SUPREME COURT OF FLORIDA

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

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

REPLY BRIEF OF APPELLANT

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Appellant, LINROY BOTTOSON, respectfully submits his reply brief on appeal of the denial of his motion to vacate conviction and sentence of death pursuant to Florida Rule of Criminal Procedure 3.850. In the interests of brevity, and in order to comply with the page limitation established by this Court, Mr. Bottoson will reply only to those arguments raised in the State's Answer Brief for which response and rebuttal are necessary and pertinent. With respect to all other issues, Mr. Bottoson relies on the arguments set forth in his Initial Brief.

ARGUMENT I

MR. BOTTOSON'S ATTORNEY CLIENT AND WORK PRODUCT PRIVILEGES WERE VIOLATED IN THE COURT BELOW

The decisions of this Court in Reed v. State, No. 80,518 (Fla. June 2, 1994), and LeCroy v. State, No. 79,956 (Fla. June 16, 1994), appear to be adverse to Mr. Bottoson's position with respect to waiver of attorney client and work product privileges regarding the trial attorney's files. Reed is not yet final, and Mr. Bottoson respectfully submits that the Court should rehear Reed or reconsider it in the context of the instant appeal. For the reasons set forth in the Initial Brief, Mr. Bottoson contends that his work product and attorney client privileges were violated during the proceedings in the court below.

Moreover, the court below also ordered Mr. Bottoson to engage in unauthorized discovery proceedings. The State continues to maintain the position that no discovery is authorized in Rule 3.850 proceedings, and has so argued in a brief filed in this Court and at oral argument. See State v. Lewis and Smith v. State, Case Nos.

82,930, 78,199, Answer Brief of Appellee, at 7-18 (brief on consolidated appeals filed February 25, 1994). The Court should adopt the position of the State as argued in Lewis on this issue.

ARGUMENT II

MR. BOTTOSON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL

A. Counsel's Performance Was Deficient

In arguing that trial counsel provided reasonably effective assistance to Mr. Bottoson, the State largely ignores the applicable law and completely ignores the relevant facts. Where counsel's failure to present mitigating evidence at the penalty phase of a capital trial is at issue, it must first be determined "whether a reasonable investigation would have uncovered such mitigating evidence." Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988) (emphasis in original). In the absence of a reasonable investigation, counsel is in no position to make reasonable choices concerning what mitigating evidence to present. It is abundantly clear from the record that there was no reasonable investigation of mitigating evidence in this case, and hence that no choices concerning what mitigating evidence to present were made by trial counsel, because counsel had no idea what was available. Instead, as in too many other cases, counsel simply conducted no investigation of mitigating evidence prior to the guilty verdict and was unable to come up with any thereafter in time for penalty phase.

There can be no question that the voluminous and substantial mitigating evidence presented in the court below was available to

trial counsel had a reasonable investigation been conducted. The mitigation witnesses so testified, see RP 83-84 (Joseph Bottoson Scott); RP 134 (Stanley Tolliver); Joint Ex. 2 (affidavit of Rev. Ronnie Robinson); RP 184 (Jesse Davis); Def. Ex. 2 (affidavit of Gertrude Bronson); RP 277 (Lawrence Boone); RP 573 (Dr. Robert Phillips), nothing to the contrary came out on cross examination, and the court below made no finding to the contrary. The State's speculation that these witnesses were not available before but have only come forward now, Answer Brief at 17, is totally unsupported by the record.[1] It is also clear from the record that the reason these witnesses did not testify at trial had nothing to do with them and everything to do with trial counsel's total failure to investigate. Several of the mitigation witnesses presented below came from Mr. Bottoson's home town of Cleveland, Ohio. They did not testify at trial because counsel and his investigator never made any attempt to travel to Ohio, or even to contact any of these witnesses by telephone. RS 139-40. This abject failure to investigate one of the most important sources of background information concerning Mr. Bottoson was clearly unreasonable. See Stevens v. State, 552 So. 2d 1082, 1085 n.7 (Fla. 1989) (trial counsel failed to investigate defendant's background in Kentucky, where he spent most of his life).

Likewise, the State's suggestion that these witnesses were not

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[1]The State inaccurately refers to the defense having presented "five additional witnesses" at the hearing below. In fact, the defense presented eight layperson mitigation witnesses, expert psychiatrist Dr. Robert Phillips, and voluminous background records concerning Mr. Bottoson and his history of mental illness. All of this evidence was available at the time of trial, had a reasonable investigation been conducted.

called at trial because they had nothing significant to offer, Answer Brief at 17-18, simply ignores trial counsel's testimony. At the time of trial, counsel knew nothing about Linroy Bottoson -- counsel did not even know whether or not Linroy had any siblings or any children. RS 141, 184. Not knowing whether any mitigation witnesses existed, counsel clearly was in no position to decide whether their testimony would be significant. Counsel did testify unequivocally, however, that if he had been aware that Mr. Bottoson had children with mental health problems (as Linroy Bottoson, Jr. and Michelle Bottoson have, RP 597-99, Def. Ex. 7), he would have presented such evidence. RS 185.

Similarly, counsel had available to him the services of a confidential defense mental health expert for use at penalty phase. RD 2186-88, 3167. Had such an expert been obtained and provided with pertinent background information, crucial evidence concerning Mr. Bottoson's mental health could have been presented. See generally RP 568-604, 619-657 (testimony of Dr. Phillips). There was no tactical reason for counsel's failure to present such evidence -- counsel simply did not get around to it. RS 176-77. It is necessary to seek mitigation witnesses in order to find them, and counsel did not seek.

