deprived of his rights to due process and a fair trial.

V. Counsel failed to investigate Preston's qualifications and abilities. Counsel also performed deficiently at trial in numerous respects. Mr. Bottoson was prejudiced thereby, requiring that a new trial be held.

VI. The trial court denied Mr. Bottoson's motions for a continuance and for the appointment of co-counsel for penalty phase. At the time of Mr. Bottoson's trial, a statutory maximum fee of $2500 for a capital case was in effect. The fee cap and the trial court's orders, individually and cumulatively, operated to deprive Mr. Bottoson of his right to effective counsel.

VII. The trial court instructed the jury to consider only statutory mitigating circumstances, and himself considered only statutory mitigation, in violation of Hitchcock v. Dugger.

VIII. The trial court's comments and instructions concerning the jury's role in the sentencing process, appellate review and clemency rendered Mr. Bottoson's trial fundamentally unfair, in violation of Caldwell v. Mississippi, and Pait v. State.

IX. The sentencing jury and judge weighed vague and invalid aggravating circumstances, in violation of Godfrey v. Georgia, Espinosa v. Florida, and Arave v. Creech. Those violations were not harmless. Mr. Bottoson is entitled to relief.

X. The penalty phase jury instructions violated Mr. Bottoson's right to a reliable sentencing determination by requiring that a majority of the jurors vote in favor of life, placing the burden on him to prove that death was not the appropriate punishment, and precluding the jury from considering sympathy and mercy.

XI. The State's use of a peremptory challenge to strike the only black venireman violated Neil v. State. Given the timing of the Neil decision, retroactive application of Neil is not required. Mr. Bottoson is entitled to a new trial.

XII. Mr. Bottoson's sentence of death was based on a prior conviction that was unconstitutionally obtained. The death sentence violates Johnson v. Mississippi, and must be vacated.

XIII. The record of the trial is incomplete, and counsel was ineffective for failing to preserve a complete record. The lack of a complete record has deprived Mr. Bottoson of his right to meaningful appellate review.

XIV. Critical stages of the proceedings against Mr. Bottoson were conducted in his absence, in violation of Fla. R. Crim. P. 3.180 and the sixth, eighth and fourteenth amendments.

XV. Mr. Bottoson was indicted by an illegal twenty-three person grand jury. The indictment and resulting judgment and sentence are void.

XVI. A new trial is required because of the historical discrimination in appointing grand jury forepersons in Orange County, Florida.

ARGUMENT I

THE COURT BELOW ORDERED MR. BOTTOSON TO COMPLY WITH DISCOVERY REQUESTS BY THE STATE, IN VIOLATION OF HIS ATTORNEY CLIENT AND WORK PRODUCT PRIVILEGES, AND DESPITE THE LACK OF ANY DISCOVERY PROVISIONS FOR PROCEEDINGS UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.850.

A. FACTS AND PROCEDURAL HISTORY RELEVANT TO THIS ARGUMENT.

After the first part of the evidentiary hearing in the court below was completed, and before the second part began, the State served an investigative subpoena on Mr. Bottoson's trial counsel, William Sheaffer, for the purpose of obtaining his trial file and taking his deposition. RP 3256. After learning of the subpoena, Mr. Bottoson's post-conviction counsel moved to intervene and to quash the subpoena, while the State moved to compel Mr. Bottoson to produce the trial file, which was in post-conviction counsel's possession. RP 3252, 3261-64. The motions to intervene and quash were denied, RP 3292-93, as was Mr. Bottoson's motion for a stay of proceedings pending appeal. RP 3299-3300.

When Mr. Sheaffer was deposed, he refused to answer questions based on Mr. Bottoson's assertion of the attorney-client privilege, and the State moved to compel answers to the deposition questions. RP 3304-08. On October 18, 1991, the court ordered Mr. Bottoson to produce the trial attorney's file to the State. RP 3352-55. On October 21, 1991, post-conviction counsel produced non-privileged portions of the file, but continued to assert the attorney-client privilege with respect to the remainder. RP 3346. The State requested an order to show cause why post-conviction counsel should not be held in contempt, and moved to strike Mr. Bottoson's pleadings for failure to comply with the State's discovery motions and orders.

RP 3369-87, 3389-3403. The court then entered an order conditionally striking the pleadings in the event that Mr. Bottoson did not withdraw his objections and allow the State access to the entire file and the opportunity to depose Mr. Sheaffer without any privilege objection being interposed by counsel for Mr. Bottoson. RP 3485-87. Under the compulsion of this order, Mr. Bottoson then waived his objection, knowingly and intelligently, but not voluntarily. RS 10. After being deposed by the State, Mr. Sheaffer testified, and portions of his file were introduced into the record by the State. State's Ex. 4.

B. THE COURT BELOW ERRED IN COMPELLING MR. BOTTOSON TO SUBMIT TO DISCOVERY AND IN COMPELLING MR. BOTTOSON TO WAIVE HIS ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES.

In Mr. Bottoson's case, the State sought to take the deposition of trial counsel, to compel answers to discovery questions, to compel Mr. Bottoson to respond to discovery requests, and to sanction Mr. Bottoson for refusing to respond to discovery, all pursuant to the Florida Rules of Civil Procedure. See, e.g., RP 3252, 3304, 3389. The State contended that Rule 3.850 proceedings are civil in nature, and therefore that the civil rules apply to them. This argument ignores the obvious fact that Rule 3.010, Florida Rules of Criminal Procedure, states that the criminal rules apply to Rule 3.850 proceedings. The criminal discovery rules, however, were designed for a pretrial setting rather than for Rule 3.850 proceedings, and are triggered only by the defendant's invocation of the discovery process, see Rule 3.220, something Mr. Bottoson has not done in these proceedings. Because the application of either the civil or criminal discovery rules to Rule 3.850 proceedings is obscure at best, it is not surprising that in other cases the State has taken the position that no discovery is provided for or permitted in Rule 3.850 proceedings. See Appendix A, State v. Lewis, Petition for Writ of Common Law Certiorari, filed November 5, 1993 (Fla. 4th DCA).

Mr. Bottoson agrees with that position. Because neither the civil rules of discovery nor the criminal rules are applicable or have ever been invoked by Mr. Bottoson, there was no authority for the court below to order Mr. Bottoson to provide discovery to the State. Even under the recent decision of Davis v. State, 624 So. 2d 282 (Fla. 3d DCA 1993), there is no provision for discovery by the State in Rule 3.850 proceedings. Accordingly, the court below erred in its orders compelling discovery and threatening the striking of Mr. Bottoson's pleadings.

More fundamentally, the court below erred in compelling Mr. Bottoson to waive his attorney-client and work product privileges. Those privileges are fundamental to our system of justice, and they are not waived simply by the act of filing a post-conviction proceeding alleging ineffective assistance of counsel. At most, any waiver must be limited to the specific matters set forth in the Rule 3.850 motion. See Fla. Stat. § 90.502(4)(c) (1993); Rules Regulating the Florida Bar, Rule 4-1.6(c); Turner v. State, 530 So. 2d 45, 46-47 (Fla. 1987), cert. denied, 489 U.S. 1040 (1989); Waitkus v. Mauet, 757 P.2d 615 (Ariz. App. 1988).

In Turner, this Court ruled that a defendant no longer had an attorney-client privilege as to communications concerning a specific, limited claim as to his waiver or acquiescence in his counsel's waiver of his presence during a critical stage of the trial. The waiver of privilege was limited solely to attorney-client communications concerning the presence issue. Since that was the only matter at issue, the attorney-client privilege was not waived as to any other matter. Professor Ehrhardt has read the Turner decision to permit disclosure only of relevant communications. Ehrhardt, Florida Evidence, § 502.07 at 79 n.7.5 (2d ed. 1989 supp.). See also Procacci v. Seitlin, 497 So. 2d 969 (Fla. 3d DCA 1986).

The court below effectively ruled that by alleging counsel's ineffectiveness, Mr. Bottoson had made an unlimited waiver of the privilege with respect to any communication that ever took place between him and his counsel. RP 3222, 3352, 3485. Those rulings were clearly inconsistent with Turner, were erroneous, and forced Mr. Bottoson to reveal and permit to be revealed otherwise privileged material.

Closely related to the attorney-client privilege is the attorneys' work product privilege, which protects documents and papers of an attorney prepared in anticipation of litigation. Included under the work product privilege are the mental impressions, conclusions, opinion, or legal theories of an attorney or other representative. Surf Drugs, Inc. v. Vermette, 236 So. 2d 108, 112 (Fla. 1970). In Waitkus, supra, the court ruled that compelled production of the trial attorney's entire file is improper and overbroad, and that production of irrelevant matters cannot be required. The order of the court below effectively required Mr. Bottoson to produce his trial attorney's entire file.

The full measure of the prejudice to Mr. Bottoson cannot be discerned in retrospect. The State gained access to privileged, but irrelevant matters relating both to attorney-client communications and to work carried out by Mr. Bottoson's attorneys on his behalf. The full use made by the State of this unwarranted disclosure cannot be known. The State did introduce, however, over Mr. Bottoson's relevance objection, portions of his attorney's file. RS 273-79. The introduction of this irrelevant and privileged matter was erroneous and it should be stricken from the record and not considered by this Court.

ARGUMENT II

LINROY BOTTOSON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Under Strickland v. Washington, 466 U.S. 668 (1984), a defendant is entitled to relief if he can show that, at the penalty phase of his capital trial, his attorney rendered deficient performance and that there is a reasonable likelihood that the sentencing outcome would have been different had his attorney performed adequately. At the evidentiary hearing held below, Mr. Bottoson presented ample proof of both prongs of the Strickland standard.

As is well recognized, counsel must discharge very significant responsibilities in the penalty phase of a capital trial. The first of these is the duty to investigate available mitigating evidence before deciding whether or not such evidence should be presented. See, e.g., Stevens v. State, 552 So. 2d 1082, 1087 (Fla. 1989); Harris v. Dugger, 874 F.2d 567 (11th Cir. 1989); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir.), cert. denied, 474 U.S. 998 (1985). Second, counsel has a duty to ensure that his client receives adequate mental health assistance, especially when, as in the penalty phase of this case, the client's mental state is (or should be) at issue. Blake; Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984). Third, counsel has a duty to investigate and if possible present evidence to refute or minimize the strength of any aggravating factors that may be available to the State. Finally, counsel has a duty both in the penalty phase before the jury and at the judge sentencing proceeding to advocate for, and not abandon, his client. Stevens; King v. Strickland, 714 F.2d 1481, 1491 (11th Cir. 1983), cert. granted and vacated on other grounds, 467 U.S. 1211 (1984).

Here, trial counsel failed in all of these duties, and those failures were clearly prejudicial to Mr. Bottoson. Counsel conducted

no investigation for the penalty phase prior to the guilty verdict, and virtually none in the few precious days thereafter. Counsel had available to him from multiple sources information concerning Mr. Bottoson's prior history of mental illness, including two occasions on which he was diagnosed as being schizophrenic, and never lifted a finger to obtain any of it. There was available to counsel information that would have cast grave doubt on the legality of Mr. Bottoson's prior conviction, or at the very least mitigated its severity as an aggravating factor, but he never made the slightest effort to find it. There was available a wealth of mitigating information concerning Mr. Bottoson's life history, but counsel did not even know how many children and siblings Mr. Bottoson had. Finally, counsel did not say a word on Mr. Bottoson's behalf to the sentencing judge, and had this to say on behalf of his client when ostensibly arguing to the jury to spare Mr. Bottoson's life:

> There is not a lot I can argue in this case. There wasn't a lot, a heck of a lot of people to come and speak about a man who is a convicted killer.

RD 2155. The fact that there weren't a "heck of a lot" of witnesses on behalf of Mr. Bottoson was attributable not to the nature of the offense but to counsel's total failure to seek out and find the numerous witnesses who were ready, willing and able to testify for Mr. Bottoson.

A. FAILURE TO INVESTIGATE, DISCOVER AND PRESENT EVIDENCE CONCERNING MR. BOTTOSON'S LIFE HISTORY.

Mr. Bottoson's trial attorney has candidly admitted that he did virtually no penalty phase investigation prior to the jury verdict -- indeed, he may not even have talked to Mr. Bottoson about the penalty phase prior to the verdict. RS 311. After the verdict, he had to plead the court for a continuance, because on the day scheduled for the penalty phase he had no witnesses. RD 2107. Counsel never

talked to Mr. Bottoson about his life history in any great detail, RS 309, and the entire penalty phase investigation, if it can be called one, consisted of asking Mr. Bottoson for names of potential witnesses after the verdict and then trying to track those people down in the few days before the penalty phase. RS 315-16. Because counsel himself knew virtually nothing about the "particularized characteristics of the individual" whom he represented, Armstrong v. Dugger, 833 F.2d 1430, 1433 (11th Cir. 1987), he was completely unable to communicate anything significant about Mr. Bottoson to the jury.

Had counsel performed adequately, there was a great deal of mitigation that could and should have been presented. At the evidentiary hearing, Mr. Bottoson presented evidence of powerful and compelling mitigation that was never investigated, developed or presented by counsel. This included, inter alia, evidence that Linroy appeared to be strange and mentally disturbed to others in his community from the time that he was a child; that he had visions and hallucinations from childhood on; that he suffered a painful and disfiguring arm injury when he was a child; that he was unable to function normally academically; that despite his limitations he tried to support his family by working in over fifty-six jobs; that he was a loved and loving father of his children, several of whom also have mental problems; that he was sufficiently troubled to try to commit suicide in his early 20s; and that many people who have come in contact with him have quickly realized that he has serious mental problems.

The court below trivialized and misconstrued this portion of Mr. Bottoson's ineffectiveness claim, treating it as a claim of a mere failure to "interview family members and friends, specifically Mr. Bottoson's mother" and apparently thinking that it was refuted

by the fact that counsel "had contacted Mr. Bottoson's mother prior to trial." Order Denying Motion for Postconviction Relief, RP 3609. This claim is in fact much broader than a mere failure to interview family members and friends. As is demonstrated by Mr. Sheaffer's own testimony, he conducted virtually no penalty phase investigation whatsoever, particularly prior to the guilty verdict. There could be no question of his having a strategy for penalty phase, or of his having made decisions either to put on or not to put on certain types of evidence, since he did not know such basic facts about his client as who his client's nearest relatives were and where his client grew up.

The court's suggestion that this claim is refuted by the fact that counsel had contacted Mr. Bottoson's mother merely serves to highlight counsel's deficient performance. Mrs. Bottoson testified that counsel had called her the night before to ask her to come and testify. RD 2137. Her testimony was limited to recounting that Mr. Bottoson had been a good boy who had helped her and who had gone into the ministry at an early age. RD 2137-39. After the penalty phase had been completed, Mrs. Bottoson wrote to the trial judge, giving a brief life history of Mr. Bottoson, including his suicide attempt and subsequent hospitalization. RD 3352. Mr. Sheaffer acknowledged that if he had had information concerning the circumstances of Mr. Bottoson's hospitalization, he would have wanted to present such information at the penalty phase and to provide it to the mental health experts. RS 149-50. Since Mrs. Bottoson had such information, but he was unaware of it and made no attempt to present it, the inference is clear that counsel never asked her about it.

Mrs. Bottoson, who is now deceased, is just one of the many people available to provide powerful mitigating evidence on behalf of Mr. Bottoson. The reason that counsel was unable to present such

evidence is that he did virtually no investigation and was thus unaware of its existence. In a capital case, that failure to investigate was clearly deficient performance.

B. FAILURE TO INVESTIGATE, DISCOVER AND PRESENT MENTAL HEALTH INFORMATION.

With respect to the failure to investigate, discover and present mental health information, counsel's failure was if anything even more abject and more clearly deficient than his failure to investigate Mr. Bottoson's life history in general. Counsel had every reason to know that Mr. Bottoson had a significant history of mental illness and hospitalization. Mr. Bottoson told counsel as much. RS 308. Mr. Bottoson told Dr. Kirkland, whose report was available to counsel. RS 145, Def. Ex. 6. A psychiatric evaluation and diagnosis of Mr. Bottoson as schizophrenic while he was in federal custody was contained in the files of the public defender who handled the case before Mr. Sheaffer, in the State Attorney's file, and even in the Orange County Sherriff's Office file, see RS 93, 381, 383, Def. Exs. 34, 40 -- in fact, everywhere but in counsel's file. All that was necessary to obtain it was to write to the federal court and request it. RS 83-84. Counsel made <u>no</u> effort to obtain those records. RS 153.

There was also abundant reason for competent counsel to question whether Mr. Bottoson's current functioning was not affected by a continuing mental health problem. Counsel was well aware of Mr. Bottoson's repeated claims of the powers to heal the sick and raise the dead, including his virtual obsession with raising the victim from the dead. RS 167-71, Def. Exs. 12, 13. Counsel was also aware that the judge who presided over Mr. Bottoson's federal trial had recommended that Mr. Bottoson receive a psychiatric evaluation. RS 169, Def. Ex. 32. These facts, as well as Mr. Bottoson's confession that he had committed the crime under the influence of

demonic possession and his pro se appeal of his federal conviction, should have raised "red flags" to any competent defense attorney of the possible presence of significant mental health issues. RP 336-41, 459-61, 1072, 1075, 1078 (testimony of expert attorneys Dennis Balske, Larry Turner and Willam Sheppard).

As with the other potential mitigation, however, counsel did virtually nothing with any of this information. Counsel never made the slightest effort to obtain the records of Mr. Bottoson's evaluation in California. RS 153. He did not provide any documentation of Mr. Bottoson's claims to have the powers to heal the sick and raise the dead to the pretrial psychiatrists. RS 167-70. Although counsel's motion for a confidential defense psychologist to assist at the penalty phase was granted, counsel never made any use of the psychologist. RD 2186-88, 3167; RS 176. Counsel had no strategy reason for failing to obtain the assistance of a psychologist. RS 177.

Most telling of all, counsel never even asked the pretrial psychiatrists whether they thought Mr. Bottoson was mentally ill. Counsel talked to one of the psychiatrists, but only to discuss the psychiatrist's report, which was limited to an assessment of Mr. Bottoson's competency to stand trial. RS 174, 312. Counsel did not ask Dr. Kirkland whether Mr. Bottoson was mentally ill. If he had done so, he would have received the following answer:

> I suspected that Mr. Bottoson had a mental disorder, probably schizophrenia.
>
> . . . .
>
> If somebody had asked me at that time, "Do you think that Mr. Bottoson is schizophrenic," I likely would have replied, "Yes."

RS 437. Counsel did not have this vital information because he never asked the question.

The trial court found this to be the "most troubling" of Mr. Bottoson's claims. RP 3609. The court nevertheless rejected it, for reasons that are flatly contradicted by the record. The court first stated that counsel "attempted to obtain Defendant's past psychiatric records but was unable to obtain them prior to trial." RP 3609. With respect to the psychiatric records from California, this statement is simply inaccurate. Counsel testified repeatedly that he made absolutely no attempt to obtain those records. RS 152-53, 163, 199. With respect to the records of the Ohio hospitalization, it is clear that those records were available -- they were easily obtained by an untrained post-conviction investigator. RS 79-81. It is unclear what steps counsel actually took in attempting to obtain the records, beyond asking his investigator to try to find them. RS 146.[2] Since the records have been in existence continuously since 1962, and were readily discovered in the post-conviction investigation, it is in fact clear that they were readily available in 1981 had an adequate investigation been conducted. See Middleton v. Dugger, 849 F.2d 491, 494 (11th Cir. 1988).

The court then reasoned as follows:

> Defendant's trial counsel stated that he had discussed Defendant's mental health with two or three psychiatrists who had taken a complete past medical history. Counsel averred that he did not receive any information which would have indicated past mental illness or present mental illness that could either serve as a defense or a mitigating factor in the penalty phase.

RP 3609. That reasoning cannot be squared with the testimony of Mr. Sheaffer and Dr. Kirkland.

