69,615

THE SUPREME COURT OF FLORIDA

THEODORE ROBERT BUNDY, Appellant, v. STATE OF FLORIDA, Appellee.	Case No. _____

BRIEF OF APPELLANT AND APPLICATION FOR A STAY OF EXECUTION

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November 17, 1986

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STATEMENT OF THE CASE

This is an appeal from the Circuit Court for the Third Judicial Circuit's denial of defendant's Applications for Stay of Execution and Motion to Vacate or Set Aside Conviction and Sentence. Defendant's execution is currently scheduled for 7:00 a.m., Tuesday, November 18, 1986. Defendant hereby requests this Court to stay his execution pending a decision on the merits of this appeal.

A. Procedural History

Defendant was convicted of murder and sentenced to death by the Circuit Court for the Third Judicial Circuit on February 12, 1980. The judgment of that court was affirmed by this Court on May 9, 1985, and rehearing was denied on July 11, 1985. Bundy v. State, 471 So. 2d 9 (1985).

On May 21, 1986, defendant filed a petition for a writ of certiorari in the United States Supreme Court, seeking review of his conviction and sentence in this case.

On September 5, 1986, defendant's counsel applied to the Circuit Court to be appointed for the purpose of representing defendant in an application for executive clemency, and also

requested the appointment of certain mental health and investigative experts to assist counsel in preparing the application. In a September 10 letter, the court responded that it was holding the motions in abeyance because, "should the Supreme Court grant certiorari and reverse this Court, the matter of a clemency hearing will be rendered moot."

The United States Supreme Court denied defendant's petition for certiorari on October 14, 1986; on October 20, defendant renewed his motions in the Circuit Court for appointment of clemency counsel and experts. On October 21, that court appointed undersigned counsel pursuant to Florida Statutes § 925.035(4) for the purpose of representing defendant in his application for executive clemency.

On October 21, the Governor of Florida signed a warrant ordering the execution of defendant's sentence of death. The warrant recites that "it has been determined that Executive Clemency, as authorized by Article IV, Section 8(a), Florida Constitution, is not appropriate."[1/]

1/ Defendant is also under sentence of death imposed by the Circuit Court of Leon County, venue in Dade County. The Eleventh Circuit Court has stayed defendant's execution in that matter, pending its consideration of defendant's appeal from the denial of his petition for heabeas corpus by the District Court of the Southern District of Florida.

On November 7, 1986, defendant filed in the Circuit Court an Application for Stay of Execution and Memorandum in Support of Application, challenging the validity of the current warrant in light of defendant's right to present an application for executive clemency. Following a hearing on on November 13, that court denied defendant's application.

On November 14, 1986, defendant filed an Application for Stay of Execution, a Motion to Vacate or Set Aside Conviction and Sentence, and related pleadings. The court held a hearing on the application and motions at 8:30 a.m. on Monday, November 16, 1986. The court denied the application for a stay, denied defendant's request for an evidentiary motion, and denied defendant's motion to vacate or set side his conviction and sentence.

Defendant immediately filed his notice of appeal from the Circuit Court's final orders of November 13 and 14.

B. Statement of Facts

1. Events Preceding Defendant's Indictment

On February 9, 1978, Kimberly Leach, a twelve-year-old junior high school student in Lake City, Florida, Columbia County, left her classroom to retrieve her handbag and did not return. Two months later, her body was found in a wooded area in nearby Suwannee County.

On February 15, 1978, defendant was arrested in Pensacola for car theft and possession of stolen credit cards. Upon being apprehended, defendant attempted to flee from the arresting officer but was captured after a struggle which resulted in injuries to defendant's head. When defendant revealed his identity, police discovered that he was wanted by Utah officials for his escape from prison following a kidnapping conviction and subsequent extradition to Colorado, where he was suspected in the disappearance of a young woman.

Shortly after his arrest, defendant told his public defender that he did not want to speak to the police without the presence of an attorney. Although informed of this request, the Pensacola police interviewed defendant extensively while informing the public defender that defendant did not want an attorney.