The State also contends that trial counsel pursued mental health evidence but concluded that his time would be better spent elsewhere. Answer Brief, at 16-17. This contention is flatly contradicted by the testimony of trial counsel and of the pretrial psychiatrist, Dr. Robert Kirkland. Trial counsel never asked either of the

psychiatrists who examined Mr. Bottoson before trial to assess the presence or absence of mitigating factors:

> Q Mr. Sheaffer, were the psychiatrists, Dr. Kirkland and Dr. Wilder ever asked to consider the statutory or non-statutory mitigating factors, by the Court?
>
> A No.
>
> Q And after their evaluations, Mr. Sheaffer, did you have any conversation with either Dr. Wilder or Dr. Kirkland in which they imparted additional information other than that which was contained in their reports, their written reports?
>
> A I had a conversation with one of the two of them, I do not remember which. And there would not have been a great deal of information beyond what was contained in the report.
>
> Q Did you ever ask Dr. Kirkland or Dr. Wilder to assess the presence of either statutory or non-statutory mitigation in this case?
>
> A No.

RS 174.

So counsel never found out that Dr. Kirkland believed that Linroy Bottoson was psychotic -- "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 failed to ask the pretrial psychiatrist an obvious and simple question. Counsel also did not bother to hire the confidential defense expert that the trial court made available to him. RS 176-77. Nor did counsel bother to obtain Mr. Bottoson's records from his prior conviction. Those records could have been obtained in a few weeks by writing a letter

and making a few phone calls. RS 84. Counsel never lifted a finger to get those records, which included a diagnosis of paranoid schizophrenia, latent type, Def. Ex. 5, and various psychotic symptoms, RP 619-21, but admitted that if he had obtained them he would have used them at the penalty phase and given them to the mental health experts. RS 163.

As is clear from the record, trial counsel never did any investigation of Linroy Bottoson's background, and never pursued potential mental health mitigating evidence. The reason for that is not that counsel decided it would be a waste of time -- there is not the slightest support in the record for such a conclusion. Rather, the reason is that counsel did no penalty phase investigation prior to the verdict. This fact is established by testimony of trial counsel, elicited by the State on cross examination. Trial counsel William Sheaffer was asked whether his investigator had done any investigation in Ohio. Mr. Sheaffer responded as follows:

> 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.

RS 310-11 (emphasis added).

Counsel's investigator did no penalty phase investigation prior to the verdict, and "minimal" thereafter. Counsel probably never even spoke to Mr. Bottoson about potential mitigation until after the verdict. Waiting until after the verdict to investigate for penalty phase is clearly inadequate as a matter of law. Deaton v. Dugger, 635 So. 2d 4, 1993 Fla. LEXIS 1627 (Fla. 1994); Blanco v. Singletary, 943 F.2d 1477, 1501-02 and n.114 (11th Cir. 1991) ("To save the difficult and time-consuming task of assembling mitigation witnesses until after the jury's verdict in the guilt phase almost insures that witnesses will not be available."). The testimony of Mr. Bottoson's counsel reads virtually identically to that of Deaton's counsel, as set forth by this Court in Deaton:

> Q In terms of preparing for trial in advance of conviction, what did you do to prepare for the penalty phase?
>
> A Very little. I usually don't try to prepare the penalty phase in advance of the verdict, so for some reason I just don't like to get psyched up and get a defeated attitude. I usually don't prepare until I lose [the conviction phase], then I started scrambling for something to do about the penalty phase.
>
> . . . .
>
> Q In terms of the penalty phase, did you explain to [Deaton] mitigating circumstances that you could pursue?
>
> A No, except he could testify as to his treatment and how he was emotionally abused as a child. Just very briefly, if he wanted to testify.

Deaton, 635 So. 2d at ___, 1993 Fla. LEXIS at 16. Here, as in Deaton and Blanco, "clear evidence was presented that defense counsel did

not properly investigate and prepare for the penalty phase proceeding." Id.

Finally, the State attempts to blame Mr. Bottoson for the fact that trial counsel conducted no penalty phase investigation. Answer Brief, at 16. Trial counsel himself rejected this suggestion, acknowledging that he and he alone was responsible for developing and presenting mitigating evidence. RP 349. More fundamentally, this argument ignores the fact that it was only after the verdict, when it was already too late to develop any meaningful mitigation, that counsel even discussed mitigation with Mr. Bottoson. The fact that Mr. Bottoson was unable, immediately after the verdict, to feed counsel with the names of numerous witnesses, willing and able to provide testimony within a few days, does nothing to absolve counsel for his total failure to conduct a mitigation investigation during the months that he represented Mr. Bottoson.

The Court of Appeals for the Eleventh Circuit addressed a similar situation in Blanco. There, too, the State argued that counsel's failure to present mitigation was attributable to the defendant. The court emphatically rejected that argument:

> [T]his court has held that a defendant's desires not to present mitigating evidence do not terminate counsels' responsibilities during the sentencing phase of a death penalty trial.... According to the testimony of attorney Rodriguez in the district court, when Blanco and his attorneys first disputed which witnesses to call, Blanco "started acting irrationally"; "his whole demeanor really changed at that point." .... According to Rodriguez, after the jury returned its guilty verdict, Blanco became further depressed and unresponsive.... During the precise period when Blanco's lawyers finally got around to preparing his penalty phase case,

> Blanco was noticeably morose and irrational. Counsel therefore had a greater obligation to investigate and analyze available mitigation evidence.

Blanco, 943 F.2d at 1502 (emphasis added) (footnotes omitted). See State v. Lara, 581 So. 2d 1288, 1290 (Fla. 1991) (rejecting argument that defendant was responsible for failure to present mitigation witnesses where counsel failed to investigate and "'virtually ignored the penalty phase of the trial.'").

What took place here was very similar to what happened in Blanco and Lara. As Mr. Sheaffer testified on cross examination:

> Q After the conviction, what was Mr. Bottoson's attitude as far as cooperating with you in the penalty phase?
>
> A Mr. Bottoson -- I was extremely upset, extremely upset. And Mr. Bottoson, it was like a punch in the solar plexus to him.
>
> . . . .
>
> And he was disheartened and not of the mind to really fight hard anymore.
>
> Q Did Mr. Bottoson offer you any assistance in preparing the penalty phase for this proceeding, after he was convicted?
>
> A Very little.