The pretrial psychiatrists were not asked to consider the existence of any possible mitigating circumstances, either by the

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[2]Mr. Sheaffer could only offer speculative, hearsay testimony that he thought the investigator told him that the hospital said the records were destroyed in a fire. RS 309.

court, RD 3238, or by Mr. Sheaffer. RS 174. Counsel talked to only one of the psychiatrists, and their conversation was limited to the contents of the report; there was no discussion of mitigating circumstances. RS 174, 312, 349. While Dr. Kirkland's report does not contain a diagnosis of mental illness, it states the following concerning Mr. Bottoson's "past medical history":

> Mr. Bottoson has had two previous periods of psychiatric treatment. In 1964 he was hospitalized in Cleveland for several days. He stated that this was the result of some personal and marital difficulties. He further stated that he believes that the diagnosis was "schizophrenia."
>
> In 1971, while in the federal penitentiary in California, he received some psychiatric counseling.
>
> Mr. Bottoson has an extensive religious background with fundamentalist beliefs.... [H]e feels that he has certain God granted gifts. He states that God moves him and that he also has special visions and occasionally hears the voice of God.

Def. Ex. 6 (emphasis supplied). Moreover, had Mr. Sheaffer asked Dr. Kirkland, Dr. Kirkland would have told Mr. Sheaffer that Mr. Bottoson had auditory and visual hallucinations, RS 411, that Dr. Kirkland believed that Mr. Bottoson was truthfully reporting these hallucinations, RS 414, and that if asked he would have said that Mr. Bottoson probably suffered from schizophrenia. RS 437, 447.

Thus, counsel did receive information indicating past mental illness and would have received information indicating present mental illness had he simply asked Dr. Kirkland. However, counsel's deficient performance went much further, in that far more information concerning Mr. Bottoson's mental illness was available simply by taking rudimentary steps such as writing the federal court in California to obtain copies of its records. In the absence of such information, Dr. Kirkland was unable to make a definitive diagnosis, RS 437; with such information, Dr. Phillips diagnosed Mr. Bottoson

as suffering from schizoaffective disorder, a mental disease with symptoms of both schizophrenia and bipolar disorder. Dr. Phillips also found that Mr. Bottoson's mental illness is of longstanding duration, and that, among other mitigating factors, his mental state at the time of the offense satisfied the statutory mental mitigating factors. RP 568-71, 632, 650-54. Given these facts, there can be no question that counsel's failure to investigate was deficient. Counsel's abject failure to investigate mitigation is closely analogous to that in Deaton v. Dugger, 18 FLW S529 (Fla., Oct. 7, 1993), where this Court recently found counsel ineffective.

The court also speculated that presenting mental health mitigation might have been inconsistent with the defense presented. RP 3609. This speculation concerning possible strategy ignores several dispositive facts. First, counsel conducted no investigation of Mr. Bottoson's mental health. Given the facts of this case, that failure was clearly unreasonable, and in the absence of a reasonable investigation it would have been impossible for counsel to make a reasonable strategy decision not to present mental health evidence. Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993); Stevens v. State, 552 So. 2d 1082, 1087 (Fla. 1989); see Blanco v. Singletary, 943 F.2d 1477, 1503 (11th Cir. 1991), cert. denied, 112 S. Ct. 1477, 119 L.Ed.2d 207 (1992). Second, counsel expressly disavowed any such strategy decision. He repeatedly testified that if he had had the mental health information presented below, including the Ohio and California mental health records, he would have provided it to the mental health experts and used it at the penalty phase, and that he had no tactical or strategic reason for not investigating and presenting the evidence. RS 149, 153, 163, 177, 185-86. Indeed, he testified that he would have "tried to introduce anything that may have been used to keep him from going to the electric chair."

RS 179. Given these facts, the trial court's suggestion that counsel could possibly have had a strategy reason for failing to investigate and present mental health mitigation is pure speculation, totally unsupported by the record.

C. ABANDONMENT OF HIS CLIENT BY COUNSEL.

In his closing argument to the jury at penalty phase, counsel made the following statement:

> There is not a lot I can argue in this case. There wasn't a lot, a heck of a lot of people to come and speak about a man who is a convicted killer.

RD 2155. In making this argument, counsel emphasized the lack of mitigating evidence (which was attributable to his own deficient performance) and "separated himself from his client, conveying to the jury that he had reluctantly represented a defendant who had committed a reprehensible crime . . . [and thus] denied [Mr. Bottoson] effective assistance at the penalty stage of the trial." King v. Strickland, 714 F.2d at 1491.

After making this inexcusable argument at penalty phase, counsel completely abandoned his client at the judge sentencing phase of the trial. At the judge sentencing phase of the trial, the court twice invited counsel to make any type of statement he wished before sentence was pronounced. On both occasions, counsel had nothing to say. RD 2343, 2354. Mr. Bottoson might just as well have appeared for sentencing pro se for all the difference it made having someone called a lawyer standing beside him at sentencing.

The sentencing proceeding in Florida's trifurcated capital sentencing scheme is not simply a perfunctory rubber-stamp proceeding. The capital sentencing statute "vests the trial court with the limited discretion to impose either the death penalty or life imprisonment even if the jury recommends to the contrary." Swan v. State, 322 So. 2d 485, 489 (Fla. 1975). See also Alvord v. State, 322 So. 2d

533, 540 (Fla. 1975); Ross v. State, 386 So. 2d 1191, 1197 (Fla. 1980). Consequently, evidence may be presented at judge sentencing as to any relevant matters, and the trial court is neither bound by the jury's recommendation nor limited to consideration only of matters presented to the jury. Engle v. State, 438 So. 2d 803, 813 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984).

In light of the critical importance of the sentencing phase in Florida's process for determining who will live and who will die, Mr. Bottoson's counsel's failure to present any evidence or argument for his client's life amounted to a complete deprivation of the right to counsel. Where counsel's conduct is equivalent to the defendant's having no attorney at all, the adversary system breaks down and prejudice from counsel's ineffectiveness may be presumed. United States v. Cronic, 466 U.S. 648 (1984). Thus, in Stevens v. State, 552 So. 2d 1082, 1087 (Fla. 1989), this Court vacated a death sentence where trial counsel "essentially abandoned the representation of his client during sentencing" by failing to make any argument on behalf of the defendant at sentencing. Counsel's failure to represent Mr. Bottoson at sentencing was equally egregious, and the same result is warranted here.

D. PREJUDICE.

Having apparently rejected the contention that counsel's performance was deficient, the court then found that even if counsel's performance was deficient in some respects, there was no prejudice to Mr. Bottoson under Strickland. In making that finding, the trial court applied the wrong legal standard, usurped the role of the sentencing jury, and trivialized the significance of the mitigating evidence presented by Mr. Bottoson. The finding is erroneous as a matter of law and is not supported by the evidence.

Under Florida's capital sentencing scheme, because the trial court must give great weight to the jury's penalty recommendation, Tedder v. State, 322 So. 2d 908 (1975), the sentencing jury and judge share the sentencing authority. Espinosa v. Florida, 112 S. Ct. 2926 (1992). Where the sentencing jury recommends life, that recommendation must be followed unless the facts are such that no reasonable person could recommend a life sentence. Tedder, supra. Given the uniquely discretionary and largely unfathomable nature of the decision whether to impose death or grant life, that will rarely be the case, particularly where, as here, there is evidence that would support one or both of the statutory mental mitigating factors. Thus, in evaluating Strickland prejudice at the penalty phase of a Florida capital case, the question becomes whether there is a reasonable likelihood that a jury would have recommended life based on the evidence presented in the Rule 3.850 proceedings. Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993) (issue is whether outcome would have been different); Hall v. State, 541 So. 2d 1125 (Fla. 1989) (issue whether jury would have recommended life if mitigating evidence presented).

The court below did not analyze this question. Rather, it simply asserted that in its view the

> mitigating evidence now presented would not outweigh or overcome the aggravating circumstances of this murder. Defendant's background, childhood experiences . . . and religious eccentricities do not compare to the aggravating factors . . . .

RP 3610. Because the question is not whether the court thinks the mitigating circumstances outweigh the aggravating cirumstances, but rather whether there is a reasonable likelihood that a jury would recommend life, the court applied the wrong standard. Moreover, the court's analysis ignored both the powerful nature of the mitigating evidence presented and its effect on the aggravating factors.

The mitigating evidence presented below went far beyond mere evidence of Mr. Bottoson's "background, childhood experiences ... and religious eccentricities." The unrefuted evidence presented showed that Mr. Bottoson suffers from a longstanding mental illness. Between 1962 and 1991, four psychiatrists who examined Mr. Bottoson found that he was currently suffering from or had suffered in the past from a psychotic thought disorder. Def. Ex. 8 (1962 diagnosis of acute schizophrenic episode); Def. Ex. 5 (diagnosis of paranoid schizophrenia, latent type); RS 437, 447 (Dr. Kirkland's testimony that he formed the impression that Mr. Bottoson suffered from schizophrenia); State Ex. 2 (Dr. Phillips' diagnosis of schizophrenia and bipolar disorder). Not only did this debilitating illness affect Mr. Bottoson throughout at least his entire adult life, after being provided with adequate background information and information concerning the facts of the offense (information that was not provided to Dr. Kirkland) Dr. Phillips reached the conclusion that this illness was in its active phase at the time of the offense, and consequently that Mr. Bottoson was under an extreme mental or emotional disturbance and that his ability to conform his conduct to the requirements of the law was substantially impaired at the time of the offense. RP 650-51.

It should really be enough to stop there. Evidence that a defendant has suffered from a psychotic thought disorder for many years, and that that thought disorder impaired his judgment and functioning at the time of the offense, is as powerful mitigation. See, e.g., Ferry v. State, 507 So. 2d 1373 (Fla. 1987). In a case where no mental health evidence, and very little mitigating evidence of any kind, was presented at trial it is certainly reasonably likely that such powerful mitigation would have made a difference. But while the evidence of Mr. Bottoson's longstanding mental illness and its

effect on him at the time of the offense is the most striking evidence that was presented at the evidentiary hearing, in reality it is only the tip of the iceberg.

The evidence of Mr. Bottoson's "background" and "childhood experiences" is significant and powerfully mitigating for a number of reasons. First, it shows that the symptoms of the thought disorder that was diagnosed when Mr. Bottoson was an adult -- in particular auditory and visual hallucinations and the excessive religiosity and grandiosity that are typical of mental illness, RP 584-86 -- were present from a young age. Second, it shows that the people who lived in Mr. Bottoson's community long ago recognized his behavior and beliefs as strange and symptomatic of a mental disorder or limitation, even in the context of a deeply religious community. Third, it shows that despite his debilitating mental and physical problems, Linroy struggled for years to provide for his family, working at over 56 different low-skill, low-paying jobs between 1959 and 1979. Fourth, it demonstrates that throughout most of his life, Linroy was a law abiding, albeit deeply disturbed person. Only on two occasions (assuming his guilt of the instant offense) has he broken the law, and on both of those occasions (as when he tried to commit suicide) he broke down under the pressures of marital discord, financial difficulties, and the reemergence of symptoms of active psychosis. RP 603-04, 621, 630-32. Finally, it shows that shows that when placed in an institutional setting he has functioned well, causing no problems to other inmates or to the institution. RP 652.

While this is only a brief summary, it shows how powerful a case in mitigation could have been presented. If Mr. Bottoson indeed committed the instant offense, it was clearly a tragic and aberrant act, committed under the influence of a powerful and debilitating mental illness, by a man who throughout the rest of his life has

struggled to maintain a marginal existence despite mental and physical limitations. It is reasonably likely that six members of a jury would find that case in mitigation to be compelling.

Moreover, the trial court's ruling ignores the effect that presentation of this evidence would have had on the State's case in aggravation. If counsel had discovered the facts concerning Mr. Bottoson's participation in the prior armed robbery, counsel could have initiated a legal challenge to the prior conviction, or at the very least presented the evidence to the jury to diminish the impact of the prior violent felony aggravating factor. All that the jury heard about the prior offense was that Mr. Bottoson had robbed a bank. RD 2115-16. The jury should have heard that Mr. Bottoson committed the offense under the command of an auditory hallucination, that he never displayed a weapon, and that in an expert psychiatrist's opinion he was insane at the time of the offense. RP 620, 656. Had they heard that evidence, it would certainly have reduced the weight of the prior violent felony aggravating factor, and thus would have made a life recommendation more likely. See Hallman v. State, 560 So. 2d 223, 227 (Fla. 1990). Moreover, Dr. Phillips also testified that in his opinion, Mr. Bottoson's psychotic symptoms prevented him from being able to think and plan in a rational manner at the time of the offense and thus precluded him from having the ability to premeditate elimination of a witness as the motive for murder. RP 654. Thus, had counsel provided competent assistance, two of the aggravating factors would either have been eliminated or diluted.

There can be no doubt that prejudice has been shown. Had counsel performed competently, he would have presented a tremendously strong case in mitigation, instead of no mitigation at all. Had counsel performed competently, the jury would not have found two of the aggravating factors, or would have found the impact of the aggravating

factors to be substantially diminished. When the scales of aggravation and mitigation are so drastically altered by counsel's failure to provide reasonably competent assistance, all confidence in the outcome is destroyed, and a new sentencing proceeding before a jury is required.

ARGUMENT III

LINROY BOTTOSON WAS DENIED A COMPETENT MENTAL HEALTH EXAMINATION, AND COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND ARRANGE FOR SUCH AN EXAMINATION, IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Whenever the State makes a defendant's mental condition relevant to guilt/innocence and/or punishment, the due process clause of the fourteenth amendment requires that an indigent defendant have access to an independent competent mental health expert who conducts a competent examination and assists in the defense of the case. Ake v. Oklahoma, 470 U.S. 68 (1985). Florida law makes mental condition relevant to criminal responsiblity and sentencing in many ways: (a) competency to stand trial and to confess; (b) specific intent to commit first degree murder, either through premeditation, or the specific intent required for the underlying felonies in felony murder; (c) legal insanity at the time of the offense; (d) statutory mitigating factors contained in Fla. Stat. § 921.141 (6)(b), (e) and (f); and (f) myriad nonstatutory mitigating circumstances relevant at sentencing. Consequently, Mr. Bottoson was entitled to competent mental health assistance.

The right to competent mental health assistance imposes duties on both counsel and any mental health experts involved in the case. Counsel has a duty to investigate the facts relating to any potential mental health issue, arrange for one or more mental health evaluations, and disclose pertinent facts and information to the mental health expert(s). See, e.g., Mauldin v. Wainwright, 723 F.2d

799, 800 (11th Cir. 1984). Mental health experts must conduct their evaluations in such a way as to meet at least a minimum standard of care, to insure that the information provided to counsel, the court and the jury is minimally accurate. State v. Sireci, 536 So. 2d 321 (Fla. 1988); Mason v. State, 489 So. 2d 734 (Fla. 1986).

In the instant case, counsel did obtain the services of two psychiatrists who performed court ordered evaluations of Mr. Bottoson's competency and sanity. RD 3238. Counsel's motion for a penalty phase psychologist was granted, RD 2186-88, but counsel never obtained the services of such a psychologist. RS 176-77. Counsel never asked either of the pretrial psychiatrists to assess any potential mitigating circumstances. RS 174, 312. Counsel thereby totally abandoned Mr. Bottoson's right to expert mental health assistance at penalty phase. The prejudice resulting from this failure is made clear in Argument I, supra.[3]

Counsel did not provide the pretrial psychiatrists with any documentation of Mr. Bottoson's history of mental problems, nor did he provide them with Mr. Bottoson's confession (attributing the offense to possession by demons) or any of Mr. Bottoson's correspondence in which he expressed bizarre beliefs (such as his beliefs that he could heal the sick and raise the dead) in a bizarre fashion. RS 167-71, 449. He also did not provide them with any information concerning the facts of the offense itself, thereby making it impossible for them to render any opinion as to Mr. Bottoson's sanity at the time of the offense. RS 439. In fact, when asked what

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[3]Apparently, the court below misconstrued this portion of the claim as a claim that counsel failed to arrange for a third competency examination. RP 3611-12. The evaluation that counsel failed to obtain was not a third competency evaluation, but rather an evaluation by a confidential defense expert for penalty phase. RD 3167, RS 176-77.

materials he was provided by counsel, Dr. Kirkland responded as follows:

> Q Yes. Let me ask you this question.
>
> Did Mr. Sheaffer provide you with any materials at the time of trial, besides the written documents, besides the order appointing you?
>
> A I don't believe so.

RS 449.

Based on Dr. Kirkland's own testimony, it is clear that the failure to provide any documentation to the psychiatrists made it impossible for them to provide competent mental health assistance with respect to the issue of sanity. As a result of Mr. Bottoson's psychosis and personality disorder, his capacity to appreciate the criminality of his conduct or to conform his behavior to the requirements of the law is seriously impaired. RP 651. If effective counsel had provided for and obtained the meaningful, competent assistance of a mental health professional, it is reasonably likely that a successful insanity defense could have been presented.

The only information concerning Mr. Bottoson's history that the psychiatrists had available to them was his own self-report. It is well established both in the psychiatric literature and in the decisions of this Court that self-report is not an adequate basis for a diagnosis. Mason v. State, 489 So. 2d 734, 737 (Fla. 1986); Bonnie and Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va. L. Rev. 427, 508-10 (1980). Indeed, failure to obtain information from other sources falls below the standard of care expected of a competent forensic psychiatrist. After reviewing the reports of the pretrial psychiatrists, Dr. Phillips testified that the records he had been provided indicate that Mr. Bottoson was delusional at the time of trial, raising serious questions regarding his competency and his

understanding of the legal process. RP 637-38. In neither of the psychiatrists' reports was any explanation given as to how they arrived at a contrary conclusion; indeed, Dr. Wilder's report contains nothing beyond the bare conclusion that Mr. Bottoson was competent and sane. RP 638-41; Def. Exs. 6, 15. Consequently, neither report meets the standard of care. RP 640-41.

Clearly, Mr. Bottoson was prejudiced by the failure of counsel to provide any documentation of Mr. Bottoson's history of mental illness and current distorted mental functioning, and by the psychiatrists' failure to demand such documentation, in violation of the standard of care. Had he received competent mental health assistance at the time of trial, he more than likely would have been found incompetent to stand trial. The court below rejected this claim, on the basis that Mr. Bottoson made Dr. Kirkland aware of his prior mental health problems during the evaluation. RP 3612. This misses the point.

Dr. Phillips' conclusion that he was "highly suspect" of Mr. Bottoson's competency at the time of trial, RP 634, was not based in large part on the prior diagnoses of schizophrenia. While those diagnoses contributed to Dr. Phillips' conclusion, the competency determination requires the psychiatrist to focus on the defendant's functioning at a particular moment in time. Instead, Dr. Phillips' conclusion was based on a mass of other supporting documentation, including letters written by Mr. Bottoson to Judge Kaney and the judge in the federal trial, Def. Exs. 12, 13; Mr. Bottoson's pro se appeal to the Fifth Circuit from his federal conviction, Def. Ex. 11, item 47; and Mr. Bottoson's confession to having committed the crime under the influence of possession by "demon spirits." Def. Ex. 11, item 3. As Dr. Phillips testified, those are the materials that raise serious doubts about Mr. Bottoson's competency:

> Well, the information that I've reviewed suggested that Mr. Bottoson believed at that time that he was possessed by demons. He was . . . consistently providing inconsistent delusional historical information about -- with regard to the offense.
>
> He was also at the time, throughout the time frame, particularly if we go back and look at, for example, the writings which he had been generating, evidencing a disturbance in thought process.
>
> Again, I think these are clear indicators that would at least call into question whether or not, in fact, someone has the ability to proceed along the lines as you've just suggested.

RP 637. In addition, Dr. Phillips concluded that Mr. Bottoson did not have the capacity to knowingly waive his rights by making statements to Kuniara and the ministers, and that those statements would not be considered reliable medically. RP 647-49.

The suggestion that Mr. Bottoson was not prejudiced by the failures of counsel and the mental health experts is untenable. A delusional, highly disturbed man with a lengthy history of psychosis stood trial with no adequate consideration of whether he was in fact competent to stand trial and sane at the time of the offense. The same man was sentenced to death without his counsel's lifting a finger to discover whether Mr. Bottoson's mental illness contributed to the offense or might serve as a potential mitigating factor, without so much as asking the one psychiatrist he talked to, "Do you think that Mr. Bottoson is schizophrenic?" Mr. Bottoson was deprived of a fair trial and sentencing proceeding. His conviction and sentence should be vacated.

ARGUMENT IV

THE STATE PRESENTED FALSE TESTIMONY AND TEST RESULTS, AND FAILED TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE, IN VIOLATION OF MR. BOTTOSON'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND THE FLORIDA CONSTITUTION.