The unprecedented news media attention focused on Defendant was succinctly noted by Judge Charles E. Miner of the Second Judicial Circuit. In a May 3, 1978, ruling denying direct news media access to defendant, Judge Miner wrote:

> It is true beyond peradventure that Theodore Bundy is newsworthy. Since his arrest and incarceration on the instant charges, Bundy has understandably been the object of intense public interest. Resourceful newsgatherers have proven well equal to the task of keeping the public informed. Virtually no aspect of Bundy's past or present life, real or imagined, has evaded media discovery, analysis and comment. Fact,

> speculations, characterization and impression have combined to give Theodore Bundy, wanted or not, a mystique of sorts. He enjoys (or tolerates, as the case may be) a name identification in this area of Florida at least equal to that of Florida's most notable personages.
>
> As of this day there is no indication that either the public or media interest in Theodore Bundy is on the wane. One must assume that the media will continue to report any bit of information thought to be of interest to the public, whatever its source or content. This court would have it no other way.
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> * * * *
>
> Whether the cumulative effect of that which has been written and spoken about Theodore Bundy has yet risen to prejudicial, thus unconstitutional, dimensions is a matter of conjecture and not before the Court. What is clear to the Court is its duty to use its offices to protect Theodore Bundy's right to fundamental fairness, even if to do so requires that the Court protect Bundy from Bundy.

(R. 127-30).

Despite the unquestioned intent of both the Leon and Columbia County courts, subsequent rulings and omissions infringed upon the courts' obligation to protect defendant's right to a fair trial and to "protect Bundy from Bundy." defendant was denied the counsel of his choice, was allowed to proceed pro se without an adequate Feretta[2/] inquiry, and was allowed to

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2/ Faretta v. California, 422 U.S. 806 (1974).

stand trial without an adequate competency hearing despite substantial evidence of his incompetence to stand trial. Pretrial publicity was so pervasive that, even after a change of venue, most of the venire -- including a majority of the jurors eventually selected to serve -- had extensive knowledge of the facts of the case and, most significantly, had preformed opinions that defendant was guilty of the crime charged.

2. Events Arising After Defendant's Indictment

a. Pretrial Motions and Hearings

In the first few days after defendant was indicted in late July 1978 in both this case and the Leon County case, defendant and Georgia attorney Millard Farmer filed motions in both actions requesting that Mr. Farmer be allowed to appear pro hac vice for the purpose of representing defendant. In support of the motions, Mr. Farmer presented a certificate of good standing from the Georgia bar. Relying on a contempt citation against Mr. Farmer in a Georgia proceeding, both courts refused to admit Mr. Farmer (R. 14029-124).

Defendant thereupon proceeded pro se. In October 1979, this Couart appointed Leon County Public Defender Michael Minerva to assist defendant in this case, but defendant continued to file pro se motions and to attempt to conduct discovery (R. 14-169). During the intervening months defendant

undertook preparations to defend two separate capital prosecutions; conducted depositions of witnesses, including identification witnesses; and made public statements in the form of motions to the court.

In late May 1979, Mr. Minerva completed negotiations on a plea bargain for defendant that included both cases and was approved by the court and prosecutor in both cases. A joint hearing was held on May 31, 1973, at which defendant appeared to enter a quilty plea (R. 14379; See Vol. 35, Leon County R.O.A.). Under the terms of the plea bargain, defendant would have received three consecutive life sentences in exchange for pleading guilty; however, the plea bargain was withdrawn by the State when defendant made a pro se motion to replace appointed counsel and behaved irrationally at the hearing.

Based, at least in part, on a report by a defense expert questioning defendant's competency to stand trial, both the State and defense counsel moved for a competency hearing in the Leon County proceeding. Defendant thereupon moved to dismiss the public defender from the case and for the appointment of separate counsel to advocate his competency at the hearing. When Defendant made this motion, the public defender moved to withdraw as counsel. The court denied defendant's motion to remove the public defender and the public defender's motion to withdraw; however, the court appointed separate counsel for the competency

hearing. The public defender was not allowed to present evidence or to participate in the hearing. Thus, all active participants in the competency hearing advocated defendant's competence.

Defendant was convicted of murder and sentenced to death for the Tallahassee crimes on August 3, 1979.

Defendant's motion for continuance and abatement of the proceedings in Columbia County was denied.