RP 316-18 (emphasis added). Just as in Blanco, counsel had a greater responsibility because he was dealing with a client who at a minimum was depressed by the guilty verdict, and who had also, to counsel's knowledge, expressed a number of irrational beliefs, including his often repeated desire to have the opportunity to raise the victim

of the offense from the dead. RS 167-71; see Initial Brief, at 22-23.[2] Here, just as in Blanco, Deaton, and Lara, counsel's performance was deficient because he abdicated that responsibility.

B. Mr. Bottoson Was Prejudiced by Counsel's Deficient Performance

The State's first argument regarding prejudice is that Mr. Bottoson has failed to show prejudice because this case is highly aggravated. Answer Brief, at 18-19. In large part, however, the case was so highly aggravated because of trial counsel's deficient performance. Of the four aggravating factors found by the trial court, one -- the felony murder aggravating factor -- applied automatically if Mr. Bottoson was guilty of the crime as charged. The weight, if not the applicability, of all of the other three factors could have been successfully challenged by competent counsel. The avoid arrest aggravating factor was based solely on the testimony of "con man" Pertrell Kuniara. See RD 3364. At best, Kuniara's testimony was incredible for any purpose. See Initial Brief at 43-46; RP 3603. It did not establish anything beyond a reasonable doubt.

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[2]Particularly in dealing with such a client, it was clearly unreasonable to rely on Mr. Bottoson's understanding of the nature of the mental health treatment he had previously received in deciding whether or not even to ask for mental health records. At a minimum, counsel was aware from Dr. Kirkland that Mr. Bottoson had a prior diagnosis of schizophrenia. RS 145, Def. Ex. 6. Regardless of what Mr. Bottoson told counsel about his prior mental health treatment -- and counsel testified that Mr. Bottoson said he was treated for "depression" in both Ohio and California, RS 308 -- what possible reason could there be for counsel not to write a letter requesting the records? Moreover, since it was certain that at penalty phase the State would introduce evidence of Mr. Bottoson's bank robbery conviction to support the prior violent felony aggravating circumstance, it was incumbent upon counsel to order the records to discover whether there was (as there turned out to be) evidence that would diminish the force of that aggravating factor.

The weight of both of the other aggravating circumstances, if otherwise applicable, would have been reduced if counsel had properly investigated and presented psychiatric mitigating evidence. It is well recognized that such evidence can significantly weaken the aggravating factors, thus helping to provide a basis for a life sentence. Hallman v. State, 560 So. 2d 223, 227 (Fla. 1990); Huckaby v. State, 343 So. 2d 29, 33-34 (Fla. 1977). Here, the weight of the prior violent felony aggravating circumstance -- based on a single prior bank robbery conviction -- would virtually have been eliminated by evidence that Mr. Bottoson was psychotic, and indeed legally insane at the time of that offense. Dr. Phillips testified that in his opinion Mr. Bottoson "would have met that test of legal insanity as a result of the active presence of underlying psychiatric illness." RP 656. The presence of the mental health mitigating factors also significantly reduces the weight of the heinous, atrocious or cruel aggravating factor. Huckaby, supra. Thus, had counsel performed adequately the case would have been both less aggravated and more mitigated, creating a reasonable likelihood that the outcome would have been different.

The State's argument also ignores the fact that in numerous highly aggravated cases this Court has found prejudice resulting from counsel's deficient performance, see, e.g., Deaton v. Dugger, 635 So. 2d 4 (Fla. 1994) (cold and calculated strangulation murder of robbery victim); Heiney v. State, 620 So. 2d 171 (Fla. 1993) (bludgeoning murder of robbery victim); State v. Lara, 581 So. 2d 1288 (Fla. 1991) (cold and calculated murder of witness against

defendant on pending charges of robbery and rape; defendant also convicted of second degree murder and rape of the victim's girl friend); Stevens v. State, 552 So. 2d 1082 (Fla. 1989) (kidnapping, robbery, rape and murder by strangulation and stabbing of convenience store clerk). The question, as always, is whether there is a reasonable possibility that a majority of the jury would have recommended life if the evidence presented below had been presented at trial. Since the evidence presented below would have favorably affected both sides of the aggravation/mitigation balance, the answer is clearly yes.

In seeking to discredit the powerful mental health mitigating evidence presented by Mr. Bottoson, the State argues that "the best indicator as to Bottoson's mental state at the relevant time" is Dr. Kirkland's evaluation, but then seriously mischaracterizes Dr. Kirkland as having found that Mr. Bottoson was not psychotic, not hallucinating and sincere in his religious beliefs. Answer Brief, at 19. In fact, at the pages cited by the State, Dr. Kirkland testified that while Mr. Bottoson was not hallucinating during their interview, Mr. Bottoson "had auditory and visual hallucinations on occasion," RS 411, and that Mr. Bottoson's accounts of hallucinations were something that he had actually experienced. RS 414. Moreover, he testified quite explicitly that he found the presence of psychosis in Mr. Bottoson:

> Q Now, what was your overall opinion, if you had one, based on your reports of Mr. Bottoson, of the existence of any mental disease or defect in Mr. Bottoson?
>
> . . . .

> THE WITNESS I suspected that Mr. Bottoson had a mental disorder, probably schizophrenia.
>
> Q Was there, at the time, sufficient evidence for you to make a diagnosis of Mr. Bottoson based on what you know (sic)?
>
> A No.
>
> . . . .
>
> If somebody had asked me at that time, "Do you think Mr. Bottoson is schizophrenic," I likely would have replied, "Yes." . . . .
>
> Once again, the nature of his presentation, the religious business, goes with a picture I would likely consider to be schizophrenic.

RS 436-38.