The State presented false testimony from two key witnesses: John Preston and Pertrell Kuniara. The State had no eyewitnesses

to identify Mr. Bottoson as the man who robbed the Eatonville post office and abducted the victim, or as the person who later killed the victim. Accordingly, it was critical for the State to provide testimony to prove that Mr. Bottoson was present at the places where those events occurred. Virtually the State's only evidence of those facts was the testimony of John Preston. We now know that Preston's testimony and claims were patently false, as did Preston himself and Deputy Greer of the Orange County Sheriff's Office. Those facts were never disclosed to Mr. Bottoson.

Pertrell Kuniara's testimony was vital not only because Mr. Bottoson allegedly confessed to Kuniara, but also because Kuniara's testimony made out Mr. Bottoson to be a cold-blooded killer who killed the victim to prevent her from being a witness against him.[4] Despite the trial court's finding to the contrary, the evidence presented demonstrated that Kuniara had an understanding with the State in exchange for his testimony, an understanding that was never disclosed to Mr. Bottoson, and that Kuniara was acting as a State agent and gave perjured testimony regarding the manner in which the incriminating statement was obtained. At the very least, the evidence presented below completely destroyed the credibility of Kuniara's testimony concerning Mr. Bottoson's alleged confession.

A. PRESENTATION OF FALSE TESTIMONY AND TEST RESULTS BY JOHN PRESTON.

At trial, the State called as an expert witness, pursuant to a stipulation by the defense, Palm Beach County Deputy Sheriff John Preston. The court told the jury that the stipulation covered Preston's qualifications and the ability of him and his dogs "to do

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[4]The other statement, given by Mr. Bottoson to Reverends Judge and Champion, in which he stated that he had been under the control of "demon spirits" at the time of the offense, could be construed as at least partially exculpatory, particularly at penalty phase. See RD 1645, State Trial Ex. 38.

whatever it is that they're going to testify that they did." RD 1346. Preston expressed an expert opinion on four fundamental factual points. First, he stated that his dog located Mr. Bottoson's scent and track at the post office, where the decedent was abducted five days earlier. RD 1348-50. Second, he testified that his dog identified Mr. Bottoson's scent and track on C Street in Taft, Florida, where the decedent's body had been found two days before the dog test. RD 1351. Third, he testified that his dog located the scent and presence of the decedent in a red and white motor vehicle associated with Mr. Bottoson five days after she had been observed entering a red and white motor vehicle at the post office. The dog selected this specific red and white motor vehicle out of a line-up of five cars. RD 1352-55. Fourth, he testified that his dog located and identified the scent of the decedent on the undercarriage of, in the interior of, and in the trunk of a Chevelle motor vehicle associated with Mr. Bottoson. RD 1355-57.

Preston presented false testimony and false test results in at least four areas. First, he falsified his formal training, certification, and professional affiliations as a dog handler and the qualifications of his dogs. RP 807-09, Def. Ex. 16 (testimony and report of Steven Haynes); RP 984-86 (testimony of Kevin Conroy). Second, he falsely claimed that his dogs had the ability to reliably and successfully locate and identify a unique scent on one of a group of similar objects (the scent identification line-up technique). RP 845-46 (testimony of Deputy Greer); RP 1039-42 (testimony of expert dog handler Philip Hoelcher). Third, he falsely claimed that his dogs could reliably identify and follow the track of scents for days and even longer after the scent was laid down. RP 1035-38 (Hoelcher); RP 1058 (proffer of Donna Brimmer). Fourth, he has cued his dogs on other occasions and likely cued his dogs in the work that he did

on Mr. Bottoson's case. RP 841-46, 857 (Deputy Greer's observation of Preston); RP 995-96 (testimony of Kevin Conroy). As summed up by Deputy Greer, the evidence overwhelmingly demonstrated that Preston was not a "righteous dog handler," RP 855, and that he presented false testimony and false test results at Mr. Bottoson's trial.

The knowing use of false testimony, whether solicited or not, deprives the defendant of a fair trial when the evidence is material to guilt or punishment. Mooney v. Holohan, 294 U.S. 103 (1935); Pyle v. Kansas, 317 U.S. 213 (1942); Alcorta v. Texas, 355 U.S. 28 (1957); Napue v. Illinois, 360 U.S. 264 (1959); Giglio v. United States, 405 U.S. 150 (1972). The state cannot deliberately use false evidence to obtain a criminal conviction or death sentence without violating due process.

This due process right requires the state to correct false testimony, Alcorta, supra, including false testimony relating solely to the credibility of a witness rather than to a substantive issue. Napue, supra. Further, under some circumstances the state can violate due process by nondisclosure of false testimony even though the untruthfulness of the witness is not known to the trial prosecutor working in the courtroom. Giglio, 405 U.S. at 154. A due process violation triggered by falsity also encompasses the misuse of physical and scientific evidence that creates a false impression of a material fact. Miller v. Pate, 386 U.S. 1 (1967).

Deputy Preston's knowledge of the falsity of his testimony is imputable to the State. Under Giglio, the lower courts have held that the prosecutor "should know" of evidence in the possession of police officers who are investigating the case, as well as other government agencies involved in the investigation. In United States v. Antone, 603 F.2d 566 (5th Cir. 1979), the court applied the Giglio holding and relied upon the close cooperation between state and

federal officials to impute the state investigators' knowledge of false testimony to the federal prosecutor. Similarly, in United States v. Diecidue, 448 F.Supp. 1011 (M.D. Fla. 1978), rev'd in part on other grounds, 603 F.2d 535 (5th Cir. 1979), the court reviewed and interpreted the prevailing case law and concluded that "the prosecutor is charged with the knowledge of any investigative member of the prosecution team who actually testifies in the case." Id. at 1017 (emphasis added). See also Schneider v. Estelle, 552 F.2d 593 (5th Cir. 1977). Consequently, Deputy Sheriff John Preston's knowledge of the falsity of his testimony is imputable to the State.

Moreover, the State had an even more direct basis of knowledge of the falsity of Preston's testimony. Orange County Deputy Sheriff Bernard Greer witnessed some of the scent work conducted by Mr. Preston in connection with the Alexander case. Deputy Greer saw Mr. Preston attempt to use a dog to identify the victim's handbag, an exercise he considered invalid at the time. He told other officers of his concerns during the investigation. RP 839-42, 859, 863. He also had questions about other scent work conducted by Mr. Preston. RP 843-46. Two later conversations Deputy Greer had with Mr. Preston confirmed Deputy Greer's conclusion that Preston was not "righteous." RP 846-55. At least one of those conversations likely took place before Mr. Bottoson's trial.[5] The State disclosed to Mr. Bottoson neither Deputy Greer's name nor his questions concerning the validity of Mr. Preston's work. Nor, of course, did the State disclose that Mr. Preston's testimony was false.

Clearly, Deputy Greer's knowledge that the testing performed by Preston was at best dubious and at worst completely fraudulent

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[5]Deputy Greer could not recall the precise timing, but believed that the first conversation took place about one and a half to two years after the Alexander investigation. RP 864-65. The investigation took place in October 1979 and the trial in March and April 1981.

is knowledge that was imputable to the State. Deputy Greer was part of the investigation team that assisted the State Attorney in prosecuting Mr. Bottoson. It is irrelevant whether the prosecutor himself was aware of and personally suppressed Deputy Greer's knowledge of the falsity of Preston's testing procedures, since the State "may not withhold favorable evidence in the hands of the police, who work closely with the prosecutor." Arango v. State, 467 So. 2d 692, 693 (Fla.), cert. denied, 457 U.S. 1140 (1982), citing Smith v. Florida, 410 F.2d 1349 (5th Cir. 1969); see Garcia v. State, 622 So. 2d 1325, 1330-31 (Fla. 1993). Clearly, Greer's knowledge concerning Preston was favorable evidence in the hands of the police.

The court below rejected this claim on the sole basis that the State's withheld knowledge of the falsity of Preston's testimony fails to satisfy the materiality standard of Brady v. Maryland, 373 U.S. 83 (1963). In order to prove a Brady violation, the defendant must show both that the State withheld exculpatory evidence, and that there is a reasonable probability that the result would have been different had the evidence been disclosed. RP 3602, citing Duest v. Dugger, 555 So. 2d 849, 851 (Fla. 1990). The court reasoned that impeaching Preston's testimony would not have changed the outcome because Mr. Bottoson's confession had been entered into evidence and the "inferences" that could be drawn from Preston's testimony "were either admitted by Mr. Bottoson or could have been drawn from other unchallenged sources." RP 3601, 3602-03.[6]

The court's reasoning is erroneous. Mr. Bottoson repudiated his confessions, one of which was allegedly given to a many times convicted felon cellmate, whom the court below found "totally

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[6]The trial prosecutor did not agree. In closing argument, he told the jury Mr. Bottoson's whole story "starts to break down" when confronted with Preston's evidence. RD 2024.

unbelievable," RP 3603, at the recent evidentiary hearing. Nor was Preston's testimony merely cumulative. Aside from Preston's testimony, the State had no evidence placing Mr. Bottoson at the post office, in the post office parking lot, or at the scene where the victim's body was discovered. The court below nevertheless found Preston's testimony on those points cumulative, because Mr. Bottoson testified and admitted his presence at those places. RP 3601-02. That assumes that Mr. Bottoson would in fact have testified if Preston's credibility had been destroyed, an assumption that is invalid. If Preston had actually been revealed to be a "liar, a charlatan and a fraud" as another court has found him to be, and as Deputy Greer agreed, RP 860, there might well have been no need for Mr. Bottoson to testify in his own defense, as there would have been major holes in the State's case.

The State's case against Mr. Bottoson consisted of (1) confessions that were repudiated, (2) alleged admissions to cellmate with multiple felony convictions, and (3) circumstantial evidence, including the Preston dog show. As such, it was remarkably similar to the evidence presented in Miller v. Pate, 386 U.S. 1 (1967), a case where the United States Supreme Court found that the presentation of false scientific evidence required that the conviction be overturned. See United States v. Pate, 226 F. Supp. 541, 543-44 (N.D. Ill. 1963), rev'd, 342 F.2d 646, cert. denied, 384 U.S. 998, rev'd 386 U.S. 1 (1967). Here, as in Miller, the false scientific evidence was material to the conviction, and requires that the conviction be overturned.

B. PRESENTATION OF FALSE TESTIMONY BY AND FAILURE TO DISCLOSE THE EXISTENCE OF A DEAL WITH PERTRELL KUNIARA.

Pertrell Kuniara, a self-proclaimed con man with numerous felony convictions, testified at trial that Mr. Bottoson had made a detailed oral statement to Kuniara while both were inmates in the Orange County

Jail. According to Kuniara, Mr. Bottoson not only admitted committing the murder, but also revealed his motive by saying, "the best witness is a dead witness." RD 1461-62. That testimony was the sole support for the trial court's finding that the murder was committed for the purpose of avoiding arrest. RD 3364. Kuniara also persuaded Mr. Bottoson that he should make a written statement and give it to two local ministers, Reverends Judge and Champion, so that they could use it to intercede on Mr. Bottoson's behalf with the State Attorney. RD 1537-42. The written statement was introduced at trial over Mr. Bottoson's objection. RD 1644.

Prior to and at trial, Kuniara claimed that he had no contact with the State before his conversations with Mr. Bottoson, and denied receiving any deal in exchange for his testimony. RD 1565, 2296, 2302. At the evidentiary hearing, Kuniara revealed that in fact he was acting as an agent of the State, prior to and from the outset of his contacts with Mr. Bottoson. RP 1300-01, 1304. A jail official told Kuniara that providing information could help Kuniara, RP 1294. While the officers did not make any express promises, they told Kuniara that "whatever information you give us to help us there is nothing wrong with someone helping you down the road," and Kuniara said he understood "how it works." RP 1303. At the end of the meeting the officers "did a soul brother slap on the hands to each other." RP 1303. Kuniara's testimony reveals that he received what amounted to a deal from the State, and that he was acting upon instructions from the State.

Mr. Bottoson's sixth amendment right to counsel was violated by this use of Kuniara as an agent to extract statements from him, United States v. Henry, 447 U.S. 264 (1980), and his right to due process was violated by the government's suppression of the fact that Kuniara was acting as a government agent. Brady v. Maryland, 373

U.S. 83 (1963). Mr. Bottoson was indicted on November 15, 1979. RD 2672. There is no question that at least as of that time Mr. Bottoson's right to counsel had attached under the Sixth Amendment, Brewer v. Williams, 430 U.S. 387, 398 (1977), and Article I, Section 16 of the Florida Constitution. Anderson v. State, 420 So. 2d 574 (1982). Kuniara's conversations with Mr. Bottoson took place in late September or early October 1980, RD 1456-57, 1464-65, well after Mr. Bottoson's right to counsel had attached, and when Mr. Bottoson was actually represented by counsel.

Both at a pretrial suppression hearing RD 2296, 2298, 2302, and at trial, RD 1565, Kuniara denied that he had any type of deal from the State Attorney's office, or that he had acted as a State agent in obtaining the statement from Mr. Bottoson and arranging for Mr. Bottoson to give a written statement to the ministers, to be conveyed by them to the State Attorney's office. It is now clear that his testimony was false and that Kuniara was in fact acting as a state agent who deliberately elicited incriminating statements from Mr. Bottoson.

Moreover, Kuniara has also admitted that all of his trial testimony -- that Mr. Bottoson admitted robbing the post office, abducting and killing the victim, that Mr. Bottoson said that the victim put up a good fight and that the best witness is a dead witness -- was false. RP 1329-32. This newly discovered evidence that Kuniara's testimony was false casts grave doubt on the validity of Mr. Bottoson's conviction -- since Kuniara's testimony was a key part of the guilt phase evidence -- and the death sentence, since Kuniara's testimony was the sole basis for the witness elimination aggravating factor. RD 3364.

The court below rejected this claim because it found that Kuniara's testimony was unbelievable and because it found that there

was no pre-testimony agreement. RP 3603. The court's finding that there was no agreement was not supported by the evidence. Even at the time of the trial, there was evidence that Kuniara had told others that he was testifying in exchange for promises from the State that he would not have to serve time in State prison if he testified. RD 1760, 1763, 2326 (testimony of John Vitale); RD 2134 (testimony of Correctional Officer Wade Childers). Kuniara has now confirmed the existence of a tacit agreement. RP 1294, 1303. Although trial prosecutor Bruce Hinshelwood denied the existence of a deal, RP 1501, it is undisputed that after Mr. Bottoson's trial was over, Kuniara was sentenced at a proceeding in which the trial prosecutor, Mr. Hinshelwood, spoke in Kuniara's behalf. RP 1328; RP 1498-99 (Hinshelwood); Def. Ex. 43. Kuniara ended up getting no additional prison time on several convictions. Def. Exs. 42, 43. These facts strongly support the conclusion that there was an understanding between Kuniara and the State prior to his testimony.

Accordingly, this Court should determine that the findings of the court below were not supported by the evidence. Mr. Bottoson established a violation of his right to counsel when the State knowingly circumvented his right to counsel by placing Kuniara next to Mr. Bottoson and feeding him with facts about the case. Maine v. Moulton, 474 U.S. 159, 176 (1985). Those facts were never disclosed to Mr. Bottoson. Moreover, the totality of the evidence establishes the existence of a pre-testimony understanding between Kuniara and the State, an understanding that was likewise never disclosed to Mr. Bottoson. Since Kuniara's testimony was clearly material both to Mr. Bottoson's conviction and death sentence, the conviction and death sentence must be vacated and a new trial held.

ARGUMENT V

MR. BOTTOSON WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The proof presented to the court below established that at the guilt phase trial counsel ineffectively failed to investigate the qualifications and proposed testimony of purported expert dog handler John Preston, failed to take minimally necessary steps to prepare for trial, and was ineffective during the actual trial of the case in numerous respects. These deficiencies were clearly prejudicial. As the discussion in the following sections demonstrates, Mr. Bottoson was and is entitled to the relief he seeks.

A. FAILURE TO INVESTIGATE THE QUALIFICATIONS AND TESTS CONDUCTED BY JOHN PRESTON.

As set forth in Argument IV.A., supra, State expert witness John Preston is a fraud who falsified his qualifications and claimed that he and his dogs had abilities that no reputable dog handler would assert. Indeed, the court below acknowledged that it had been "amply demonstrated" that Preston was not a competent dog handler. RP 1033. Competent defense counsel would have investigated Preston, and would have demonstrated the fradulent nature of his claimed qualifications and tests, rather than stipulating to his qualifications and allowing his testimony to go virtually unchallenged. RD 1344-46, 1358-62.

The court below suggested that at the time of Mr. Bottoson's trial, Preston was a "nationally recognized expert in dog tracking" and therefore that it was reasonable for counsel not to expend the time necessary to investigate Preston's qualifications. RP 3599 n.1, 3600. Those assertions ignore the clear evidence to the contrary that was presented at the evidentiary hearing. There was no evidence that Preston was a "nationally recognized expert;" rather, he was a charlatan who had not yet been totally exposed. At the time of

trial, Preston was already known to be a fraud by many dog handlers and persons familiar with dog handling who testified at the evidentiary hearing.[7] While that knowledge had not yet been fully disseminated, once his claims and actual performance became known to them, they all recognized him as fraudulent. RP 803-04, 807-11, Def. Ex. 16 (testimony and report of Steven Haynes); RP 924-29 (testimony of Palm Beach Sergeant Ernest Milner that Preston failed test approximately contemporary with trial); RP 983-86, 988-96 (testimony of Kevin Conroy); RP 1030-31, 1035-42 (testimony of Philip Hoelcher). Indeed, Mr. Hoelcher testified that Preston's reputation for truth and veracity among dog handlers and trainers was basically "that the man was a liar." RP 1044. Although Preston managed to pull the wool over some people's eyes, he was not recognized as an expert by truly expert dog handlers -- those who knew him knew him to be a liar, and those who did not know him would have said that he was a liar if asked about his claims.

Moreover, no great time or effort was needed to expose Preston. This is most clearly demonstrated by the testimony of defense attorney William Bluth. Mr. Bluth testified concerning his defense in 1980 and 1981 of a case in which Preston testified. Mr. Bluth's investigation of Preston was limited to doing some basic research on dog handling in a public library, and calling two dog handlers to describe the trail Preston claimed to have tracked. RP 944-47. The dog handlers immediately told Mr. Bluth that Preston's claims to have tracked a several day old trail were false. Mr. Bluth challenged Preston's qualifications, called the dog handlers as witnesses, and got a hung jury in the first trial of the case.

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[7]Several were aware that Preston had accomplished nothing when working with them, but were unaware that Preston was making untruthful claims to others about what his dogs had done. RP 884-93 (testimony of Joseph Petrencsik); RP 898-911 (testimony of Arthur Linville).

Preston did not testify at the retrial, the jury was hung again, and there was no further attempt to prosecute the defendant. RP 948-52. Only a minimal investigation was needed to expose Preston.

Trial counsel, however, conducted no investigation of Preston at all. Counsel did nothing beyond talking to Mr. Bottoson's prior counsel in the federal prosecution. Counsel did not depose Preston, did not investigate Preston's qualifications or the validity of his claims, did not do any research on the subject of dog handling, and did not consult any expert dog handlers. RS 220-22, 241, Def. Ex. 38. Counsel's total failure to investigate Preston was clearly deficient performance, as three expert attorneys testified. RP 353-55, 469-70, 1088-89. Similarly, while the decision to stipulate to Preston's qualifications may have been reasonable at the time, given that counsel had no basis on which to challenge those qualifications, the failure to investigate was clearly deficient and unreasonable. Unless counsel first makes a reasonable investigation or a reasonable decision not to investigate (neither of which was present here) counsel cannot later make a reasonable strategic decision. Strickland v. Washington, 466 U.S. 668, 691 (1984); Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988).

As Mr. Bluth demonstrated, the information with which to destroy Preston's credibility was readily available. Like Mr. Bluth, a competent trial attorney would have investigated Preston and developed the information with which to challenge his false and incredible claims. Trial counsel's failure to do so was deficient performance. The resulting prejudice is demonstrated in Argument IV.A., supra, since the prejudice standards under Strickland and Brady are identical. Compare Strickland, 466 U.S. at 694 ("reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different") with United States v.

Bagley, 473 U.S. 667, 682 (1985) ("reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.").