Dr. Kirkland's testimony establishes two salient facts. First, Dr. Kirkland was not provided with sufficient information to render a reliable diagnosis, particularly with reference to Mr. Bottoson's mental state at the time of the offense. Second, even based on the limited information he did have at his disposal, Dr. Kirkland concluded that he was schizophrenic, i.e. psychotic. Thus, far from undercutting Dr. Phillips' testimony, Dr. Kirkland's testimony actually supports it with respect to the crucial questions concerning Mr. Bottoson's mental illness.

Finally, the State argues that even if Mr. Bottoson is schizophrenic, he cannot show that the schizophrenia was in an active stage or that it led to the commission of the crime. Answer Brief, at 20-21. This argument ignores the fact that Dr. Phillips testified that in his opinion, to a reasonable degree of psychiatric certainty, at the time of the offense Mr. Bottoson "was suffering from the active

phase of an acute thought disorder manifested by his schizoaffective diagnosis and his schizotypal personality." RP 650. Dr. Phillips reached this conclusion based not only on his interview of Mr. Bottoson and review of prior mental health records, but also after reviewing the testimony and affidavits of persons who had been around Mr. Bottoson at or near the time of the offense. State Ex. 2 (affidavit of Robert Phillips, M.D.); Def. Ex. 11 (materials reviewed by Dr. Phillips).

Dr. Phillips also testified to the existence of a connection between Mr. Bottoson's mental illness and the commission of the offense. He noted that persons with mental illness like Mr. Bottoson frequently decompensate and become frankly psychotic when subjected to stressors, and that this had happened to Mr. Bottoson at the time of the 1971 bank robbery, when he was faced with diminishing financial resources and marital difficulties. RP 621. Similarly, at the time of the instant offense, Mr. Bottoson was faced with "marital discord, financial difficulty and a re-emergence of signs and symptoms of the acute phase of his psychotic thought disorder," culminating in decompensation of his mental condition. RP 631. Nor are the facts of the case to the contrary. If Mr. Bottoson in fact committed the offense, his actions, including leaving the victim somewhere while he, his wife and a house guest went overnight to a wedding in Georgia, are thoroughly consistent with the presence of a thought disorder.

The fact is that evidence forming the basis for a consistent and powerful mitigation presentation was readily available to counsel. Had counsel simply looked for the evidence, counsel would have been

able to show that Mr. Bottoson has a longstanding history of mental illness; that he struggled unsuccessfully for many years to get by despite his mental illness; that everyone who knew him well considered him to be a harmless, but mentally impaired person; and that only on two occasions, including the instant offense, did he deviate from obeying the law, under the overpowering influence of his mental illness. When that powerful mitigation case is compared with the paucity of mitigation actually presented, on the basis of which two jurors nevertheless voted for life, this Court cannot have any confidence in the outcome of the penalty phase.

ARGUMENT III

MR. BOTTOSON WAS DENIED A COMPETENT MENTAL HEALTH EXAMINATION, AND COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND ARRANGE FOR SUCH AN EXAMINATION

The State's argument that this claim is barred is wrong and was rejected by the court below, which denied the claim on the merits. RP 3611-12. The State seeks to ignore the ineffectiveness component of this claim and compounds the error by totally ignoring the defense counsel's duties with respect to the mental health issues in a capital case. Those duties include the duty to make sure that the mental health experts have sufficient information on which to render reliable opinions and, where possible, offer persuasive testimony on one or more of the myriad mental health related issues that arise in the course of a capital homicide case. Nor does the State offer any response to the evidence that counsel here failed in that duty. That fact is made abundantly clear, among other things, by Dr. Kirkland's

testimony that he had insufficient information upon which to make a diagnosis. RS 437.

The State's arguments concerning the proper label to apply to this claim, and that any claim of inadequate mental health assistance is limited to guilt phase issues, are squarely foreclosed by this Court's decisions in State v. Sireci, 502 So. 2d 1221 (Fla. 1987), and State v. Sireci, 536 So. 2d 231 (Fla. 1988). In the first Sireci decision, this Court held that Mr. Sireci was entitled to an evidentiary hearing on his claim that he was "deprived of his rights to due process and equal protection" because the mental health experts "failed to conduct competent and appropriate evaluations" and to determine what effect that violation had on the sentencing hearing. Sireci, 502 So. 2d at 1223. In the second Sireci decision, this Court affirmed the trial court's grant of a new sentencing hearing based on the denial of an adequate mental health examination. Sireci, 536 So. 2d at 233. Together, the Sireci decisions establish the existence of a due process right to adequate mental health assistance in the context of capital sentencing proceedings.

Clisby v. Jones, 960 F.2d 925 (11th Cir. 1992) (en banc), has no effect on the law of this State as set forth in Sireci. Even if it did, however, the State's discussion of Clisby is remarkably specious and misleading. First, Clisby did not even address Mr. Clisby's claims of ineffective assistance of counsel, because the district court had not ruled on those claims. Id. at 926-27 and n.1. Second, Clisby did not address what it perceived to be a Sixth Amendment claim of inadequate psychiatric assistance, for the same

reason. Id. at 934. Third, while the State cites Clisby as if it supported its argument that Ake v. Oklahoma, 470 U.S. 68 (1985), is limited to issues of competence and sanity, Clisby actually says just the opposite:

> As applied to the penalty phase of a capital case, Ake requires a state to provide the capital defendant with ... access to a competent psychiatrist upon a preliminary showing to the trial court that the defendant's mental status is to be a significant factor at sentencing.

Id. at 928-29 (citations omitted). Indeed, Clisby specifically rejected the State's argument that Ake would apply to a penalty phase only if the State put on mental health evidence with regard to aggravating factors:

> Respondent urges us to adopt a narrow reading of Ake that would restrict a capital defendant's right to access to a competent psychiatrist for the evaluation, preparation, and presentation of mitigating evidence at sentencing to a case in which the state has introduced expert testimony .... We reject such a categorical limitation of Ake's scope.

Id. at 929 n.7 (emphasis added).

Mr. Bottoson did not receive adequate mental health assistance at either the guilt/innocence or penalty phase of his capital trial. That fact is attributable both to the ineffective assistance rendered by counsel and to the failure of the mental health experts themselves to "conduct competent and appropriate evaluations." Sireci, 502 So. 2d at 1223. Mr. Bottoson was deprived of both his due process and Sixth Amendment rights, and is entitled to relief under either theory.

ARGUMENT IV

THE STATE PRESENTED FALSE TESTIMONY AND FALSE TEST RESULTS

Remarkably, the State continues to defend the testimony of sham dog tracking expert John Preston. Mr. Preston's credentials and testimony were totally exploded during the evidentiary hearing. As Judge Formet noted during the hearing, Mr. Preston's

> competency, is, at this point, not much in question. It's been aptly (sic; read amply) demonstrated to the court, unless the state have some evidence otherwise. Doesn't appear that he was particularly competent.

RP 1033. Despite that, the State makes the hyperbolic assertion that "not one shred of . . . evidence even remotely suggests that Preston's work in this case was not accurate." Answer Brief, at 26.

To the contrary, there is abundant evidence that Preston's testimony and test results were manufactured. Deputy Greer, a dog handling expert still employed in that capacity by the Orange County Sheriff's Office, testified that, prior to doing any scent work, Preston was aware which items the police believed were linked to Mr. Bottoson and/or to the victim. RP 837, 845-46. He questioned the validity of that work done by Preston, as well as the validity of the "identification" by Preston and his dog of a single pocketbook placed in the middle of a parking lot:

> Q Now, as a dog man, did you question the validity of that exercise?
>
> A Yes. In my own mind, I did.
>
> Q Why did you question it, as a dog man, in your own mind?

> A Well, knowing dogs like I do, that single pocketbook in the parking lot is akin to having a single fire hydrant or single any kind of object out there in a flat place. It just sticks out and the dog is going to investigate that.
>
> . . . .
>
> Q Instead of it being Harrass II and John Sutton (sic), if it had been Bernie Greer and his pet Chihuahua doing the same exercise, what would you expect your pet Chihuahua do?
>
> A It would most likely go to the pocketbook.

RP 841. Consequently, Deputy Greer believed it was a "very distinct possibility" that Preston had cued and led his dog during the work that Greer witnessed. RP 857.

In addition to Deputy Greer's eyewitness testimony, Mr. Bottoson presented and proffered expert dog handler testimony that it would have been impossible for a dog to actually track or identify the objects and trails that Preston claimed his dogs had identified, given the length of time that had passed and the weather and other conditions. See, e.g., RP 1035-42 (testimony of dog handling expert Philip Hoelcher); RP 1058 (proffered testimony of Donna Brimmer).[3] Mr. Bottoson established that Preston is a thorough fraud, that the work that he claimed to perform was completely unreliable, and that his testimony was false. Attempting to ascribe this unrebutted testimony to "professional jealousy," Answer Brief at 27, is absurd,

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[3]In fact, following days old trails is simply impossible, and the other supposed scent identification conducted by Preston and his dogs was either meaningless (a dog that has been trained to do so jumping into the trunk of a car), impossible (a dog identifying an individual's scent in a rental car after the car had been washed and rented to other individuals) or both.

particularly given the fact that Preston has been exposed as a charlatan who among other things had taken his dog out in a canoe to try to find a weapon at the bottom of a lake by sniffing the surface of the water, had asked for planes to spray trees with water to bring the scent down, RP 903-04, and who, to Deputy Greer's knowledge, had tried to track a scent that was eight years old, and made the comment that he had "only fifty yards left to go" on the track. RP 850-51.

With respect to the materiality of Preston's testimony, the State now argues, after the fact, that Mr. Bottoson would assuredly have been convicted even without the testimony. That was not what the State told the jury at the time of the trial, however. In closing argument, the trial prosecutor told the jury that Mr. Bottoson's entire defense "starts to break down" when confronted with Preston's evidence. RD 2024. The State's opinion of the importance of Preston's testimony at the time of trial is clearly far more probative than that offered now.

The State makes a similar argument that Pertrell Kuniara's testimony was not material because Mr. Bottoson was convicted of separate federal charges in a trial at which Kuniara did not testify. Answer Brief, at 26. This argument neglects the obvious fact that in the federal case, Mr. Bottoson was not charged with first-degree murder, whereas in the instant case Kuniara testified that Mr. Bottoson had admitted murder to him. It also ignores the equally obvious fact that violations of Brady v. Maryland, 373 U.S. 83 (1963) may be material to either guilt or penalty, id. at 87; Garcia v.

State, 622 So.2d 1325, 1330-31 (Fla. 1993) (finding Brady violation material as to penalty only). Here, Kuniara's testimony was the sole evidentiary basis for the finding of the "avoid arrest" aggravating factor. RD 3364. On that basis alone, Kuniara's false and unreliable testimony was clearly material as to the death sentence imposed on Mr. Bottoson.

ARGUMENT V

MR. BOTTOSON WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL

There is no need to belabor the Preston issue further, except with respect to the State's unfounded assertion that Mr. Bottoson "has presented no evidence to suggest that Preston could have been successfully challenged in another proceeding at the time of Bottoson's trial." Answer Brief, at 29. In fact, Mr. Bottoson showed how Preston was successfully challenged at the time of his trial, through the testimony of William Bluth, who exposed similar testimony by Preston in an Ohio robbery trial by the simple expedient of doing some research in a public library and calling two expert dog handlers. RP 944-52. That is all that it would have taken in Mr. Bottoson's case, also, to show that Preston's claims were totally unreliable and that his testimony was incredible.

With respect to the failure to object claim, the State first argues that this claim is procedurally barred because it is a "merits claim cast as ineffective assistance of counsel." Answer Brief, at 22, 31. Ultimately, the State's contention, repeatedly made throughout its brief, is that all claims that counsel is ineffective

for anything that happened at trial are procedurally barred, because if counsel had properly objected or preserved the alleged error, the claim could have been raised on direct appeal. That contention cannot withstand close scrutiny.