B. FAILURE TO PREPARE FOR TRIAL.

Prior to Mr. Bottoson's murder trial, a trial was held from March 25 to March 28 in the United States District Court for the Middle District of Florida on charges of making a false statement in connection with the purchase of a firearm and possession and conveyance of stolen money orders. United States v. Bottoson, Case Nos. 79-86, 87 and 88 Orl-Cr-R (M.D. Fla.). Mr. Bottoson was convicted on all counts. As Mr. Bottoson's defense counsel was well aware, many of the same witnesses and much of the same evidence would be presented in the first degree murder trial. In order to prepare for the cross examination of witnesses, for challenges to expert witnesses, and simply to find out what much of the evidence both for and against his client would be, it was crucial for defense counsel to obtain a transcript of that trial.

All of Mr. Bottoson's counsel were well aware of the importance of obtaining these transcripts. No transcript of the trial was immediately prepared because Mr. Bottoson did not appeal his convictions. A motion for transcription of the federal court proceedings filed by his inital counsel, Assistant Public Defender James Valerino, was granted, RD 2718, but no transcript was prepared, because the court reporter was overburdened preparing transcripts for direct appeals. RD 2746, RP 33-36. Mr. Valerino twice had continuances granted, based in part on the lack of a transcript of the federal trial. RD 2776, RD 3027.

After Mr. Valerino withdrew and William Sheaffer was appointed to represent Mr. Bottoson, Mr. Sheaffer again raised the necessity

of obtaining a transcript of the federal trial. At a motions hearing on February 23, 1981, the following exchange took place.

> [MR. SHEAFFER]: Also, if the court would note, we have made a request to have certain statements. depositions and testimonies in the federal case transcribed.
>
> THE COURT: Right.
>
> MR. SHEAFFER: We have not received any cooperation. I'm at the point now where I must have those transcribed in order to effectively proceed.

RD 2176 (emphasis added). It was agreed that it would be sufficient for counsel's needs if a typescript of the testimony rather than an official transcript was prepared, subject to a stipulation by the prosecution as to the accuracy of the typescript. RD 2177-78.

After some futile efforts, counsel abandoned any attempt to get a typescript or any other type of record of the federal trial. RS 222-23, 232-34. Mr. Sheaffer testified that the court reporter refused to make a copy of his tape recording of the proceedings, RS 233, although the court reporter testified that he could have made a copy of the tape. RP 37. Mr. Sheaffer was never aware of the fact that Mr. Bottoson had filed a pro se appeal of his federal conviction, and therefore was never aware that under the rules of the United States Court for the Fifth Circuit Court of Appeals then in effect, Mr. Bottoson could have obtained a transcript for use in that proceeding. RS 225-28, Def. Ex. 37. Nor did Mr. Sheaffer ever obtain a copy of the court file from the federal proceeding. RS 224.

Mr. Sheaffer simply allowed the whole issue to drop. In a capital case, in which almost all of the same witnesses had already testified concerning the same factual issues in the previous trial, this was inexcusable. In expert attorney William Sheppard's opinion, counsel's failure to obtain a transcript in some form, together with counsel's failure to obtain the files of the public defender, the

federal defense attorney, and the court files, were all deficient and prejudicial to Mr. Bottoson's defense. RP 1077-82.

C. FAILURE TO OBJECT TO IMPROPER CROSS EXAMINATION AND IMPROPER CLOSING ARGUMENT.

In his testimony on direct examination, Mr. Bottoson admitted possession of the stolen money orders, but denied having participated in the robbery of the post office or the abduction and murder of the victim. RD 1891-1909. The prosecutor concluded his cross examination of Mr. Bottoson by indulging in an orgy of improper questions that assumed facts not in evidence, harassed Mr. Bottoson, and were clearly intended to do nothing other than inflame the jury against Mr. Bottoson. RD 1927-39.[8] Trial counsel sat mute while this abusive questioning continued through pages of transcript. Finally, defense counsel made an objection, which was promptly sustained. The damage had already been done, however. The prosecutor was able to make use of his abusive line of questioning by using it to imply guilty knowledge at closing argument. It was grossly ineffective for defense counsel to permit this extended abuse of his client to go unchallenged.

Obviously, counsel did not have any strategy for allowing this line of abusive questions to go on. Indeed, counsel has candidly admitted that he did not have any tactical reason for not objecting sooner, but that he "simply let it get away from me." RS 247. The prosecutor made effective use of counsel's passivity at closing argument. At closing, again without any objection from defense counsel, the prosecutor recited the responses to his objectionable questions:

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[8]Among the questions asked by the prosecutor were where Mr. Bottoson had "stashed" the victim; whether the victim "was getting pretty uncomfortable in the trunk of that Chevelle;" and, repeatedly, whether he had checked up on the victim's well being at various times.

> [W]hat's interesting is I got the same response on where he stabbed her first, whether she plead or begged for her life, I got the same response on that as I got on how this came to be in his house and how these shoes came to be in his house. How that knife came to be in his garbage with Mrs. Alexander's shoes. I don't know. I don't know. I don't know. I don't know. I don't know.

RD 2034. Defense counsel's failure to protect Mr. Bottoson against the prosecutor's improper cross examination and closing argument was grossly ineffective. Prejudice to Mr. Bottoson is apparent. A single improper question may be so inflammatory and prejudicial as to deprive the defendant of a fair trial. Keen v. State, 504 So. 2d 396 (Fla. 1987). Here, defense counsel allowed a whole line of improper questions to go unchallenged.

The prosecutor violated Mr. Bottoson's right to due process, see Darden v. Wainwright, 477 U.S. 168 (1986); Teffeteller v. State, 439 So. 2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984), by making numerous improper comments during the closing argument at the guilt phase of the trial. Defense counsel failed to make a contemporaneous objection, instead moving for a mistrial after the case had gone to the jury. RD 2096. Defense counsel's failure to object to the comments, which constituted reversible error, Rhodes v. State, 547 So. 2d 1201 (Fla. 1989), was clearly ineffective and prejudicial to Mr. Bottoson.

The prosecutor's closing argument was littered with improper comments. First, the prosecutor repeatedly expressed his personal opinion as to the evidence. For example, he told the jury that he thought the State's evidence "adds up to a pretty solid picture," RD 1996, and stated his personal belief that an eyewitness' sitting position accounted for the discrepancy between her description of the robber and Mr. Bottoson's features and size. RD 2004-05 ("I think

that could account for a little variation in the height").[9] These comments were clearly objectionable and violated the principle that a lawyer shall not "state a personal opinion as to . . . the credibility of a witness . . . or the guilt or innocence of an accused." Model Rules of Professional Conduct, Rule 3.4(e) (1984); ABA Standards for Criminal Justice 3-5.8(b)(2d ed. 1980).

The prosecutor also intentionally misstated the evidence by stating that eyewitness Gary Smith, who was unable to identify the perpetrator of the robbery, RD 860, had seen "Linroy Bottoson and Catherine Alexander there in the parking lot . . . ." RD 2005. The prosecutor was well aware that Mr. Smith had said nothing about seeing Mr. Bottoson. His argument blatantly misrepresented Mr. Smith's testimony, and as such was highly improper. Peterson v. State, 376 So. 2d 1230, 1232 (Fla. 4th DCA 1979), cert. denied, 386 So. 2d 462 (Fla. 1980). Any attempt to misstate the evidence or to influence the jury by the statement of facts or conditions not supported by the evidence is subject to rebuke by the trial court, and, if it influences the verdict, is grounds for a new trial. Washington v. State, 86 Fla. 533, 98 So. 605 (1923).

Next, the prosecutor implied that he had additional evidence of Mr. Bottoson's guilt that he did not present. At closing argument, he stated that he had forty-six or more witnesses from "every postal inspection domicile in the United States." RD 2002.[10] The claim that there were significantly more witnesses than were actually called, coupled with the implication that the uncalled witnesses were postal inspectors from every domicile in the United States, left the

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[9]The prosecutor also stated that Pertrell Kuniara was not a violent man and that he had not made a deal with the State in exchange for his testimony. RD 2020, 2067.

[10]In fact, the State called thirty-one witnesses in its case in chief and three in rebuttal.

obvious impression that the government was armed with additional, highly probative evidence of Mr. Bottoson's guilt that was not presented to the jury. This argument should have been objected to, as it was both improper and reversible error. See Williamson v. State, 459 So. 2d 1125, 1126-27 (Fla. 3rd DCA 1984); Kirk v. State, 227 So. 2d 40, 42-43 (Fla. 4th DCA 1969) (prosecutor should not resort to innuendo to give case false appearance of strength).[11]

Throughout this string of improper arguments, defense counsel sat mute. Defense counsel acknowledged that all of these arguments were objectionable, and denied having any tactical reason for failing to object to them, at least if he made no rebuttal to the arguments in his closing. RS 248-51, 254. In fact, his only rebuttal to any of these objectionable arguments, arguments that also constituted reversible error, was to complain about the prosecutor parading back and forth with pictures of the victim, RD 2057 -- the one part of the prosecutor's argument that he did object to. Clearly, there was no tactical basis for the failure to object. The prosecutor's improper arguments were so pronounced and persistent as to deprive Mr. Bottoson of a fair trial, and counsel's failure to protect Mr. Bottoson from the prejudicial effect of the argument was ineffective.

D. WAIVER OF MR. BOTTOSON'S RIGHT TO BE FOUND GUILTY OF A LESSER OFFENSE.

Under Florida law, Mr. Bottoson had a right to a jury instruction on all crimes supported by the evidence that were lesser included offenses in the crime of first-degree murder, including second and

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[11]Additional improper arguments included attacking Mr. Bottoson's "audacity" for praying for the victim, RD 2008, making repeated unnecessary and prejudicial references to the age and occupational status of the victim, RD 2015, 2033, 2069, and waving photographs of the victim in front of the jury while suggesting that the reason that he did not accept Mr. Bottoson's request for a plea agreement, but rather introduced it into evidence, was the gruesomeness of the crime. RD 2018. Counsel finally objected at that point.

third-degree murder and manslaughter. Fla. R. Cr. P. 3.490; Brown v. State, 206 So. 2d 377 (Fla. 1968). As the defendant in a capital murder case, Mr. Bottoson also had a constitutional right to such an instruction. Beck v. Alabama, 447 U.S. 625 (1980). As the Supreme Court noted in Beck, that

> safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense -- but leaves some doubt with respect to an element that would justify conviction of a capital offense -- the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.
>
> Such a risk cannot be tolerated in a case in which the defendant's life is at stake.

Beck, 447 U.S. at 637.

Defense counsel effectively waived this crucial safeguard for Mr. Bottoson by making the following argument:

> The Judge is going to read you about first degree murder, second degree murder, third degree murder, manslughter and not guilty, and I'm going to tell you something. Either Mr. Bottoson, from this evidence, is guilty of first degree murder or Mr. Bottoson is innocent. There is no in between. There is none. Now, if you find him guilty, you've got to find him guilty of first degree murder. And if you don't find him guilty, second degree or anything else, any of those lessers, the evidence just does not warrant. He's either guilty of first degree murder and you can make your recommendation pursuant to that or he's not guilty. There is no in betweens.

RD 2044. Defense counsel repeated this argument at the end of his closing argument, RD 2064, and the prosecutor gladly agreed that the lesser included offenses did not apply. RD 2065.

Counsel's high risk gamble with the life of his client was clearly unwarranted and ineffective. As counsel admitted, RS 246, nothing was gained by affirmatively telling the jury that they should not consider the lesser included offenses. Mr. Bottoson admitted on the stand that he was involved in a plan to obtain possession of

stolen money orders, RD 1909, but denied knowledge of or participation in the robbery, kidnapping and murder, RD 1891-1909. Since there was no direct evidence how the victim died or at whose hands, the jury could have believed much of Mr. Bottoson's story but also believed that the extent of his participation in the events that led to the victim's death was great enough that he should not be left to go unpunished. In that case, as in Beck, taking the "third option" away from the jury was highly likely to increase the risk of an unwarranted conviction. See Beck, 447 U.S. at 637. For defense counsel to take that option away was inexcusable. Moreover, it was also quite possible that the jury could tell that Mr. Bottoson was mentally disturbed simply from his demeanor. Combined with his statement to the ministers that he was possessed by demons at the time of the offense, RD 1645; State's Trial Ex. 38, that perception might have led them to find that the murder was not premeditated, but rather the result of a "depraved mind regardless of human life," Fla. Stat. § 782.04(2), and hence was second degree, rather than first degree murder.

It is reasonably likely that defense counsel's decision to tell the jury to find Mr. Bottoson guilty of first degree murder or nothing at all affected their verdict. That decision was not made after any reasoned consideration of the relevant law and facts, but was simply a blind all or nothing gamble. As such, it deprived Mr. Bottoson of the effective assistance to which he was entitled. Mr. Bottoson is now entitled to relief from this Court.

ARGUMENT VI

THE COURT AND THE STATE CREATED CONDITIONS IN WHICH IT WAS IMPOSSIBLE FOR COUNSEL TO RENDER EFFECTIVE ASSISTANCE, THEREBY DEPRIVING MR. BOTTOSON OF HIS RIGHT TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, AND UNDER THE FLORIDA CONSTITUTION.

The Sixth and Fourteenth Amendment right to the effective assistance of counsel is violated when the government "interferes . . . with the ability of counsel to make independent decisions about how to conduct the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984); see also United States v. Cronic, 466 U.S. 648 (1984). A defendant is deprived of the right to the effective assistance of counsel by orders such as those struck down in Geders v. United States, 425 U.S. 80 (1976) (barring attorney-client consultation during overnight recess); Holloway v. Arkansas, 435 U.S. 475 (1979) (representation of multiple defendants); and Herring v. New York, 422 U.S. 853 (1975) (refusal to allow summation at bench trial).

The State may also interfere with the right to the effective assistance of counsel by creating conditions in which it is impossible for counsel to function effectively. One way in which the State has historically done this is by setting statutory maximum fees for appointed counsel. Where such statutory maximum fees are set sufficiently low, there is a powerful financial disincentive for the provision of competent representation. White v. Board of County Commissioners, 537 So. 2d 1376 (Fla. 1989); Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986), cert. denied, 479 U.S. 1043 (1987).

In the instant case, both individual court orders and State created fee caps deprived Mr. Bottoson of even the possibility of receiving the effective assistance of counsel. The trial court denied counsel's motion for a continuance to complete his investigation and discovery review, and denied counsel's motion for co-counsel. Those rulings insured that Mr. Bottoson's inexperienced, sole practitioner

attorney would be in no position to conduct an adequate investigation and thus contributed largely to Mr. Sheaffer's ineffectiveness both at the guilt phase and especially at the penalty phase. Moreover, the statutory maximum fee was set so low that if Mr. Sheaffer had conducted an adequate defense of Mr. Bottoson, he would have done so out of his own pocket. A conviction and death sentence resulting from such a process cannot be allowed to stand.

A. THE TRIAL COURT'S DENIAL OF A CONTINUANCE AND DENIAL OF COUNSEL'S MOTION FOR ADDITIONAL COUNSEL AT PENALTY PHASE.

Three days before trial, Mr. Bottoson moved for a continuance based on counsel's inability to interview a crucial witness whom the defense claimed resembled the man who drove off with the victim in Mr. Bottoson's car, the lack of transcription of some of the depositions in the case, and the failure to receive records concerning Mr. Bottoson's commitment to an Ohio psychiatric hospital. RD 3206. Mr. Sheaffer stated that without an extension, he would be unable to provide effective assistance to Mr. Bottoson. RD 3209. Approximately three weeks before trial, on February 23, 1981, Mr. Sheaffer moved to have additional counsel appointed to represent Mr. Bottoson at the penalty phase of the proceedings, RD 3169, arguing that if the jury rejected his defense, his credibility would be damaged, and he would be unable to provide effective assistance of counsel. RD 3170. As is clear from his testimony, Mr. Sheaffer was unable, due to time constraints and his own inexperience in capital cases, to prepare adequately for both the guilt and penalty phases

of the trial. RS 130-31, 309-11.[12] The court denied the motion for co-counsel on the first day of trial. RD 34.

Here, the trial court's rulings prevented Mr. Sheaffer from effectively preparing for both the guilt and penalty phases of the trial. The lack of a continuance prevented defense counsel from speaking to Roy Bostic, who the defense contended was likely the actual killer. When Mr. Bostic was called by the defense, his testimony turned out to be highly damaging. RD 1823-36. Additionally, the order prevented defense counsel from reviewing deposition transcripts and from obtaining psychiatric records which the defense needed in order to represent Mr. Bottoson effectively. RD 3209.

Most egregiously, in the circumstances of this case, the trial court's refusal to associate additional counsel for penalty phase foreclosed defense counsel's ability to represent Mr. Bottoson effectively at penalty phase. It is now well-recognized that co-counsel is required in order for a defendant to receive effective representation in a capital case. See, e.g., American Bar Association, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 44-49 (1989); Ind. Crim. Rule 24. Given the complexity of the case and the fact that it was Mr. Sheaffer's first capital case, RS 117, it was clearly impossible for Mr. Sheaffer to prepare effectively for both phases of the trial at once. That being the case, and inasmuch as none of Mr. Sheaffer's prior experience had prepared him to present a case in mitigation at penalty phase

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[12]The court below even suggested that it was reasonable for Mr. Sheaffer to fail to investigate the phony dog expert, John Preston, because of the time constraints of preparing for trial. RP 3600. If counsel did not even have time to investigate crucial guilt phase issues prior to trial, much less any penalty phase issues, then clearly Mr. Bottoson did not receive that counsel which the sixth amendment requires, regardless of whether the cause of the denial of counsel is attributable to counsel's own failings or the obstacles to counsel's effectiveness created by the court and the State.

proceedings and he believed that his credibility would be destroyed if he lost the guilt phase of the trial, it is not surprising that he put all of his efforts into the guilt phase. RS 130-31. As a result, Mr. Sheaffer did not investigate mental health issues for presentation at penalty phase, did not consider or investigate other mitigating evidence, knew virtually nothing about Mr. Bottoson's life, and had virtually no mitigating evidence to present at penalty phase. RS 139-44, 176-77, 181-86, 194.

Mr. Sheaffer's inability to represent Mr. Bottoson effectively was largely a result of the circumstances created by the court's orders. Where that is the case, prejudice to the defendant may be presumed. United States v. Cronic, 466 U.S. 648, 662 (1984). Moreover, even if a showing of prejudice is required, the prejudice to Mr. Bottoson is clear. Even with the feeble penalty phase presentation actually made, two members of the jury recommended a life sentence. RD 2168. Had defense counsel been in a position to present the mitigating evidence presented at the evidentiary hearing, it is more than reasonably likely that the jury would have recommended life, a recommendation that, supported by extensive mitigating evidence, would have been binding on the trial court. Tedder v. State, 322 So. 2d 908 (1975).

B. THE FEE CAP PROVISIONS OF SECTION 925.036, FLORIDA STATUTES, OPERATED TO DEPRIVE MR. BOTTOSON OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

At the time of Mr. Bottoson's trial, Fla. Stat. § 925.036(4) (1980), provided for a mandatory fee cap in capital cases of $2,500. Even without investigating the qualifications of John Preston, the background and family history of his client, or making any effort to develop and present mitigating evidence relating to Mr. Bottoson's mental and emotional condition, trial counsel spent a total of 191.2 hours on the case. RD 3377. For that amount of time, Mr. Sheaffer

was paid a total of $2,500, or approximately $13 per hour. RD 3381. Clearly, spending the additional time necessary to prepare an effective penalty phase defense would not only have required more knowledge and experience than Mr. Sheaffer was able to bring to bear on the case, but also that Mr. Sheaffer donate the remaining time that would have been required, with no expectation that he would ever be compensated therefor.

At the time of the trial, there was no reason to believe that an effective challenge could be brought to the fee cap provision. Indeed, this Court had just reversed a decision that the statute was unconstitutional, Wakulla County v. Davis, 395 So. 2d 540 (1981), and shortly after the trial the court affirmatively held that the fee cap provision was constitutional. Metropolitan Dade County v. Bridges, 402 So. 2d 411 (1981). See also Dade County v. Strauss, 246 So. 2d 137 (Fla. 3d DCA), cert. denied, 253 So. 2d 864 (Fla. 1971), cert. denied, 406 U.S. 924 (1972). Only five years later, however, this Court receded from Bridges, acknowledging that

> the statutory maximum fees, as inflexibly imposed in cases involving unusual or extraordinary circumstances, interfere with the defendant's sixth amendment right "to have the assistance of counsel for his defense." The statute, as applied to many of today's cases, provides for only token compensation. The availability of effective counsel is therefore called into question in those cases when it is needed most.