Mr. Bottoson had a right to the effective assistance of counsel at his trial. Strickland v. Washington, 466 U.S. 668 (1984). If counsel, by failing to object, to make a timely motion, or otherwise failing to preserve a meritorious issue, rendered assistance that fell below that expected of a reasonably competent criminal defense attorney, and Mr. Bottoson was prejudiced thereby, then counsel failed to render effective assistance, violating Mr. Bottoson's rights under the Sixth Amendment to the United States Constitution and Article I, § 16(a) of the Florida Constitution. Id.; see Kimmelman v. Morrison, 477 U.S. 365 (1986) (failure to file suppression motion could constitute ineffective assistance of counsel); Smith v. Dugger, 911 F.2d 494 (11th Cir. 1990) (failure to file suppression motion was ineffective). Florida courts have likewise repeatedly held that failure to preserve issues of appellate review can constitute ineffective assistance of counsel. Rhue v. State, 603 So. 2d 613, 615 (Fla. 2d DCA 1992); Martin v. State, 501 So. 2d 1313 (Fla. 1st DCA 1986); Crenshaw v. State, 490 So. 2d 1054 (Fla. 1st DCA 1986).

To say that counsel, by failing to provide effective assistance, could also bar any future attempt to redress the resulting violation of Mr. Bottoson's constitutional rights, is to deny that the right to effective assistance has any meaning or validity. It is also to deny Mr. Bottoson's fundamental right of access to the courts of this

State to achieve redress for the constitutional violation, in derogation of Article I, § 21 of the Florida Constitution. There is no other forum in which Mr. Bottoson can achieve redress for the violation of his right to the effective assistance of counsel.

With respect to the merits of the claim, the State's citations to trial counsel's testimony are incomplete and misleading. On direct examination, counsel testified explicitly that he had no tactical reason for failing to object to the prosecutor's impermissible and prejudicial cross examination of Mr. Bottoson. When asked why he had not objected, trial counsel testified as follows:

> I let it get away from me at that point. I made a mistake. I should have objected.
>
> Q I take it then -- well, did you have a tactical or strategic reason for not objecting?
>
> A No. I just didn't get on it soon enough. About the end of the questions I did object, and the Judge sustained it. But I let it get away from me.

RS 247. On cross examination, counsel testified in general terms that there are times when a decision is made for a tactical reason not to object. RS 263-64 (the passage cited by the State). Counsel immediately reiterated, however, that he had no such reason for failing to object to the questioning of Mr. Bottoson:

> Q Do you specifically remember as to any of these closing argument objections specifically why you did object or didn't object?
>
> A No. Except the one where Henshellwood (sic; the prosecutor) was going on about: Did you examine her in the trunk? Did you do this? Did you do that?

And I must honestly say I waited too long to object on that.

RS 264 (emphasis added). In the light of this testimony, it is incomprehensible for the State to argue that counsel's testimony supports the existence of a tactical reason for the failure to object. Answer Brief, at 32.

With respect to counsel's waiver of Mr. Bottoson's right to have the jury consider lesser included offenses, the State's argument entirely misses the mark. First, regardless of whether the evidence would otherwise be sufficient to convict a defendant of first degree murder, a capital defendant has a constitutional right to have the jury instructed on lesser included offenses. Where that right is violated, a new trial is required, regardless of the weight of the evidence. Beck v. Alabama, 447 U.S. 625 (1980); Eaddy v. State, 19 FLW S186 (Fla. April 14, 1994) (denial of instruction in robbery murder case required new trial). Second, counsel had no tactical reason for taking away from the jury the option to convict of a lesser included offense -- as he admitted, that argument was simply a mistake. It gained Mr. Bottoson nothing. Third, the basis on which the jury could have convicted of a lesser included offense is set forth in the Initial Brief, at 56-57.

ARGUMENT VI

THE COURT AND THE STATE CREATED CONDITIONS IN WHICH IT WAS IMPOSSIBLE FOR COUNSEL TO RENDER EFFECTIVE ASSISTANCE TO MR. BOTTOSON

As set forth in the Initial Brief, the ability of trial counsel -- who had only recently become a Bar member and had never before tried a capital case -- to provide effective assistance was interfered with by the trial court's denial of the defense motions for a continuance and for appointment of additional counsel. In addition, the $2500 fee cap provision of § 925.036(4), Florida Statutes (1980), had the effect that trial counsel quickly reached the point where any additional work performed on behalf of Mr. Bottoson was unpaid. Taken together, these facts deprived Mr. Bottoson of any opportunity of receiving the effective assistance of counsel.

The State argues that this claim is barred, but because the effects of the numerous factors precluding counsel from providing effective representation necessarily include facts outside the trial record, it was impossible for counsel to raise this claim fully at the time of trial or direct appeal. Moreover, as pointed out in the Initial Brief, at 62, the rulings of this Court gave counsel every reason to believe that a further challenge to the fee cap provision would be futile. Where it was the trial court, the legislature and this Court that created all of these facts, it would be manifestly unjust to deny Mr. Bottoson merits review of his claim.

On the merits, the State contends that the limit on compensation had no effect on the representation Mr. Bottoson received. The notion that compensation is unconnected to effective representation was

emphatically rejected by this Court in White v. Board of County Commissioners, 537 So. 2d 1376 (Fla. 1989), and Makemson v. Martin County, 491 So. 2d 1109, 1112 (Fla. 1986). See also Martinez-Macias v. Collins, 979 F.2d 1067, 1067 (5th Cir. 1992) (finding ineffective assistance of counsel: "The state paid defense counsel $11.84 per hour. Unfortunately, the justice system got what it paid for."); State v. Peart, 621 So. 2d 780 (La. 1993) (adopting rebuttable presumption that counsel was ineffective where indigent defense system was drastically underfunded).

The State's assertion that defense counsel here "did as well as possible" boggles the mind. Counsel did no penalty phase investigation. Counsel's investigator limited his inquiry to penalty phase issues until after the conviction, and then did almost nothing. Counsel did not know how many siblings Mr. Bottoson had, the name of his brother, or whether or not Mr. Bottoson had any children. Counsel never made any use of his confidential penalty phase expert. Counsel never asked the pretrial psychiatrist whether Mr. Bottoson was mentally ill. Mr. Bottoson has a lengthy history of mental illness -- the records establishing that fact were readily available, but counsel simply never bothered to ask for the crucial California records. Counsel knew virtually nothing about his client and told the jury virtually nothing. The representation of Mr. Bottoson -- especially at penalty phase -- was pathetic, and was symptomatic of a system in which representation of indigents charged with capital offenses was lackluster at best. Article I, § 16(a) of the Florida

Constitution and the Sixth Amendment to the United States Constitution require that Mr. Bottoson be granted relief.

ARGUMENT VII

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

Amazingly, the State argues that no violation of Hitchcock v. Dugger, 481 U.S. 393 (1987), took place in Mr. Bottoson's trial. The State appears to argue a variation of the "mere presentation" standard, asserting that this is not a "pure" Hitchcock claim because the defense was allowed to present mitigating evidence. Answer Brief, at 36, citing Adams v. State, 543 So. 2d 1244, 1247 (Fla. 1989). As the State should well know, the mere presentation standard is no longer good law, following Hitchcock. This point was driven home in Maxwell v. State, 603 So. 2d 490 (Fla. 1992):

> As we earlier have noted, the United States Supreme Court in Hitchcock reversed the "mere presentation" standard that this Court had followed previously. This superseded standard had required only that a defendant be permitted to present both statutory and nonstatutory mitigating evidence to the court and the jury; and we consistently had found no error if this nonstatutory mitigating evidence was not actually weighed in the sentencing process.
>
> After Hitchcock reversed us on this point of law, we held that an error has occurred in sentencing if the judge believes or the jury is led to believe that nonstatutory mitigating evidence may not be considered.

Id. at 490-91 (footnotes and citations omitted) (emphasis added). See Downs v. Dugger, 514 So. 2d 1069, 1071 (Fla. 1987); Delap v. Dugger, 890 F.2d 285, 304 (11th Cir. 1989); Armstrong v. Dugger, 833 F.2d 1430, 1436 (11th Cir. 1987).

Adams is not to the contrary. The critical distinction between Adams and the instant case (as well as a host of other Hitchcock error cases, including Maxwell), is that in Adams the jury was instructed that mitigation was unlimited. Adams, 543 So. 2d at 1247. Here, in contrast, the jury was instructed to consider only statutory mitigating circustances. RD 2157-58. The instruction given here is identical to that which this Court found to violate Hitchcock in Maxwell,[4] where the defense also presented nonstatutory mitigating evidence, but where the State conceded that the instructions violated Hitchcock. Maxwell, 603 So. 2d at 491. There is no reason for the State not to have made a similar concession here.

The State argues that the trial judge did not believe himself precluded from considering nonstatutory mitigating evidence, again because the court permitted such evidence to be introduced. Again, that fact is virtually irrelevant. In numerous cases where nonstatutory mitigating evidence was introduced, this Court has found judge Hitchcock error. See Maxwell, supra, and the cases cited in the Initial Brief, at 65-66. Here, the conclusion that the judge felt precluded from considering nonstatutory mitigation is clinched by a number of salient facts: 1) the trial judge said in his sentencing order that he had considered the "legislatively mandated criteria of aggravating and mitigating circumstances," RD 3363, i.e. only the statutory mitigating circumstances; 2) the judge's failure

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[4]In both Maxwell and the instant case, the jury was instructed as follows: "The mitigating circumstances which you may consider, if established by the evidence, are these . . . [listing the statutory mitigating circumstances]." RD 2157-58; see Brief of Appellant at 9, Maxwell v. State, 603 So. 2d 490 (Fla. 1992) (No. 77,138).

to say a single word about nonstatutory mitigation in his sentencing order, see RD 3367-69; and 3) the fact that the judge gave a preclusive instruction to the jury. As set forth in the Initial Brief, at 65-66, those facts establish that the judge violated Hitchcock, and the State's argument to the contrary is meritless.[5]

Nor was the Hitchcock error harmless. In its argument, the State totally fails to address the nonstatutory mitigation that was present in the record and that was clearly sufficient to support a recommendation of life from a jury that was not precluded from considering it. Initial Brief, at 66-68. Instead, the State first asserts that in some cases in the past this Court has found non-record Hitchcock error harmless. This proves nothing, since there are numerous other cases in which this Court and the Court of Appeals for the Eleventh Circuit have found record Hitchcock error, like that present here, to be prejudicial and to require a new sentencing proceeding. See, e.g., Maxwell, supra, 603 So. 2d at 492-93; Copeland v. Dugger, 565 So. 2d 1348 (Fla. 1990); O'Callaghan v. State, 542 So. 2d 1324 (Fla. 1989); Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988); Delap, supra; Jones v. Dugger, 867 F.2d 1277, 1280 (11th Cir. 1989). The State also argues that the error cannot be harmless because multiple aggravators were present. Again, this proves

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[5]The State's argument that this Court's prior review of Mr. Bottoson's sentence is the law of the case, thereby precluding Hitchcock relief, Answer Brief, at 37, is truly incredible. As is obvious, the question in any case of Hitchcock error is the effect of the error on the weighing process conducted by the jury and the court. If this Court's pre-Hitchcock direct appeal review precluded relief, then no defendant would ever have obtained relief under Hitchcock.

nothing. In O'Callaghan, this Court found Hitchcock error harmful in a case where there were four aggravating factors, including that the murder was committed in the course of a kidnapping, a prior conviction of a violent robbery, that the murder was heinous, atrocious or cruel, and cold, calculated premeditation -- and only a single nonstatutory mitigating factor -- that lesser penalties had been imposed on the coperpetrators (although O'Callaghan was the trigger person). O'Callaghan, supra; see O'Callaghan v. State, 429 So. 2d 691, 696-97 (Fla. 1983).