Makemson v. Martin County, 491 So. 2d 1109, 1112 (Fla. 1986), cert. denied, 479 U.S. 1043 (1987). See White v. Board of County Commissioners, 537 So. 2d 1376, 1380 (Fla. 1989).

Makemson and White recognized that Fla. Stat. § 925.036 could operate to deprive the defendant of the "adequate, effective representation to which he is entitled," White, 537 So. 2d at 1380. Where that takes place, the statute constitutes an impermissible state interference with the quality of representation provided a criminal

defendant, particularly a capital defendant. Indeed, when, as here, the fee cap statute results in a payment to appointed counsel of little more than minimum wage, but there are major areas of trial preparation untouched, including virtually the entire penalty phase, it can be presumed that a capital defendant was deprived of effective representation.

In the instant case, it is clear that the fee cap actually had that effect. This was an extraordinarily complicated case, involving over thirty (30) State witnesses and twelve (12) defense witnesses as the case was tried, as well as a great deal of information concerning Mr. Bottoson's background and mental condition which should have been, but was not investigated by defense counsel. See Argument II, supra. Defense counsel was woefully unprepared and failed to investigate whole areas of great promise to the defense. The failure to put on a full defense was a direct result of the limited statutory compensation, together with the denial of a continuance and the denial of co-counsel.

There is no question that here, as in Makemson, the limitation on Mr. Sheaffer's compensation "interfere[d] with the sixth amendment right to counsel" because the "two [are] inextricably interlinked." Makemson, 491 So. 2d at 1112. Therefore, the "circumstances surrounding [Mr. Bottoson's] representation" -- the combination of an extraordinarily complex capital case with an unreasonably low mandatory fee cap -- "justify a presumption of ineffectiveness ... without inquiry into counsel's actual performance at trial." United States v. Cronic, 466 U.S. 648, 662 (1984). Mr. Bottoson should receive a new trial.

ARGUMENT VII

THE TRIAL COURT INSTRUCTED THE JURY TO CONSIDER ONLY STATUTORY MITIGATING CIRCUMSTANCES, AND LIMITED HIS OWN CONSIDERATION TO STATUTORY MITIGATING CIRCUMSTANCES, IN VIOLATION OF MR. BOTTOSON'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS AND THEIR FLORIDA COUNTERPARTS.

It is a fundamental precept of modern Eighth Amendment law that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" Skipper v. South Carolina, 476 U.S. 1, 4 (1986), quoting Eddings v. Oklahoma, 455 U.S. 104, 114 (1982). In the instant case, this fundamental precept was violated in two ways: the trial judge instructed the jury that it could not consider such evidence in recommending sentence, and the judge himself refused to consider such evidence in actually passing sentence. Such a sentencing proceeding violates the principles of Skipper, Eddings, and Lockett v. Ohio, 438 U.S. 586 (1978). Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987).

A. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY AND REFUSAL TO CONSIDER NONSTATUTORY MITIGATING CIRCUMSTANCES VIOLATED HITCHCOCK V. DUGGER.

When charging the jury following close of testimony at the penalty phase, the trial court instructed the jury to consider only the statutory mitigating circumstances:

> Should you find sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist. The mitigating circumstances which you may consider, if established by the evidence, are these: [the court then listed the statutory mitigating circumstances found in Fla. Stat. § 921.141(6)].

RD 2157-58 (emphasis added). The emphasized language is identical or virtually identical to the instructions found to violate Lockett in Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987); Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987); and Downs v. Dugger, 514 So. 2d 1069, 1072 (Fla. 1987). That these instructions violate

Hitchcock is clear. Indeed, the State conceded as much in the court below, RP 2980, 2982, and the court below apparently tacitly found Hitchcock error. RP 3605.

In addition to the Hitchcock jury instruction error, the judge also committed Hitchcock error by refusing to consider non-statutory mitigating circumstances. The sentencing judge stated on the record that the only evidence he considered was evidence of statutory mitigation. He prefaced his findings by stating that he had weighed the "legislatively mandated criteria of aggravating and mitigating circumstances." RD 3363. He then considered only the statutory mitigators and found, one by one, that none of them existed. RD 3367-69. The trial judge also indicated his belief that the applicable mitigating circumstances were limited to those enumerated in Fla. Stat. § 921.141(6) by his comments during voir dire. Throughout voir dire, the judge repeatedly reminded the jury that its sentencing recommendation constituted only one of fourteen or sixteen factors (the aggregation of all subsections in Fla. Stat. §§ 921.141(5) and (6)) that he would consider in sentencing Mr. Bottoson. RD 64-65, 318, 408-09, 521-22, 655. The trial court also repeatedly stressed the specific number of factors considered by the court (variously numbered as fourteen or sixteen in total) that would be applied to the facts of the case in reaching a sentencing decision. RD 318, 408-09, 521, 655.

Therefore, the findings of the trial court in the instant case are indistinguishable from those in Hitchcock. Just like the Hitchcock judge, Mr. Bottoson's judge considered "certain enumerated 'aggravating' and 'mitigating' circumstances." Hitchcock, 481 U.S. at 398-99. This Court has repeatedly found judge Hitchcock error under similar circumstances. Combs v. State, 525 So. 2d 853, 855 (Fla. 1988); Zeigler v. Dugger, 524 So. 2d 419, 420 (Fla. 1988); Riley

v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987); Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987), cert. denied, 485 U.S. 960 (1988); Morgan v. State, 515 So. 2d 975, 976 (Fla. 1987), cert. denied, 486 U.S. 1036 (1988). Finally, not only does this Court presume that a trial judge felt precluded when that judge preclusively instructs a capital sentencing jury, Zeigler, supra, but where the trial court both instructs the jury in a preclusive manner and then makes no mention of nonstatutory mitigators in his sentencing order, there is no question that the judge failed to consider the nonstatutory mitigation. Combs, supra; Foster v. State, 518 So. 2d 901 (Fla. 1987), cert. denied, 487 U.S. 1240 (1988); Morgan, supra.

B. THE HITCHCOCK ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

Thus, the trial judge both instructed the jury to consider only statutory mitigating circumstances, and himself refused to consider nonstatutory mitigating circumstances. Evidence presented at both the guilt/innocence and penalty phases of the trial supported the existence of nonstatutory mitigating circumstances. This evidence included the following:

Martha Bottoson, Mr. Bottoson's mother

Mrs. Bottoson testified her son never caused trouble as a child and entered the ministry at the age of thirteen or fourteen. RD 2137. Mr. Bottoson's mother informed the jury that her son was a nonviolent person and the father of six children, the youngest of whom was ten at the time of the trial. RD 2138.

Reverend Floyd Jones, minister

The Reverend Jones testified that Mr. Bottoson acted as his assistant pastor at his church. RD 2125. Mr. Bottoson conducted a Bible class as well as services on alternate Sundays. RD 2126. Mr. Bottoson unselfishly devoted himself to the church and its mem-

bers. RD 2127. The Rev. Jones also testified that Mr. Bottoson was kind, nonviolent and an honest and respectable person. RD 2127-28.

Mrs. Jones, minister's wife

Mrs. Jones testified that Mr. Bottoson worked with her on church programs and prayed for her sight to improve. RD 2131. She also testified that Mr. Bottoson was sincerely religious and non-violent. RD 2132.[13]

John Loughney, F.B.I. agent

A witness for the State, Mr. Loughney testified that Mr. Bottoson was the subject of a court ordered psychiatric evaluation associated with a 1971 California bank robbery conviction. RD 2116-17.

Lastly, the considerable amount of evidence from which the jury could have reached the conclusion that Mr. Bottoson was not the sole participant in the events leading to the victim's death functioned as a nonstatutory mitigator as well.[14] None of the eyewitness descriptions of the man who apparently abducted the victim matched Mr. Bottoson. RD 820, 844, 857, 860, 870. Indeed, the State admitted this point in its closing. RD 2004. No physical evidence linked the victim to Mr. Bottoson's home or business, and State witnesses testified the victim was not present in Mr. Bottoson's home. RD at 1068, 1222. This evidence alone could well have caused the jury to believe that others were involved in the abduction of the victim in light of the fact that the Bottosons were out of the Kissimmee area

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[13]Mr. Bottoson's ex-wife also testified that she had no reason to doubt the sincerity of his religious beliefs. RD 1240.

[14]This issue is not to be confused with "residual doubt" as to the defendant's guilt. This Court has held that "residual doubt" is not a valid mitigating factor. King v. State, 514 So. 2d 354, 358 (Fla. 1987), cert. denied, 487 U.S. 1241 (1988). The issue presented herein relates not to doubt as to Mr. Bottoson's guilt, particularly with regard to the felony murder theory, but rather to doubt as to his role in the killing and concern the Mr. Bottoson alone not be made to pay the ultimate penalty.

for over twenty-four hours during the period between the victim's apparent abduction and her death. Additionally, Mr. Bottoson testified, and told two ministers who took a confession from him, that the money orders were taken by a man named Ernest and that on the day of the murder he met Ernest and a girlfriend of Mr. Bottoson taking the victim away. RD 1645, 1895-98, 1900-01, 1903-09. Thus, the jury could well have believed that other persons participated in the abduction, robbery and murder of the victim, and may not have been convinced that Mr. Bottoson was the actual killer. Certainly, such a belief is consistent with the general verdict of guilty, since the prosecution argued the case and the court instructed the jury on premeditated as well as felony murder. RD 1998-99, 2035, 2073, 2078, 2081.

This court has repeatedly held nonstatutory mitigation of the type presented in Mr. Bottoson's case, particularly when taken together, will support a jury recommendation of life imprisonment. Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993); Holsworth v. State, 522 So. 2d 348, 353-55 (Fla. 1988); Hansbourough v. State, 509 So. 2d 1081, 1086-87 (Fla. 1987); Amazon v. State, 487 So. 2d 8, 13 (Fla.), cert. denied, 479 U.S. 914 (1986); Buckrem v. State, 355 So. 2d 111, 113-14 (Fla. 1978). Examining nonstautory mitigators individually, this Court has held a history of non violence[15], doubt as to which of the accomplices was the actual killer[16], evidence of

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[15]Pentecost v. State, 545 So. 2d 861, 863 (Fla. 1989); Perry v. State, 522 So. 2d 817, 821 (Fla. 1988); Jacobs v. State, 396 So. 2d 713 (Fla. 1981). Although Mr. Bottoson had a prior bank robbery conviction, defense counsel argued there was no evidence of any violence during the bank robbery. RD 2153.

[16]Pentecost, 545 So. 2d at 863; Harmon v. State, 527 So. 2d 182 (Fla. 1988); DuBoise v. State, 520 So. 2d 260, 266 (Fla. 1988).

good character[17], being a good son[18], and being a good parent[19] to be sufficient to support a life recommendation.

Despite the nonstatutory mitigating evidence presented by Mr. Bottoson, the court below found the Hitchcock error to be harmless on the grounds that (1) the instructions did not expressly limit the jury to consider only statutory mitigation and (2) the judge and the jury were repeatedly told that anything could be considered in mitigation. RP 3605-06. These findings cannot stand as a matter of law.

No reasonable juror would understand the trial court's instructions as permitting the jury to consider anything other than the statutory mitigating circumstances. As such, the instructions violated Hitchcock, as both the State and the 3.850 court have conceded. Whether it would be possible for the trial court to have committed "worse" Hitchcock error is legally irrelevant to the issue whether the error in the instructions actually given to this jury was harmless beyond a reasonable doubt.

The facts that defense counsel presented nonstatutory mitigation, and that the prosecutor told the jury that they could consider nonstatutory mitigation, are also legally irrelevant to the harmless error inquiry. Presentation of nonstatutory mitigating evidence has "no effect if the jury was instructed to consider evidence relating only to the statutory mitigating factors." Delap v. Dugger, 890 F.2d 285, 304 (11th Cir. 1989), reh'g denied, 898 F.2d 160 (11th Cir.), cert. denied, 496 U.S. 929 (1990) (emphasis added). For the same

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[17]Perry, 522 So. 2d at 821; Walsh v. State, 418 So. 2d 1000, 1002-03 (Fla. 1982).

[18]Wasko v. State, 505 So. 2d 1314, 1318 (Fla. 1987).

[19]Thompson v. State, 456 So. 2d 444, 447-48 (Fla. 1982); Jacobs, 396 So. 2d 713 (Fla. 1981).

reason, prosecutorial comments do not cure instructional error. In the instant case, the trial court instructed the jury to reach its sentencing decision based on the law as given to them by the court. RD 776, 2072, 2901. At voir dire, the court informed each panel that it would select a jury comprised of only those who would follow the law[20], and asked all but one panel whether it could render a verdict based on the evidence and as instructed by the court. RD 63, 533, 654. Of perhaps even greater importance, the prosecutor also repeatedly told the jurors that the law they would apply would come only from the court, thus undercutting the significance of anything counsel told the jurors about aggravating and mitigating factors. RD 106, 360, 802, 1995, 2140.[21]

For this reason, the Court of Appeals for the Eleventh Circuit determined in Delap that the prosecutor's comments there failed to remove the prejudicial effect of the Hitchcock violation. Delap, 890 F.2d at 304-05. Although the court did not reach the issue whether prosecutorial comment could ever cure Hitchcock error, it strongly suggested that it could not, noting that "throughout almost every criminal trial, including this one, the jury is instructed that it cannot rely on what the attorneys say either as evidence or as a definitive statement of the law." Delap, 890 F.2d at 304 n.21. As the United States Supreme Court has recently acknowledged,

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[20]RD 50-51, 321, 525-26, 635.

[21]Most of the examples given by the State of occasions during voir dire when the prosecutor discussed the lack of limitation on mitigating circumstances have no significance whatever, since they took place during individual voir dire of prospective jurors who did not hear the case. RD 189, 192, 198, 206, 211-12, 234, 250, 265, 272, 281, 292, 447, 461, 474, 591, 711, 773. The prosecutor also told all five of the jurors with whom he discussed the issue who were eventually seated that the law they would apply would only come from the judge. RD 216-18, 225-26, 414-15, 483-84, 494-96.

> arguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, see Tr. 3933, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.

Boyde v. California, 494 U.S. 370, 384 (1990) (emphasis added). The statement of an advocate cannot "cure" the error committed when the "definitive and binding" instructions of the judge are erroneous.

In these circustances, the jurors were obliged, unless they chose to disregard their oath, to consider only the enumerated statutory mitigating circumstances as instructed. The jury is presumed to follow the instructions of the court as they relate to mitigating and aggravating circumstances. Valle v. State, 474 So. 2d 796, 805 (Fla. 1985), cert granted and judg. vacated on other grounds, 476 U.S. 1102 (1986). The record clearly shows that there was both jury and judge Hitchcock error in Mr. Bottoson's case, and that the errors were not harmless. Mr. Bottoson is entitled to a new sentencing proceeding.

ARGUMENT VIII

A NEW TRIAL IS REQUIRED BECAUSE THE TRIAL COURT'S COMMENTS CONCERNING THE JURY'S ROLE IN THE SENTENCING PROCESS, APPELLATE REVIEW AND CLEMENCY RENDERED MR. BOTTOSON'S TRIAL FUNDAMENTALLY UNFAIR.

The trial court repeatedly violated the principles of Caldwell v. Mississippi, 472 U.S. 320 (1985). Caldwell held that:

> it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.

Id. at 328-29. Indeed, the court went far beyond the error in Caldwell by informing the jury that the sentence of the court is subject to appellate review in violation of Pait v. State, 112 So. 2d 380 (Fla. 1959). RD 65-66.

On at least twelve occasions the trial court unconstitutionally diminished the gravity of the jury's recommendation. RD at 65; 318; 409-10; 521; 522; 655; 656; 2090; 2113; 2155, 2157, 2159-61. There are four instances where the trial court informed the panel that the sentence (assuming, of course, that the case proceeded to penalty phase) would be reviewed by appellate courts. RD at 66; 318; 522; 655. Finally, on two occasions the court lessened the responsibility of the jury by informing the panel that clemency proceedings exist for death sentenced individuals. RD at 409-10; 522.[22]

Typical of the court's comments were the statement that the jury's recommendation was only "one of fourteen factors" that he would consider in deciding the sentence, RD 65, and the following description of the appellate review process:

> [T]he case goes from this courtroom right here to the Florida Supreme Court with the transcript that the court reporter is making and my Sentencing Memo. All right, and the Florida Supreme Court, all seven of them then do two things. After they receive everything in the case then they look to see, one, whether or not I have properly followed all of the requirements of the sentencing law and then they look to see if they agree with the solution that I have reached . . . If they don't agree with the results and so they change it.

RD 65-66. Similarly, the court described the clemency process to the prospective jurors in the following terms:

> All right, it is at that point then that we have finished with the order of judicial process and the matter goes to the Governor and the Cabinet. I've forgotten what they are called, the Clemency Board. What I'm again pointing out to you, as I told you, yesterday, I don't want to throw it up out of proportion either. You are not sitting in judgment of your fellow man, nor are you sentencing someone to death. You are simply making a recommendation to me, which I may accept or reject as I see is proper, and that

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[22]The trial court made these comments before separate panels of prospective jurors. Four panels, from which most of the actual jurors were drawn, heard his comments concerning appellate review. Two panels, from which seven actual jurors were drawn, heard his comments concerning the clemency process.

> is reviewed by the folks in Tallahassee who decide whether or not they agree with what I decided.

RD 409-10. At penalty phase, the court again instructed the jury that the final decision on punishment "rests solely with me," RD 2113, and that they would merely "advise" or "recommend" a sentence to the court.

The trial court's repeated and egregious misstatements violated Mr. Bottoson's eighth and fourteenth amendment rights to a reliable sentencing determination in at least three ways. First, the Court misled the jury "into believing that its role [in the capital sentencing process] is unimportant." Mann v. Dugger, 844 F.2d 1446, 1454 (11th Cir. 1988) (en banc), cert. denied, 489 U.S. 1071 (1989). Second, it informed the jury that any death sentence would be subject to appellate review, in violation of Pait v. State, 112 So. 2d 380 (Fla. 1959), and shifted their "sense of responsibility" for the sentence to the Florida Supreme Court. Caldwell v. Mississippi, 472 U.S. 320, 330 (1985). Finally, the comments informed or at least suggested to the jurors that any death sentence could be commuted by the Clemency Board, in violation of Blackwell v. State, 79 So. 731, 735 (Fla. 1918), thereby providing them with inaccurate and misleading information concerning their role in the sentencing process. See Caldwell, supra, 472 U.S. at 336; id. at 341 (O'Connor, J., concurring).

The court below held that this claim is without merit because Caldwell "'is inapplicable to the Florida procedure in which the judge rather than the jury renders the sentence.'" RP 3604, quoting Bertolotti v. State, 534 So. 2d 386, 387 n.2 (Fla. 1988). In so holding, the court below ignored the fact that, like many other decisions of this Court, Bertolotti was effectively overruled by the United States Supreme Court in Espinosa v. Florida, 112 S. Ct. 2926 (1992).

In Espinosa, the United States Supreme Court found that the Florida death sentencing procedure "split[s] the weighing process" between the sentencing jury and the trial court, requiring that the jury be properly instructed and guided with respect to aggravating factors. Espinosa, 112 S. Ct. at 2928. When the jury is inadequately instructed as to an aggravating circumstance, the resulting death sentence is presumed invalid because the trial court gives "great weight" to the jury's recommendation. Id. Espinosa makes clear that Florida has placed part of the "capital sentencing authority," id. at 2929, in the hands of the jury. That being the case, any comments or instructions from the court that diminish the jurors' sense of responsibility for imposing sentence clearly violate the eighth amendment, and Caldwell applies with full force to Florida.

As such, Espinosa constitutes a fundamental change in Florida law, overruling prior decisions of this Court holding Caldwell error inapplicable to capital sentencing in Florida. See Grossman v. State, 525 So. 2d 833, 839 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989); Combs v. State, 525 So. 2d 853 (Fla. 1988); Aldridge v. State, 503 So. 2d 1257, 1259 (Fla. 1987); Pope v. Wainwright, 496 So. 2d 798, 804-05 (Fla. 1986), cert. denied, 480 U.S. 951 (1987); Darden v. State, 475 So. 2d 217, 221 (Fla. 1985). Because Espinosa is a fundamental change in Florida law, Witt v. State, 387 So. 2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980), its holding should be applied retroactively to permit consideration of the merits of Mr. Bottoson's Caldwell claim.