In fact, because Hitchcock error drastically alters the aggravation/mitigation balance by precluding the jury and judge even from considering a whole array of mitigating factors, it can only rarely be found harmless beyond a reasonable doubt. Hitchcock error can only properly be found harmless where either no nonstatutory mitigating evidence was presented, or where the evidence is so insubstantial that it could not possibly have affected the jury's decision. Jones, supra, 867 F.2d at 1279-80 (finding Hitchcock error prejudicial in light of testimony that defendant was a very nice person who never got into trouble). Thus, the focus is properly not on the weight of the aggravation but on whether there is non-statutory mitigation in the record that the jury was precluded from considering. Knight v. Dugger, 863 F.2d 705, 710 (11th Cir. 1988).

The State never contests the crucial fact that there was sufficient nonstatutory mitigation present in the record on which a properly instructed jury could have recommended life. Initial Brief, at 66-69. That nonstatutory mitigation included a history

of non-violence, doubt as to who was the actual killer, evidence of good character, and evidence that Mr. Bottoson was a good son and parent. In Maxwell, supra, and in numerous other cases this Court has found such evidence to preclude a finding that Hitchcock error was harmless. It precludes such a finding here as well. Mr. Bottoson is entitled to a new sentencing proceeding before a jury that is instructed in accordance with the dictates of the Eighth and Fourteenth Amendments.

ARGUMENT VIII

THE TRIAL COURT'S COMMENTS CONCERNING THE JURY'S ROLE IN THE SENTENCING PROCESS WERE INACCURATE AND DIMINISHED THE JURY'S SENSE OF RESPONSIBILITY FOR DETERMINING THE SENTENCE, AND COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE COURT'S COMMENTS

In its argument, the State appears to fail to understand the components of this claim. This claim includes both an allegation that fundamental constitutional error occurred, through a violation of the principles of Caldwell v. Mississippi, 472 U.S. 320 (1985), which should be retroactively applied, and an allegation that counsel was ineffective for failing to object to violation of longstanding state law principles set forth in Pait v. State, 112 So. 2d 380 (Fla. 1959), and Blackwell v. State, 79 So. 731 (Fla. 1918).

With respect to the Caldwell error component of the claim, the State argues that the claim is procedurally barred because it was not raised on direct appeal, and that the claim is meritless because Caldwell does not apply to Florida. Answer Brief, at 39. As argued at length in the Initial Brief, at 73-74, neither of those arguments is valid in light of Espinosa v. Florida, 112 S.Ct. 2926 (1992).

Espinosa establishes that the jury is a co-sentencer in Florida. Id. at 2928. Accordingly, any comment by the State or by the trial court that conveys to the jury that the responsibility for the sentencing decision rests elsewhere is materially inaccurate and violates Caldwell.[6] Espinosa overrules this Court's decisions holding that Caldwell does not apply to Florida and mandates that this Court give retroactive effect to Caldwell, regardless of any possible procedural bar. Initial Brief, at 72-73.

With respect to the ineffectiveness component of the claim, the State argues that counsel could not have been ineffective because Caldwell had not been decided and because it is inapplicable to Florida. Answer Brief, at 39-40. This misses the mark, however. Blackwell and Pait had both been decided long before Mr. Bottoson's trial, and both of those decisions, which set forth Florida law, obviously apply to Florida. Since these long established decisions prohibit any reference to appellate review or clemency proceedings before a capital sentencing jury, any competent defense attorney should have objected to the trial court's comments. Counsel's failure

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[6]In Romano v. Oklahoma, 1994 U.S. Lexis 4585, 62 USLW 4466 (June 13, 1994), the Supreme Court made clear that Caldwell error occurs when the information conveyed to the jury is inaccurate and misleading. Precisely that type of error took place here, since the trial judge told the jury repeatedly that the sentencing decision was his alone, and that their verdict was purely advisory. See Initial Brief at 72-73; RD 2113. Moreover, in informing the jurors of the fact of appellate review, the court never told them that a death sentence supported by a jury's recommendation of death is accorded a presumption of correctness, including special deference to the jury's verdict. See Mann v. Dugger, 844 F.2d 1446, 1450-53 (11th Cir. 1988) (en banc) (collecting cases). Failure to provide that information rendered the comments concerning appellate review misleading, as well. Caldwell, 472 U.S. at 343 (O'Connor, J., concurring).

to object was deficient, and was clearly prejudicial to Mr. Bottoson, as the court's comments constituted reversible error under Blackwell and Pait.

Under either theory, the trial court's comments were misleading and erroneous, rendering the jury's sentencing verdict unreliable and the death sentence imposed after giving "great weight" to that verdict unconstitutional.

ARGUMENTS IX TO XVI
REMAINING CLAIMS

Mr. Bottoson will not reargue the remaining claims in detail, relying instead on the arguments set forth in the Initial Brief. It is necessary, however, to rebut one specious accusation made by the State in its Answer Brief. The State appears to think that Mr. Bottoson cited and relied on the United States Supreme Court's decision in Tennessee v. Middlebrooks, 126 L.Ed.2d 555 (1993), going so far as to refer to this as a "remarkably misleading piece of advocacy." Answer Brief, at 42. In fact, as is clearly set forth in the Initial Brief, at 82, Mr. Bottoson cited the decision of the Supreme Court of Tennessee -- Tennessee v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992) -- with a reference to the subsequent history of the case in the United States Supreme Court, as is entirely proper. The State's accusation is entirely baseless and indeed ridiculous.

CONCLUSION

For the reasons set forth herein and in the Initial Brief, Mr. Bottoson's conviction and sentence of death are unconstitutional and in violation of the laws of the United States and the State of Florida.

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 23rd day of June, 1994.

Attorney