The court below also found that this claim is procedurally barred and cannot be restated as an ineffective assistance of counsel claim. RP 3603. As set forth above, because this claim is based on a fundamental change in Florida law, no bar should be applied. However, should this Court find it to be barred, it must consider Mr.

Bottoson's ineffective assistance of counsel claim. Although there is language from prior decisions of this Court that would appear to support the lower court's ruling, see, e.g., Kight v. Dugger, 574 So. 2d 1066, 1073 (Fla. 1990), the result cannot be correct. Assuming, arguendo, that Mr. Bottoson's counsel rendered constitutionally ineffective assistance by failing to object, this Court must hear the merits of his claim. Otherwise, Mr. Bottoson would be deprived of his constitutional right to the effective assistance of counsel, without being given any opportunity for redress of that deprivation, in violation of his rights of due process and access to the courts.

The failure of Mr. Bottoson's trial attorney to object to the court's grossly improper and inaccurate comments constituted ineffective assistance of counsel.[23] Counsel's failure to object was unreasonable in light of longstanding Florida law with regard to the jury's sentencing role. See RP 356-59; 471; 1086-87. In Pait v. State, 112 So. 2d 380, 384-85 (Fla. 1959), this Court reversed a first-degree murder conviction for remarks made by the prosecutor to the jury to the effect that the defendant has the right to appeal if convicted, but the State cannot appeal an acquittal. Although no contemporaneous objection was made at trial, this Court found that such a statement amounted to plain error and could not be harmless as "the jury is being told that in some measure they could disregard their own responsibility in the matter and leave it up to the Supreme Court." Pait, 112 So. 2d at 384. See also Blackwell v. State, 79 So. 731 (Fla. 1918) (error to give jury impression that appellate court or clemency authority could correct verdict).

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[23]Trial counsel's failure to object was particularly deficient in light of the fact that the trial court notified counsel in advance regarding his intention to improperly instruct the jury. RD 2200.

Moreover, this Court has emphasized that the jury's sentencing "recommendation" is in fact a decision which reaches to the level of a verdict, and is therefore entitled to great deference.

> A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) (emphasis added).

Thus, trial counsel for Mr. Bottoson had every conceivable basis under long standing state law on which to object to the court's grossly misleading and prejudicial statements under Tedder, Pait and Blackwell. When counsel failed to do so, his actions fell outside the range of professionally competent assistance. The failure to provide Mr. Bottoson with adequate sentencing instructions overwhelmingly prejudiced Mr. Bottoson. Mann v. Dugger, 844 F.2d 1446, 1454 (11th Cir. 1988) (en banc), cert. denied, 109 S. Ct. 1353 (1989). In the face of the trial court's repeated misleading, erroneous and inaccurate comments and instructions, the jury's recommendation of death is hopelessly unreliable and cannot be allowed to stand.

ARGUMENT IX

THE SENTENCING JURY AND JUDGE WEIGHED VAGUE AND CONSTITUTIONALLY INVALID AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.[24]

In Sochor v. Florida, 112 S. Ct. 2114, 119 L.Ed.2d 326 (1992), the Supreme Court made clear that the Eighth Amendment is violated whenever the sentencer in a "weighing" state, like Florida, considers an "invalid" aggravating circumstance. An aggravating circumstance may be invalid either because it does not apply as a matter of law, or because it is so undefined that it fails to offer adequate guidance

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[24]This argument encompasses both Claim M of the original 3.850 motion, and Claim H-V of the Supplement to the 3.850 motion.

to the sentencer. As the Court noted in Sochor, either type of error tilts the weighing process in favor of death and invalidates the death sentence. Sochor, 119 L.Ed.2d at 336-37.

In the instant case, the trial court instructed the jury to consider all of the statutory aggravating circumstances then in effect. RD 2156-57. The jury instructions on the "especially heinous" and "avoid arrest" aggravating factors were unconstitutionally vague. Of the other aggravating circumstances, the trial court found that several did not apply as a matter of law. Moreover, the felony murder aggravating circumstance is an invalid "automatic" aggravating circumstance. Thus, multiple "invalid" aggravating circumstances were presented to and weighed by the sentencing jury. And the absence of any adequate statutory definition or limiting construction of the "especially heinous" and "avoid arrest" aggravating factors tainted the sentencing court's consideration of those factors. Because the sentencers' weighing process was "infected" by invalid aggravating factors, Mr. Bottoson's death sentence "must be invalidated." Stringer v. Black, 112 S. Ct. 1130, 1139 (1992).

A. WEIGHING OF INVALID AGGRAVATING CIRCUMSTANCES BY THE JURY.

Mr. Bottoson's jury was given the following instruction concerning the "especially heinous, atrocious or cruel" aggravating circumstance:

> H, that the crime for which the Defendant is to be sentenced was especially heinous, atrocious, or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked or vile. And then cruel means designed to inflict a high degree of pain, utter indifference to, or even enjoyment of, the suffering of others; pitiless.

RD 2157. There is now no question that this instruction is unconstitutionally vague, and that the giving of this or any similar instruction to a Florida penalty phase jury violates the eighth and

fourteenth amendments. Espinosa v. Florida, 112 S. Ct. 2926 (1992); Shell v. Mississippi, 498 U.S. 1 (1990); id. at 2 (Marshall, J., concurring).

In cases, like the instant one, in which a person other than a police officer is killed, the "avoid arrest" aggravating factor is valid only where there is proof beyond a reasonable doubt that the dominant or only motive of the killing was to eliminate a witness. Perry v. State, 522 So.2d 817 (Fla. 1988); Herzog v. State, 439 So.2d 1372 (Fla. 1983). Mr. Bottoson's jury was never informed of this limiting construction. Instead, the trial court instructed the jury on this aggravating circumstance in the bare language of the statute. RD 2156. In the absence of a limiting instruction, the jury was given no meaningful guidance concerning the application of this aggravating factor, in violation of the eighth amendment.

The jury was also instructed to consider all of the other statutory aggravating circumstances. RD 2156-57. The trial court found that five of those aggravating circumstances did not apply, either as a matter of law or of fact. RD 3363-67. While two of the aggravating factors clearly did not apply as a matter of fact ("under sentence of imprisonment," RD 3363, and "great risk of death to many," RD 3364), the trial court rejected the others as a matter of law, based on concerns about improper doubling of aggravating factors. The jury was never instructed not to double aggravating factors, although to give separate weight to aggravating factors based on identical facts violates the law of this State. Provence v. State, 337 So. 2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977). Finally, as discussed below, the jury's consideration of the felony murder aggravating circumstance, like the sentencing court's weighing of that circumstance, was tainted by the fact that it is an "automatic" aggravating circumstance.

B. WEIGHING OF INVALID AGGRAVATING CIRCUMSTANCES BY THE COURT.

Under Arave v. Creech, 113 S. Ct. 1534 (1993), a trial court's weighing of an aggravating factor is invalid if the statutory definition of the aggravator "'is itself too vague to provide any guidance to the sentencer,'" id. at 1541, quoting Walton v. Arizona, 497 U.S. 639, 654 (1990), and the state courts have failed to adopt a constitutionally sufficient limiting construction of the aggravator. Id. Using this analysis, there is no question that the language of Florida's "especially heinous, atrocious or cruel" aggravating circumstance by itself does not provide any guidance to the sentencer, and thus fails to meet the first test.[25] In Creech, the Court further held that in order for a state limiting construction to be constitutionally sufficient, the state must "adhere[] to a single limiting construction," Creech, 113 S. Ct. at 1544, of an otherwise vague aggravating factor. As demonstrated below, the Florida Supreme Court does not have a "single limiting construction" of the heinousness aggravating factor, but rather a menu of constructions from which it chooses, constructions that give the trial courts and this Court sufficient latitude to find that virtually any first-degree murder is "especially heinous."

Florida's failure to "adhere[] to a single limiting construction" renders the heinousness aggravating factor useless as a means of genuinely narrowing the "'class of defendants eligible for the death penalty.'" Creech, 113 S. Ct. at 1542, quoting Zant v. Stephens, 462 U.S. 862, 877 (1983). Reliance on the aggravating factor therefore violates the Eighth Amendment. "If the sentencer fairly could conclude that an aggravating circumstance applies to every

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[25]Espinosa v. Florida, 112 S. Ct. 2926, 2628 (1992); Shell v. Mississippi, 498 U.S. 1 (1990); Maynard v. Cartwright, 486 U.S. 356, 364 (1988).

defendant eligible for the death penalty, the circumstance is infirm." Creech, 113 S. Ct. at 1542 (emphasis added) (citations omitted). Florida's heinousness aggravator is "infirm" for that very reason.

In Proffitt v. Florida, 428 U.S. 242 (1976), the Supreme Court approved Florida's heinousness aggravating factor on the understanding that the factor was limited to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Proffitt, 428 U.S. at 255-56; see also Lewis v. Jeffers, 497 U.S. 764 (1990). In spite of Proffitt, in numerous cases, this Court approved findings of the aggravator because the crime was "evil," "wicked," "atrocious," or some similarly vague term standing alone. See, e.g., Johnson v. State, 393 So. 2d 1069, 1073 (Fla.), cert. denied, 454 U.S. 882 (1981) (murder was "atrocious and cruel and was committed to seek revenge" on victim); Hargrave v. State, 366 So. 2d 1, 5 (Fla.), cert. denied, 444 U.S. 919 (1979) (crime was extremely wicked and shockingly evil). Further, in 1982, this Court disapproved use of the Dixon construction, Vaught v. State, 410 So. 2d 147, 151 (Fla. 1982), and in 1983, it removed the constitutionally approved construction altogether. Pope v. State, 441 So. 2d 1073, 1077-78 (Fla. 1983). Thus, in Pope, this Court expressly repudiated any reliance on the limiting construction that was approved by the Supreme Court in Proffitt as essential to a constitutional application of this aggravator.[26]

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[26]In other cases, this Court has relied on varying and inconsistent formulations that relieve the sentencing court of any guidance concerning the aggravating factor. See, e.g., Harvard v. State, 414 So. 2d 1032, 1036 (Fla. 1982), cert. denied, 459 U.S. 1128 (1983) (crime accompanied by "additional acts"); Magill v. State, 428 So. 2d 649 (Fla.), cert. denied, 464 U.S. 865 (1983) ("entire set of circumstances"). See generally Mello, Florida's "Heinous, Atrocious or Cruel Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making it Smaller, 13 Stetson L. Rev. 523, 537-40 (1984); Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases -- The Standardless Standard, 64 N.C.L.

The only conclusion that can be reached in light of the multiple, inconsistent formulations of the aggravating factor and the flatly contradictory results of factually indistinguishable cases is that trial courts decide whether this aggravator has been established and this Court reviews those decisions based on the totality of the circumstances. That is not enough, however; such an approach fails to give the sentencer any meaningful guidance in making the decision whether to allow life or impose death, and does not constitutionally narrow the class of death-eligible individuals. As a result, it permits the kind of arbitrary and capricious decisions concerning the ultimate penalty that were condemned by the United States Supreme Court over twenty years ago in Furman v. Georgia, 408 U.S. 238 (1972), and as recently as the past year in a string of cases concerning the proper application of aggravating factors. Richmond v. Lewis, 113 S. Ct. 528 (1992); Espinosa; Sochor; Stringer v. Black, 112 S. Ct. 1130 (1992). In the absence of a clear, objective limit on the vague words of Florida's heinousness aggravator, Mr. Bottoson's death sentence, imposed in reliance on that aggravator, is unconstitutional.

Similarly, at the time of Mr. Bottoson's trial, there was no consistent limitation on the scope of the "avoid arrest" aggravating factor. At that time, the silencing of a witness had been construed as giving rise to the aggravating circumstance, Knight v. State, 338 So. 2d 201 (Fla. 1976); Meeks v. State, 336 So. 2d 1142 (Fla. 1976), and as giving rise to no aggravating circumstance. Gibson v. State, 351 So. 2d 948 (Fla. 1977), cert. denied, 435 U.S. 1004 (1978).

Rev. 941 (1986); Skene, Review of Capital Cases: Does the Florida Supreme Court Know What It's Doing?, 15 Stetson L. Rev. 263, 318-320 (1986); Sochor v. Florida, 112 S. Ct. 2114 (1992), Petitioner's Brief at 44-47.

Finally, the trial court found and weighed the felony murder aggravating factor. RD 3364. The jury was instructed on felony murder, RD 2076-78, and may well have convicted Mr. Bottoson of first degree murder based on the felony murder doctrine. Thus, it was felony murder that made Mr. Bottoson eligible for the death penalty, but felony murder was used again as an aggravating factor in support of the death penalty. Use of the same factor to make Mr. Bottoson eligible for the death penalty and to determine whether he fell within the narrow category of first degree murderers on whom the death penalty should actually be imposed violated the eighth amendment and Article I, Section 17 of the Florida Constitution. See Tennessee v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), cert. dism'd as improvidently granted, 126 L.Ed.2d 555 (1993); Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991); State v. Cherry, 257 S.E.2d 551 (N.C. 1979), cert. denied, 446 U.S. 941 (1980).

Both the penalty phase jury and the sentencing judge thus weighed vague and constitutionally invalid aggravating circumstances. The court below denied these claims on the basis that they were not cognizable under Roberts v. State, 568 So. 2d 1255, 1258 (Fla. 1990). RP 3607. Roberts, however, is clearly overruled by Espinosa, which holds that the principles of Maynard v. Cartwright, 486 U.S. 356 (1988), are applicable to Florida. Espinosa, 112 S. Ct. at 2928. The court below also stated that the issue was not preserved for appeal. Mr. Bottoson did object to the vagueness of the "especially heinous" aggravating factor by a pretrial motion. RD 2984.[27]

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[27]It is not known whether counsel objected to the instructions on the aggravating factors, because no record of the penalty phase charge conference was preserved. See Argument XIV, infra. Because counsel was ineffective in failing to preserve an adequate record, Mr. Bottoson should not be penalized by making a presumption that counsel waived objection. On the other hand, to the extent that counsel did fail to preserve the objection, counsel was ineffective, as the basis for the objection was known at least since Godfrey v.

Finally, the court below asserted that any error was harmless, because there remained three valid aggravating factors and no mitigating factors. RP 3608. That analysis is invalid for several reasons. First, it fails to assess the impact of the invalid instruction on the jury. Because instructing the jury to consider a vague aggravating factor creates "bias in favor of the death penalty," when the jury weighs a vague aggravating factor a reviewing court "may not assume that it would have made no difference if the thumb had been removed from death's side of the scale." Stringer v. Black, 112 S. Ct. 1130, 1137, 1139 (1992). The court below, however, simply assumed that the presence of other valid aggravating factors makes the error harmless. Such a rule of automatic affirmance is invalid. Id.[28] Second, it assumes that the jury found no mitigating circumstances. In fact, mitigating evidence was presented at trial, see Argument VII, supra, two jurors recommended life, and more jurors may have found mitigation. Had the jury recommended life in the absence of the invalid aggravating factor, it cannot be said beyond a reasonable doubt that that recommendation would not have been followed either by the trial court or on direct appeal. Third, it ignores the fact that, as demonstrated above, both the jury and the court considered and weighed multiple invalid aggravating circumstances.

Finally, that analysis asks the wrong question. It assumes a trial in which no weighing of an invalid aggravating factor occurred, and asks whether Mr. Bottoson would still have been sentenced to

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Georgia, 446 U.S. 420 (1980). Thus, the statement of the court below that counsel could not be ineffective for failing to raise meritless issues, RP 3611, is inapplicable.

[28]Moreover, the prejudicial impact of the instruction was heightened by the prosecutor's improper argument that the victim's age and sex made the crime "especially heinous." RD 2148.

death. The proper harmless error question is not whether the outcome would have been the same in the absence of the error, but whether Mr. Bottoson's death sentence "was surely unattributable to the error." Sullivan v. Louisiana, 124 L.Ed.2d 182, 189 (1993). Under that standard, the errors in this case cannot be found harmless beyond a reasonable doubt absent the type of "speculation" which the Eighth Amendment and the Florida Constitution forbid. See Stringer, 112 S. Ct. at 1137. We must presume, see Espinosa, that the jury improperly weighed the aggravator, "creat[ing] the risk that the jury . . . treat[ed] [Mr. Bottoson] as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." Id. In light of the entire record, it would be impossible for this Court to find "beyond a reasonable doubt that the error complained of did not contribute to the [sentence] obtained," Chapman v. California, 386 U.S. 18, 24 (1967).

ARGUMENT X

THE PENALTY PHASE JURY INSTRUCTIONS VIOLATED MR. BOTTOSON'S RIGHT TO A RELIABLE SENTENCING DETERMINATION BY REQUIRING THAT A MAJORITY OF THE JURORS VOTE IN FAVOR OF LIFE, PLACING THE BURDEN ON HIM TO PROVE THAT DEATH WAS NOT THE APPROPRIATE PUNISHMENT, AND PRECLUDING THE JURY FROM CONSIDERING SYMPATHY AND MERCY.

The trial court instructed the jury that a "majority" of "seven or more members of the jury" was required before they could recommend a life sentence. RD 2160-61. This instruction was erroneous under state law, Rose v. State, 425 So. 2d 521 (Fla. 1982), cert. denied, 461 U.S. 909 (1983); Harich v. State, 437 So. 2d 1082 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984), and created a misleading impression of the jury's role at sentencing, in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985).

At the penalty phase of the trial, the court instructed the jury that it must recommend the death penalty unless it found "mitigating circumstances sufficient to outweigh the aggravating circumstances."

RD 2114, 2156, 2159. The court further instructed the jury that it had a duty, which it could not stray from, to "follow the law" provided by the court. RD 2155, 2159. These instructions were bolstered by the prosecutor's argument that under the circumstances of this case, a death penalty recommendation was required by the law and by the jurors' promises to the prosecutor during voir dire. RD 2149.[29]

The sentencing instructions and prosecutorial argument thus required the jury to recommend death unless they found that the mitigating circumstances outweighed the aggravating circumstances. The jury was instructed that if they found aggravation and mitigation to be equally balanced, they must recommend death. They were also instructed in effect that once they found sufficient aggravating circumstances they must presume that the death penalty was the appropriate recommendation until such presumption was overcome by the defendant. Such an instruction is "so skewed in favor of death that it fails to channel the jury's sentencing discretion appropriately." Jackson v. Dugger, 837 F.2d 1469, 1474 (11th Cir.), reh'g denied, 842 F.2d 339, cert. denied, 486 U.S. 1026 (1988).

Immediately before the guilt phase determination the court instructed the jury:

> You are to lay aside any personal feelings you may have in favor of, or against, the State and in favor of, or against, the Defendant. Now, while I realize it is only

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[29]At voir dire, the prosecutor had questioned each of the jurors and prospective jurors concerning their willingness to recommend the death penalty if aggravating factors were found. The prosecutor asked almost every juror, in slightly different language, if he or she could follow the law by recommending life if the mitigating factors outweighed the aggravating factors, and by recommending death if the aggravating factors outweighed the mitigating factors. Each juror promised that he or she would do that. RD 218-19 (Rigante); RD 227 (Larson); RD 416-17 (Schafner); RD 465-66 (Crews); RD 485-86 (Duke); RD 496-97 (Kazaros); RD 612-13 (Swetz); RD 732-33 (Turner); RD 760 (Dunn).

> human to have personal feeling or sympathy in matters of this kind, but any such personal feeling or sympathy has no place in the consideration of your verdict.

RD 2091. At the penalty phase of the proceeding, the court never instructed the jury that it could consider sympathy or mercy for Mr. Bottoson, nor did it instruct the jury to disregard its instruction at guilt phase. In fact, the court reiterated to the jury that it must base its sentencing recommendation solely on the law and the evidence relating to aggravating and mitigating factors, which did not include any reference to sympathy or mercy. RD 2114, 2155-56, 2158-59.

Instructing the jury to disregard any sympathy they may have felt for the defendant undermined the jury's ability to weigh and evaluate all of the mitigating evidence. Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988)(en banc), rev'd on other grounds sub. nom. Saffle v. Parks, 494 U.S. 484 (1990). The jury's role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an appropriate punishment. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). An admonition to disregard the consideration of sympathy improperly suggests to the sentencer "that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown, 479 U.S. 538, 546 (1987) (O'Connor, J., concurring).

Individually and cumulatively, these erroneous instructions operated to deprive Mr. Bottoson of his fundamental right to a reliable sentencing proceeding. This Court should act to correct this fundamental error regardless of any procedural bar. To the extent that this Court finds any part of this claim to be barred by trial counsel's failure to object to the instructions, such failure

to object constituted ineffective assistance of counsel. Mr. Bottoson is entitled to relief on the merits of this claim.

ARGUMENT XI

THE STATE'S USE OF A PEREMPTORY CHALLENGE TO STRIKE THE ONLY BLACK VENIREMAN, VIOLATED MR. BOTTOSON'S RIGHTS UNDER ARTICLE I, SECTION 16(A) OF THE FLORIDA CONSTITUTION AND UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The defendant, Mr. Bottoson, is black. Only one black venireman, Mr. Newton, was called for Mr. Bottoson's trial. The State used one of its peremptory strikes to challenge Mr. Newton. Defense counsel immediately objected to the exercise of this specific peremptory challenge, on the grounds that the State was deliberately excluding the only black venireman. RD 616.

The Court did not require the State to offer any reasons for the use of its peremptory challenge to strike the only black venireman. RD 616. No race neutral reason is apparent from the face of the record. Mr. Newton was questioned at length by both counsel during the opening day of jury selection. RD 230-44. Mr. Newton stated under oath that he could return a verdict of guilty to the charge of first-degree murder and, under appropriate circumstances, could vote for the death penalty. Thereafter, both counsel accepted Mr. Newton as a member of the jury. RD 309-10. However, three days after he had been examined, Mr. Newton was back-struck by the State. RD 615-16. Ultimately, an all-white jury was impaneled.

The trial court thus allowed the State to strike the only black venireman without requiring the State to enunciate a race-neutral reason for the peremptory challenge. This clearly violated the United States and Florida Constitutions. Batson v. Kentucky, 476 U.S. 79, 89-93 (1986); State v. Neil, 457 So. 2d 481 (Fla. 1984). Under Neil, as clarified in State v. Slappy, 522 So. 2d 18 (Fla.), cert. denied, 487 U.S. 1219 (1988), the State must justify a peremptory strike on

race-neutral grounds once the defendant demonstrates that his objection to the strike is not frivolous. Slappy, 522 So. 2d at 22. The court wrote:

> [R]ecognizing, as did Batson, that peremptory challenges permit "those to discriminate who are of a mind to discriminate," . . . we hold that any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor. If we are to err at all, it must be in the way least likely to allow discrimination.
>
> Once a trial judge is satisfied that the complaining party's objection was proper and not frivolous, the burden of proof shifts.

Id. This Court's decisions in Slappy and in Tillman v. State, 522 So. 2d 14 (Fla. 1988), make clear that, under Neil, the facts of the jury selection process at the Bottoson trial mandated a full inquiry into the State's reasons for excusing Mr. Newton. See Tillman, 522 So. 2d at 16-17. Nonetheless, the trial judge made no inquiry into the State's rationale for striking Mr. Newton. In contravention of Neil, the court merely "denied" the objection and motion, allowing the State to exercise peremptory strikes for any reason, including race.

The court below denied relief on this claim, stating that the claim was procedurally barred under Mikenas v. State, 460 So. 2d 359 (Fla. 1984). RP 3598. The court went on to find that it could not consider the Neil/Slappy claim even if the claim had not been defaulted as Neil has no retroactive application. RP 3598-99. Finally, the trial court held that Mr. Bottoson improperly "couche[d] this claim as ineffective assistance of counsel." RP 3599. None of the court's reasons for denying relief are well taken.[30]

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[30]In particular, Mr. Bottoson has never claimed that trial counsel was ineffective with respect to the Neil issue.

Mikenas restated the well-worn proposition that claims which either could have been or were, in fact, raised on direct appeal are not cognizable through collateral attack. Mikenas, 460 So. 2d at 361. The court did not state which of the possible Mikenas bars it was applying. Since Mr. Bottoson raised his Neil claim at the first available opportunity after Neil was decided, and hearing his claim would not require retroactive application of Neil, no procedural bar applies and this Court should consider the merits of the claim.

Application of Neil to Mr. Bottoson's case would not in fact be retroactive. On the day Neil was handed down, Mr. Bottoson's certiorari petition remained pending before the United States Supreme Court. Four days later, on October 1, 1984, the Court denied certiorari. Bottoson v. Florida, 469 U.S. 962 (1984). As such, Mr. Bottoson had yet to receive a "final judgment" regarding his conviction and sentence. Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987); Burr v. State, 518 So. 2d 903, 905 (Fla. 1987), vacated on other grounds, 487 U.S. 1201 (1988). Mr. Bottoson's judgment was not final until the denial of certiorari, and therefore Neil and its progeny remain available to Mr. Bottoson, as he presented this claim for review at his earliest opportunity -- the filing of his Rule 3.850 motion in the Ninth Judicial Circuit of Florida. RP 1770.

While Neil states that its holding is not retroactive, in State v. Castillo, 486 So. 2d 565 (Fla. 1986), this Court clarified Neil, holding that the comment in Neil that the case had no retroactive impact "was intended to apply to completed cases." Id. at 565. As such, if a case is not "completed," that case benefits from Neil and its progeny. A Florida criminal case is not completed if, in the direct appeal process, there is a petition for certiorari pending in the United States Supreme Court, Smith v. State, 598 So. 2d 1063,

1066 (Fla. 1992); Burr, supra.[31] Therefore, Mr. Bottoson is entitled to an adjudication on the merits of this claim.

ARGUMENT XII

MR. BOTTOSON'S SENTENCE OF DEATH WAS BASED UPON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION AND THEREFORE VIOLATES HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS AND THEIR FLORIDA COUNTERPARTS.

In Johnson v. Mississipppi, 486 U.S. 578 (1988), the Supreme Court held that basing a death sentence in part on evidence of a prior conviction that was reversed because it was unconstitutionally obtained violates the principle that a death sentence may not be "predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'" Johnson, 486 U.S. at 585, quoting Zant v. Stephens, 462 U.S. 862, 884-85 (1983). Like a conviction that has actually been reversed, a conviction that was obtained in violation of a defendant's fundamental constitutional rights provides "no legitimate support," Johnson, 486 U.S. at 586, for a death sentence.

Mr. Bottoson's death sentence was based in part on the aggravating circumstance that he had a prior conviction for a violent felony: a 1971 bank robbery conviction. RD 3363. When the constitutionality of such a prior conviction is challenged, this Court is required to review it to determine whether it was constitutionally obtained. Id. See Maleng v. Cook, 490 U.S. 488 (1989) (petitioner

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[31]In considering the retroactive application of the federal constitutional parallel to Neil -- Batson v. Kentucky, 476 U.S. 79 (1986) -- the United States Supreme Court came to a similar conclusion in Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987). Griffith held Batson applies to all cases, state and federal, pending on direct review or not yet "final" when the new rule was announced. The Court defined "final" as "a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for petition for certiorari elapsed or a petition for certiorari finally denied." Id.

in federal habeas action could challenge prior conviction used to enhance sentence for subsequent conviction).

On July 12, 1971, Mr. Bottoson pled guilty to a single count of bank robbery in violation of 18 U.S.C. § 2113(a). In the lower court, Dr. Phillips testified that Mr. Bottoson was suffering from schizophrenia at the time of the 1971 crime. RP 620. This diagnosis was based on post-conviction psychiatric reports completed subsequent to a federal court order to mentally evaluate Mr. Bottoson, RP 638, 642, 643, Def. Ex. 5. In the opinion of Dr. Phillips, the reports completed in 1971 supported his conclusion that Mr. Bottoson was insane at the time he committed the bank robbery. RP 656, Def. Ex. 5.

A conviction based on a guilty plea that was not "voluntary and intelligent," North Carolina v. Alford, 400 U.S. 25, 31 (1970), violates the privilege against self-incrimination, the right to trial by jury and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 243 (1969). Where the defendant was represented by counsel, the defendant may attack the voluntariness of his plea by showing he was prejudiced by counsel's failures. Hill v. Lockhart, 474 U.S. 52 (1985); Tollett v. Henderson, 411 U.S. 258, 267 (1973).

The fact that Mr. Bottoson was profoundly disturbed in 1971 should have been readily apparent to reasonably competent counsel. Indeed, Mr. Bottoson's mental condition was his strongest (if not only) defense. Given that fact, counsel had a duty to investigate so that he could make a reasoned decision whether or not to raise his client's competency and sanity. See Strickland v. Washington, 466 U.S. 668, 690-91 (1984); Adams v. Wainwright, 764 F.2d 1356, 1360 (11th Cir. 1985), cert. denied, 474 U.S. 1073 (1986). However, it is abundantly clear from the record of Mr. Bottoson's trial counsel

that no such investigation took place.[32] This failure to investigate was clearly unreasonable in light of Dr. Phillips' conclusion regarding Mr. Bottoson's competence and sanity. RP 618-57. See, McMann v. Richardson, 397 U.S. 759, 771 (1970).

As demonstrated above, because Mr. Bottoson was probably not competent to plead guilty, because it is reasonably likely that an insanity defense would have been successful, and because Mr. Bottoson's trial counsel failed to provide him with minimally effective assistance of counsel, his guilty plea was not "voluntary and intelligent." The plea violated Alford, supra and Boykin, supra, and was therefore unlawfully obtained.

During trial, Mr. Bottoson's jury was never informed of any of the circumstances of the offense, but rather only the fact of the prior conviction. RD 2115-17. At closing argument of the penalty phase, the prosecutor emphasized both that the bank robbery conviction supplied the aggravating circumstance of prior felony conviction (RD 2146) and that it negated the mitigating circumstance of no significant history of criminal activity. RD 2142. Similarly, the trial court in passing sentence relied on the bank robbery conviction both in finding the prior violent felony aggravator and in rejecting the mitigator of no significant history of criminal activity. RD 3363, 3367. In this regard, it is significant that before the 1971 bank robbery, Mr. Bottoson had no prior record.

In all of its essentials, then, this case is on all fours with Johnson v. Mississippi, 486 U.S. 578 (1988). Mr. Bottoson is entitled

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[32]Trial counsel spent a total of 7.80 hours on the case before Mr. Bottoson pled guilty, of which 7.10 hours were spent in conference with Mr. Bottoson. Counsel could have pursued an insanity defense by moving for expert assistance pursuant to 18 U.S.C. § 3006A. See, e.g., United States v. Schappel, 445 F.2d 716 (P.C. Cir. 1971); United States v. Taylor, 437 F.2d 371 (4th Cir. 1971); United States v. Tate, 419 F.2d 131 (6th Cir. 1969).

to a new sentencing hearing before a jury wherein no evidence of the unconstitutionally obtained bank robbery conviction may be introduced.

ARGUMENT XIII

THE RECORD OF THE TRIAL IS INADEQUATE, AND COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE AN ADEQUATE RECORD, IN VIOLATION OF MR. BOTTOSON'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

The record on appeal of Mr. Bottoson's trial does not include a transcript of the charge conferences at either the guilt or penalty phases of the trial, and there are over thirty unrecorded bench conferences.[33] A full record of the trial proceedings, especially in a capital trial, is required so that this Court can carry out its individualized review of each death sentence, as mandated by § 921.141, Florida Statutes, and the Eighth and Fourteenth Amendments of the United States Constitution. Delap v. State, 350 So. 2d 462 (Fla. 1977); Parker v. Dugger, 498 U.S. 308 (1991). In Mr. Bottoson's case it is unknown what transpired at most bench conferences and at any jury charge conference. The record does include an objection by defense counsel on the trial court's failure to instruct on the requested lesser included offense of accessory after the fact, RD 1988-99, 2096, but that is all. The bench conferences and jury charge conferences are critical stages of the trial proceeding and an appellate record without such proceedings is fundamentally inadequate.

It is clear that trial counsel has a duty to preserve a complete record of the proceedings, and just as clear that trial counsel in the instant case failed to do so. Failure to take the minimal steps necessary to protect the record is ineffective. RP 1083-85. Mr. Sheaffer testified that nothing of substance took place at any of the bench or charge conferences, RS 205, 207-09, 212-13. Mr.

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[33]A listing of the unrecorded bench conferences, showing the stage of the proceeding at which they took place, is included in Appendix B.

Sheaffer, however, could not even recall whether or not there was a penalty phase charge conference, RS 212, and admitted that it is impossible to tell from the record, at RD 1988-90, what objection he had actually made during the guilt phase charge conference. RS 210-12. Thus, even from Mr. Sheaffer's own testimony, it is clear that not everything of substance was actually recorded.

The prejudice to Mr. Bottoson is apparent. First, he was deprived of the meaningful and complete appellate review by this Court to which he was entitled. Second, to the extent that this Court holds any of his otherwise meritorious claims to be procedurally barred because counsel failed to make a proper objection, Mr. Bottoson is unable to demonstrate that such an objection was in fact made.

ARGUMENT XIV

CRITICAL STAGES OF THE PROCEEDINGS AGAINST MR. BOTTOSON WERE CONDUCTED IN HIS ABSENCE, IN VIOLATION OF FLA. R. CRIM. P. 3.180 AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

It is well settled that a criminal defendant has a sixth and fourteenth amendment right to be present at all critical stages of the proceedings. Francis v. State, 413 So. 2d 1175 (Fla. 1982); Illinois v. Allen, 397 U.S. 337, 338 (1970). Both jury charge conferences and the voir doir process are critical stages of the trial. Francis, supra; Mack v. State, 537 So. 2d 109 (Fla. 1989). If a defendant is deprived of the right to be present, absent a personal, voluntary and knowing waiver, the defendant is entitled to a new trial. Francis.

The record is clear that on two occasions Mr. Bottoson was absent at a critical stage of his trial when jurors were excused and the jury was given preliminary instructions concerning death penalty procedures. RD 313-20; 517-22. On each occasion, the court informed the jury that Mr. Bottoson was not present so that he would not miss supper. RD 314; 517. On each occasion, the court proceeded to tell

the jurors, that if being on the jury for three weeks would be a substantial hardship, "raise your hand and we'll excuse you from the panel." RD 316; see RD 518. On each occasion, the trial court also gave the jurors inaccurate and prejudicial information concerning the role played by the jury in the Florida death sentence procedure. RD 318-19; 521-22. See Argument VIII, supra. Moreover, it also appears from the record that Mr. Bottoson was not present at the unrecorded charge conferences. See Argument XIV, supra.

The court below suggested that there is no prejudice to Mr. Bottoson because he voluntarily absented himself from the proceedings. RP 3605. However, Mr. Bottoson's waiver was not personal, and it was also not truly voluntary, as if he had remained in court he would have had to go without food. RD 314.

Significant prejudice to Mr. Bottoson took place at the proceedings from which he was involuntarily absent. Without any inquiry into the nature or existence of any substantial hardship, the trial judge excused thirty (30) jurors who raised their hands to indicate that they would have trouble attending a three week trial. RD 316-17; 518-19. The failure to require any showing of those jurors expressing a desire to be excused was in conflict with Fla. Stat. § 40.013(6), which permits a person desiring to be excused from jury service only upon a "showing of hardship, extreme inconvenience, or public necessity."

Mr. Bottoson's absence during the charge conferences was also prejudicial. In the absence of a personal waiver of the right to be present at charge conferences, prejudice is presumed. See Mack, supra. The proceedings resulting in Mr. Bottoson's conviction and death sentence therefore violated his sixth, eighth and fourteenth amendment rights.

In addition, defense counsel's failure to insure that there was a record of the charge conferences, and failure to protect Mr. Bottoson's right to be present at the charge conferences and during voir dire, was unreasonable. Mr. Bottoson was thus not only deprived of his fundamental right to be present at all stages of the proceedings against him, but also of his right to the effective assistance of counsel. Mr. Bottoson is entitled to relief.

ARGUMENT XV

A NEW TRIAL IS REQUIRED BECAUSE THE TWENTY-THREE MEMBER GRAND JURY WHICH INDICTED MR. BOTTOSON WAS ILLEGALLY CONSTITUTED.

Mr. Bottoson was indicted on November 15, 1979, by the fall term, 1979, Orange County grand jury. RD 2672. This grand jury was impaneled on October 15, 1979, by Circuit Judge Joseph A. Baker and had twenty-three members. Nov. 12, 1987 Hearing, Def. Exs. 2, 3. Section 905.01(1), Florida Statutes (1979) provides that a Florida grand jury shall consist of no more than eighteen members; therefore, the indicting grand jury was illegally constituted. The right to be indicted for a capital crime by a properly impaneled grand jury is a constitutionally provided, fundamental right. Art. I, Sec. 15(a), Fla. Const.; Amend. V, XIV, U.S. Const.

The indictment upon which the judgment of conviction and sentence of death are based is void because the indicting grand jury was illegally constituted; consequently, the trial court was without jurisdiction. See Gladden v. State, 12 Fla. 562, 566-67, 577-78 (1869). It is fundamental that the power and authority of a circuit court to conduct a capital trial is dependent upon an indictment returned by a grand jury that is legal constituted. If the grand jury is not legally constituted, it is not a grand jury. As a result, the accusation it returns is a nullity, a totally void event under the law. Mr. Bottoson's conviction and death sentence therefore resulted from fundamental and jurisdictional error, just as do

convictions based upon indictments or informations charging non-existent offenses, State v. Gray, 435 So. 2d 816 (Fla. 1983); State v. Ervin, 435 So. 2d 815 (Fla. 1983).

Errors of this type are fundamental errors that can be raised for the first time in a Rule 3.850 motion. Willie v. State, 600 So. 2d 479 (Fla. 1st DCA 1992). As this Court stated in Gray,

> Where an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state. Since a conviction cannot rest upon such an indictment or information, the complete failure of an accusatory instrument to charge a crime is a defect that can be raised at any time--before trial, after trial, on appeal, or by habeas corpus.

Gray, 435 So. 2d at 818 (citations omitted) (emphasis added).

This Court has both the authority and the duty to consider and decide this claim of fundamental error on the merits. On the merits, it is clear that 23 persons on a panel in Orange County, Florida, in 1979 did not constitute a legal grand jury. Any legal action attempted by them, specifically the return of an indictment in this case, is a total nullity and without any legal force and effect. Mr. Bottoson's judgment and sentence must be vacated.

ARGUMENT XVI

A NEW TRIAL IS REQUIRED BECAUSE OF THE HISTORICAL DISCRIMINATION IN APPOINTING GRAND JURY FOREMEN IN ORANGE COUNTY, FLORIDA.

Discrimination in the appointment of a grand jury foreperson denies a defendant the right to due process of law and equal protection under both the Florida and United States Constitutions. Guice v. Fortenberry, 661 F.2d 496 (5th Cir. 1981) (en banc). See also Rose v. Mitchell, 443 U.S. 545 (1979). The non-ministerial duties of a Florida grand jury foreperson are many, and include, among others, organizing the grand jury; requesting the issuance of subpoenas; returning to the court a list of grand jury witnesses; and instituting contempt proceedings against recalcitrant witnesses.

Chapter 905, Fla. Stat. (1979); see also Andrews v. State, 443 So.2d 78, 87-92 (Fla. 1983) (Shaw, J., dissenting).

To establish a constitutional claim of discrimination a party must (a) establish that a group whom discrimination is asserted is a recognizable, distinct class; (b) prove the degree of underrepresentation by comparing the proportion of the group in the total population to the proportion called to serve over a significant period of time; and (c) support the presumption thus created by showing that the selection procedure is susceptible to abuse or is not racially neutral. Guice, 661 F.2d at 499, citing Castaneda v. Partida, 430 U.S. 482 (1977). Once such a showing has been made, the burden then shifts to the State to rebut the presumption of unconstitutional action by showing that permissible, racially neutral selection criteria and procedures have produced the results under attack. Castaneda, 430 U.S. at 494.

Both women and blacks have long been recognized as distinct classes subject to different treatment under the law. See Taylor v. Louisiana, 419 U.S. 522 (1975); Hernandez v. Texas, 347 U.S. 475 (1954); United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982). Mr. Bottoson, a black male, was indicted on November 15, 1979, by the fall term, 1979, Orange County grand jury. RD 2672. The foreman of this grand jury, Thomas A. Tourville, was a white male. Of the thirty grand juries impaneled beginning with the spring term 1968 through the spring term 1982, twenty-four had foremen who were white males. The race of six foremen was not verified. However, of the six grand jury foremen whose records were not verified, all six have what are commonly male first names. Supplement to 3.850 Motion, Appendix 4, RP 2497-2574.

According to the 1970 census, women constituted 51.2% of the population of Orange County, and non-whites constituted 14.4% (a

separate figure for blacks only was not available). According to the 1980 census, women constituted 51.4% of the population of Orange County, and non-whites constituted 17.1% (a separate figure for blacks again was not available). These decennial figures are sufficient to establish that blacks and women constitute a significant percentage of the Orange County community. Supplement, Appendix 5, RP 2575-84.

Mr. Bottoson has shown the degree of underrepresentation over a significant period of time. For the grand jury term included in this time period, no women or blacks were chosen as foreperson of any Orange County grand jury. These statistics point out the gross underrepresentation of two substantial citizen groups. Although statistics may be misleading, "nothing is as emphatic as zero . . . ." Guice, 661 F.2d at 505. Mr. Bottoson has met his burden of showing disproportionate treatment of blacks and women in the selection of grand jury forepersons.

Moreover, the selection procedure implemented in the State of Florida and Orange County is susceptible to abuse. Section 905.08, Florida Statutes, provides for the appointment of a foreman by the presiding circuit judge from the already impaneled grand jury venire. No articulable guidelines for non-discriminatory selection are provided. In a case discussing the selection of grand jury forepersons in the federal system, where the presiding judge selects a foreperson from the impaneled venire, as is the procedure under Section 905.08, one court recognized that:

> The selection of forepersons is susceptible of discrimination since the district judge can observe the race, ethnic background, and sex of the grand jurors beforehand.

United States v. Cabrera-Sarmiento, 533 F.Supp. 799, 805 (S.D. Fla. 1982), quoting United States v. Jenison, 485 F.Supp. 655, 663 (S.D. Fla. 1979).

Therefore, Mr. Bottoson has demonstrated that the system of selecting grand jury foremen in Orange County is susceptible to discrimination, and in fact, discrimination has resulted in the significant underrepresentation of two recognizable and distinct groups -- blacks and women. The burden is now on the state to prove that there has not been discrimination.

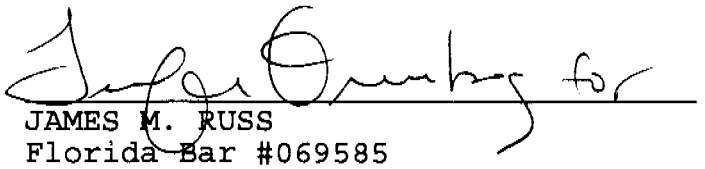
Thus far this Court has rejected claims of discrimination regarding the selection of grand jurors and grand jury forepersons, see Andrews v. State, 443 So. 2d 78 (Fla. 1983); see also Jackson v. State, 498 So. 2d 406, 409 (Fla. 1986), cert. denied, 483 U.S. 1010 (1987); Valle v. State, 474 So. 2d 796, 800 (Fla. 1985), vacated on other grounds, 476 U.S. 1102 (1986); Burr v. State, 466 So. 2d 1051, 1053 (Fla.), cert. denied, 474 U.S. 879 (1985). Those decisions were based, however, on the lower courts' finding that the selection of grand jurors and grand jury foremen was random and non-discriminatory. See, e.g., Andrews, supra (circuit judges testified that they used non-racial criteria).

It is self-evident that systematic racial discrimination by a series of circuit judges in the Florida grand jury procedure is the complete antithesis of the courts' reason for being. Mr. Bottoson is entitled to have his case presented to a properly constituted grand jury free of discrimination. Because it was not, his indictment should be quashed and his conviction vacated.

CONCLUSION

For all of the reasons set forth herein, and on the basis of what was submitted to the Rule 3.850 trial court, this Court should vacate the judgment of the court below, quash the indictment, and set aside Mr. Bottoson's unconstitutional capital conviction and sentence of death.

Respectfully submitted,



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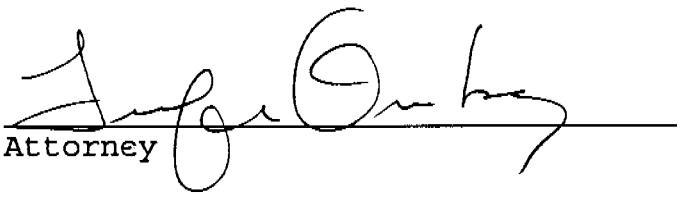
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to Margene Roper, Esquire, Assistant Attorney General, Department of Legal Affairs, 210 North Palmetto Avenue, Suite 447, Daytona Beach, FL 32114, this 14th day of January 1994.



Attorney

Appendix A

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. LAWRENCE FRANCIS LEWIS, Respondent.	)	Case No.

PETITION FOR WRIT OF COMMON LAW CERTIORARI

The State of Florida, by and through the undersigned attorney, hereby files the instant petition for writ of common law certiorari, to review and quash the order of the Honorable Susan Lebow, Circuit Court Judge in and for the Seventeenth Judicial Circuit, Broward County, Florida, denying the State's motion to quash a deposition subpoena served on the Honorable Stanton Kaplan, Circuit Court Judge in and for the Seventeenth Judicial Circuit, Broward County, Florida.

JURISDICTION

The State maintains that the trial court departed from the essential requirements of law when it denied the State's motion to quash a deposition subpoena issued by the Office of Capital Collateral Representative (CCR) on the Honorable Stanton Kaplan, who sentenced Respondent to death, but who later recused himself from presiding over Respondent's pending 3.850 action. Pursuant to Article V, section 4(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(b)(2), this Court has

jurisdiction to review the trial court's order, which was entered on October 11, 1993, where such order constitutes a departure from the essential requirements of law resulting in a miscarriage of justice and where Respondents have no other adequate remedy. See Greenstein v. Baxas Howell Mobley, Inc., 583 So.2d 402, 403 (Fla. 3d DCA 1991) ("Certiorari is the appropriate vehicle to review an order granting discovery."); Smith v. Bloom, 506 So.2d 1173, 1175 (Fla. 4th DCA 1987) ("Certiorari is the proper vehicle for testing a discovery order, and is particularly appropriate where disclosures are required to be made which, once made, may obviously not be recalled.").

FACTS

Respondent was tried by a jury in Broward County, Florida, and convicted on August 3, 1988, of first-degree murder and various other offenses. After a penalty phase proceeding, the Honorable Stanton Kaplan followed the jury's recommendation and sentence Respondent to death. The Florida Supreme Court affirmed Respondent's conviction and sentence of death, Lewis v. State, 572 So.2d 908 (Fla. 1990), and the United States Supreme Court denied Respondent's petition for writ of certiorari. Lewis v. Florida, 111 S.Ct. 2914 (1991).

On September 11, 1992, Respondent filed in the trial court before Judge Kaplan a motion to vacate his judgment of conviction and sentence of death pursuant to Florida Rule of Criminal Procedure 3.850, raising the following claims: 1) the State has failed to comply with his public records requests, 2) he has failed to obtain defense counsel's file, 3) the HAC instruction was vague, 4) the prior violent felony aggravating factor failed

to "define the elements of the aggravating factor," 5) the trial court failed to instruct on or find age as a mitigating factor, failed to consider that Lewis was under extreme mental or emotional distress based on the turbulent relationship with his girlfriend, failed to consider that Lewis' ability to conform his conduct to the requirements of law was substantially impaired by his ingestion of alcohol preceding the murder, and failed to consider as a mitigating factor that Lewis was gainfully employed at the time of the murder, 6) the felony murder aggravating circumstance constituted an automatic aggravating factor, 7) the felony murder aggravating circumstance instruction was vague, 8) Lewis was not examined by a mental health expert prior to sentencing, 9) the trial court relied on the Assistant State Attorney to draft the sentencing order, which it then signed without conducting an independent evaluation of the evidence, 10) the penalty phase jury instructions impermissibly diminished the jury's role in the sentencing process, and 11) the cumulative errors in the trial deprived Lewis of a fair trial. (Appendix A).

One month later, on October 11, 1992, Respondent filed a motion to disqualify Judge Kaplan from presiding over the post-conviction proceeding, alleging (1) that Judge Kaplan had previously worked for Respondent's original trial counsel, Richard Kirsch, and that they were still "personal friends," which prevented Judge Kaplan from considering the merits of any forthcoming ineffective assistance of counsel claim in a fair and impartial manner, and (2) that Judge Kaplan harbored personal animosity towards Respondent, as evidenced by Judge Kaplan's

written response to the Executive Clemency Board's request for information. (Appendix B).

On December 11, 1992, Respondent filed an amended motion to vacate, adopting all of his previous claims, except claim II which he asserted was moot, and alleged three additional ones: 1) unspecified Brady violations which led to ineffective assistance of trial counsel, 2) unspecified Brady violations during the guilt phase of his first trial,[1] and 3) ineffective assistance of trial counsel at the penalty phase.[2] (Appendix C). Five months later, on May 12, 1993, Respondent filed a supplement to his motion to disqualify Judge Kaplan, claiming (1) that "Judge Kaplan made inappropriate remarks" in an episode of CBS' "48 Hours," entitled "Rough Justice," and (2) that, because monies for Special Assistant Public Defender and expert witness fees come from the same fund as monies for administrative courtroom needs, "[t]his situation gives rise to an irreconcilable conflict of interest in capital cases litigated in Broward County." Regarding this latter claim, Respondent asserted that "Judge Kaplan will of necessity be a witness regarding this conflict of interest issue."[3] (Appendix D).

On June 23, 1993, Judge Kaplan granted Respondent's motion to disqualify, finding the motion to be legally sufficient based upon the allegations regarding his personal relationship with

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[1] Appellant's first trial ended in a mistrial.

[2] Lewis voluntarily, knowingly, and intelligently waived his right to present evidence in mitigation after consulting with counsel.

[3] Respondent also added this latter claim to his motion for post-conviction relief in a supplemental pleading. (Appendix E).

trial counsel.[4] (Appendix F). Thereafter, counsel for Respondent sua sponte issued a deposition subpoena to Judge Kaplan.[5] In response, the State filed in the trial court a motion to quash the subpoena. (Appendix H). A hearing on the State's motion was held on September 29, 1993, before the Honorable Susan Lebow, who had been appointed to preside over Respondent's post-conviction proceeding. (Appendix I). Judge Lebow took the State's motion under advisement and entered a written order on October 11, 1993, denying the State's motion to quash. (Appendix J). Because Judge Lebow departed from the essential requirements of law by denying the State's motion to quash, this petition follows.

RELIEF SOUGHT

Petitioner seeks the issuance of a writ of Common Law Certiorari[6] either (1) quashing the order of the trial court denying the State's motion to quash the deposition subpoena issued to Judge Kaplan, or (2) limiting the scope of the deposition to the funding issue, which is the only issue in Respondent's post-conviction motion that relates to Judge Kaplan.

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[4] The order specifically limits the finding of legal sufficiency to this particular claim. The trial court did not even acknowledge that Respondent filed a supplemental motion to disqualify raising two other grounds.

[5] The notice setting the deposition has been provided in Appendix G.

[6] In the event this Court finds certiorari to be improper, it is authorized by Article V, section 4(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.040(c) to issue any writ necessary to complete the exercise of its jurisdiction. Accordingly, Petitioner requests this Honorable Court to issue any writ it deems appropriate.

ARGUMENT

To support his motion to recuse Judge Kaplan from hearing his 3.850 motion, Respondent alleged the following four grounds: (1) a potential bias by Judge Kaplan in favor of Respondent's trial counsel on an ineffective assistance of counsel claim due to an alleged friendship and former working relationship between Judge Kaplan and trial counsel, (2) animosity towards Respondent as evidenced by Judge Kaplan's written response to the Executive Clemency Board, (3) "inappropriate remarks" in a news magazine television show, and (4) an alleged conflict of interest between the expenditure of funds for appointed counsel and expert witnesses and the expenditure of funds for capital improvements. (Appendices B & D). Finding the motion legally sufficient based on the first ground, Judge Kaplan recused himself. (Appendix F).

The only claim relating to Judge Kaplan in Respondent's motion to vacate is the latter one. Issue XI in Respondent's first supplement alleges the following:

> 3. The county fund from which Special Assistant Public Defenders and expert witnesses in capital cases are paid is the same fund from which Broward County Circuit Court judges receive funding for capital improvements. Judges receive moneys from this fund to purchase items including but not limited to computers, telephones, law books, and other necessary office equipment.
>
> 4. To resolve these conflicting uses of county funds, many Broward Circuit Judges, including Judge Kaplan, engage in the practice of negotiating lesser fees with Special Assistant Public Defenders in order to increase the available funds for their own purposes. Because expert witnesses are also paid from this same fund, Special Assistant Public Defenders appointed to capital cases are also expected to 'shop for the best deal' before the Court will approve an expert. The

> experience or competence of the attorney and/or expert takes a backseat to economy in the judge's determination of appointment in capital cases.
>
> 5. This situation gives rise to an irreconcilable conflict of interest in capital cases litigated in Broward County. Because Mr. Lewis was tried in Broward County, was represented by a Special Assistant Public Defender, and was allowed to consult with court-appointed experts, this situation is clearly relevant to Mr. Lewis' case.

(Appendix E).[7]

In response, the State asserted that these allegations (1) were conclusory in nature and wholly unsupported, which made them legally insufficient as a claim for relief, and (2) could have been, and should have been, raised on direct appeal. Clearly, the information upon which this claim is based was available to Respondent at or before his trial. Thus, Respondent is procedurally barred from raising this claim in a motion for post-conviction relief. Engle v. Dugger, 576 So.2d 696 (Fla. 1991); Atkins v. Dugger, 541 So.2d 1165, 1166 n.1 (Fla. 1989); Roberts v. State, 568 So.2d 1255, 1257-58 (Fla. 1990); Correll v. Dugger, 558 So.2d 422, 425 (Fla. 1990). (Appendix K).[8]

Regardless, Judge Lebow has authorized Respondent to depose Judge Kaplan regarding this funding issue. In fact, by denying the State's motion to quash, Judge Lebow has authorized

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[7] Respondent's ineffective assistance of counsel claim does not in any way relate to trial counsel's relationship with Judge Kaplan.

[8] Now that Judge Kaplan has recused himself from the post-conviction proceeding, Respondent's other complaints regarding Judge Kaplan's friendship with trial counsel and his alleged personal bias against Respondent are moot and would not constitute a basis for post-conviction relief.

Respondent to depose Judge Kaplan regarding any issue he sees fit to inquire into. Judge Lebow made no restrictions upon the sources and scope of discovery, thereby giving Respondent carte blanche to "fish" for information.[9]

Traditionally, there has been no discovery in post-conviction proceedings. Florida Rule of Criminal Procedure 3.850 makes no provision for discovery, and none has traditionally been allowed. Recently, however, the Third District Court of Appeal decided to break from tradition and allow limited prehearing discovery in 3.850 cases. Davis v. State, 18 Fla. L. Weekly D1713 (Fla. 3d DCA Aug. 3, 1993).

While the State takes issue with the holding and rationale of Davis,[10] Judge Lebow was required to consider Davis in ruling upon the State's motion to quash. However, Judge Lebow totally ignored the procedural requirements and limitations that Davis places upon defendants who seek prehearing discover. Davis states: "On a motion which sets forth good reason, . . . the court may allow limited discovery into matters which are relevant and material, and where the discovery is permitted the court may place limitations on the sources and scope." Id. at 1713 (emphasis added). As argued by the State at the hearing on its motion to quash, Respondent had filed no motion for discovery,

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[9] At the hearing on the State's motion to quash, Judge Lebow even went so far as to say, "[I]f I find you have a right to take the deposition, you have the right to take the depositions of anybody that could have any information relating to this." (Appendix I at 17).

[10] The State's motion for rehearing was denied on October 19, 1993, and a motion to invoke the discretionary jurisdiction of the Florida Supreme Court has been filed.

but rather had issued a subpoena to Judge Kaplan sua sponte. (Appendix I at 6-7). When asked at the hearing what its purpose was in deposing Judge Kaplan, CCR initially claimed that it did not have to disclose its purpose,[11] but then claimed that it was trying to avoid the appearance of impropriety because Judge Kaplan was presiding over other cases involving CCR; thus, it wanted the State present when it spoke to Judge Kaplan. (Appendix I at 8-11). Ultimately, CCR admitted that it wanted to depose Judge Kaplan in order to support the otherwise unsupported allegations in its 3.850 motion. In other words, it could not know how Judge Kaplan's testimony would be relevant and material until it had deposed him. Davis clearly requires, however, that counsel seek leave from the court to engage in discovery and that counsel provide "good reason" for the discovery, which includes a showing that the subject matter of the inquiry is "relevant and material." Respondent should not have been allowed to defeat this requirement with circular reasoning.[12]

More importantly, as a matter of public policy, Judge Lebow should have been especially vigilant in protecting the judiciary from potential abuse of process. The burden for seeking and obtaining the recusal of trial judges is relatively easy since the judges may not pass upon the merits of the motions. If the

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[11] "I don't know that a showing has to be made of necessity." (Appendix I at 4).

[12] Realistically, Respondent cannot make the requisite showing because any knowledge Judge Kaplan may have about the disbursement of funds for attorneys' fees and capital improvements is not relevant and material. As noted earlier, this issue is procedurally barred as a claim for relief since it should have been, and could have been, raised on direct appeal.

judges, once recused, are then automatically available as potential sources of information for 3.850 claims, the incentive to seek their disqualification increases and the burden on the circuit courts becomes overwhelming.[13]

Post-conviction motions present an added burden to the already high circuit court caseload. Those filed in death penalty cases are particularly time-consuming, especially where, as here, the judge who presided over the trial has recused himself, leaving the replacement judge to familiarize herself with the facts from the voluminous, but cold, record. The original trial judge, once recused, should then not be subjected at the whim of the defendant to a deposition, especially one unjustified in substance and unlimited in scope.

Like the deliberations of a jury, or the work product of a prosecutor, the mental thought processes of a trial judge should not be the subject of inquiry by a defendant. See Harris v. Rivera, 454 U.S. 339, 344-45 (1981) ("Although there are occasions when an explanation of the reasons for a decision may be required by the demands of due process, such occasions are the exception rather than the rule." (footnotes omitted)). Judge Kaplan's decisions regarding the appointment of counsel and expert witnesses, and the fees authorized for their services (if such are even determined by the trial judge as opposed to the

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[13] The incentive in collateral proceedings to seek disqualification of the original trial judge is already great, since most post-conviction motions raise a claim of ineffective assistance of counsel. Defendants generally do not want the original trial judge, who saw and heard the defendant's trial counsel in action, to consider a later ineffectiveness claim. Thus, disqualification is already becoming a common practice.

county's fiscal officer), are discretionary matters which should not have to be justified to Respondent via a deposition. Every decision that a trial court makes during the course of a case has fiscal implications, e.g., the denial of co-counsel, the denial of a continuance, the denial of expert witnesses. Taken to its extreme, the denial of any defense motion could be said to be fiscally motivated--and in some respects it is. Although it is the trial court's "duty to firmly and unhesitatingly resolve any conflicts between the treasury and fundamental constitutional rights in favor of the latter," Makemson v. Martin County, 491 So.2d 1109, 1113 (Fla. 1986), the trial court still has an obligation to be fiscally responsible. It should not, however, have to detail and justify the mental processes that it used to make these decisions. Rather, such decisions are reviewed on appeal upon an abuse of discretion standard.

Given that Respondent failed to meet his burden in seeking discovery and showing good reason for deposing Judge Kaplan, and given the public policy reasons for prohibiting the unfettered ability of a defendant to subpoena over-burdened trial court judges to "fish" for information, the trial court departed from the essential requirements of law in denying the State's motion to quash the subpoena. See State v. Domenech, 533 So.2d 896, 896 (Fla. 3d DCA 1988) (granting certiorari and quashing an order which denied the State's motion to quash a deposition subpoena, where "[t]he subpoenas issued below at the behest of the defendants were directed to witnesses whose supposed testimony was affirmatively shown to bear no legal pertinence whatever to the issues in the case and thus could not be of any potential

assistance in the legitimate defense of the pending charges."). See also Combs v. State, 436 So.2d 93, 95-96 (Fla. 1983) ("In granting writs of common-law certiorari, the district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error."). As a result, this Court should grant the State's petition for writ of certiorari in this case and quash Judge Lebow's order which denied the State's motion to quash the deposition subpoena issued by CCR to Judge Kaplan or, in the alternative, limit the scope of Respondent's inquiry of Judge Kaplan to the single issue in the 3.850 relating to Judge Kaplan.

Respectfully submitted,

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Appendix B