The court began voir dire of the venire in Suwanee County --under a provision of Florida law that permits the defendant to elect venue in any of the counties where the crime was alleged to occur -- but ultimately discovered such pervasive prejudice that it granted the defense motion for a change of venue to Orlando, in Orange County, Florida. When voir dire began in the new venue, extensive knowledge of the case among the veniremen was apparent. Nonetheless, a jury was selected and sworn. Subsequent motions for change of venue were denied.

b. Trial, Penalty Phase, and Sentence

Following defendant's indictment for the murder of Kimberly Leach, the State developed the testimony of Clarence ("Andy") Anderson, the prosecution's only alleged eyewitness to the abduction of Kimberly Leach, and the only witness who associated defendant with that abduction.

Mr. Anderson was an employee of the Lake City Fire Department when he made his first report to the police on July 28, 1978. Mr. Anderson's report came more than five months after defendant was arrested, more than two months after Judge Miner noted the unprecedented news media attention on defendant, and one week after defendant was indicted for the kidnapping and murder of Kimberly Leach. Mr. Anderson later admitted that, prior to coming forward, he was aware of the publicity tying defendant to the kidnapping of Kimberly Leach and had seen news photographs of both the Defendant and the victim. Mr. Anderson explained that he had not come forward earlier because, although he had had "a nagging feeling" that he had seen Kimberly Leach, he also had "a lot of doubt." (See R. 4132, A. 129). Prior to trial, the state hypnotized Anderson twice in order to enhance his recollection. At trial, the defense moved to exclude Anderson's testimony on the ground that it was inherently unreliable and that hypnotism erected barriers to effective cross-examination. The motion was denied.

The Chief Justice of the Florida Supreme Court characterized Mr. Anderson's testimony at trial as "the crucial link in the chain of circumstantial evidence of [defendant's] guilt." 471 So. 2d at 24.

Indeed, the remaining evidence against defendant consisted of the following:

- A man, later identified as defendant, fled from a police officer who inquired about a license plate on the floor of the man's car.

- Following defendant's arrest, a police detective reported that his fourteen-year-old daughter had been approached in a shopping center parking lot the day before the abduction by a man driving a white van with a license plate later identified as the license plate found on the floor of defendant's car. The girl and her brother, who had also observed the driver and license tag, were later hypnotized by the police to improve their recollection. Police composites were made from each child's description after the hypnotic sessions. Eventually, when presented with a photo lineup, the children identified defendant as the man they had seen.

- A white van reported stolen from the University of of Florida was recovered several days after the abduction. Fingerprints and hair sample comparisons taken could not be linked to the defendant or the victim. Soil samples taken from the van were different from those taken from the crime scene. Blood stains on the van's carpet were identified

as group B -- a blood type common to fifteen percent of the population, including the victim. A fiber analyst testified that it was "extremely probable" that clothing of both defendant and the victim had come into contact with the University van's carpet, and that "probably" the clothing of each had come into contact with each other.

- Two Lake City hotel employees and the State's handwriting expert testified that defendant had registered at the hotel under another name the night before the abduction.

- A school crossing guard testified that he saw a man whom he identified as defendant driving a white van in front of the school on the day that the victim was abducted from the school.

The trial court's refusal to suppress Anderson's testimony placed the burden upon the defense to negate its incriminating impact. The defense contended that the only way the jury could fully appreciate its argument that Anderson could not have seen the abduction of the Leach girl by defendant, was for the jury actually to visit the site to see the spatial relationship and distances between the homeroom class building, the auditorium, the place where he first saw the man and girl, where he said the van was parked, and Anderson's vantage point (R. 5590). Nonetheless, defendant's motion for a view was denied.

c. Penalty and Sentencing Phases

The defense submitted a Motion to Enter Life Sentence on Verdict and to Prohibit Penalty Phase of Trial to the court on February 9, 1980 (R. 14840-14842). The Motion alleged that defendant was forced to risk a death sentence to exercise his right to a jury trial. The court, after lengthy debate by defense and prosecution, denied the motion (Supp. 13).

The defense moved for a statement of particulars regarding aggravating circumstances and proposed state witnesses (Supp. 7). Both motions were denied (Supp. 13). Thereafter followed a motion to poll the jury to inquire about intervening influences upon them (Supp. 13). That motion was denied (Supp. 15).

The state began the presentation of aggravating factors to the jury through the testimony of Jerry Thompson (Supp. 20-25). Thompson, a law enforcement officer from Utah, testified about defendant's Utah conviction for kidnapping (Supp. 21). The state introduced, over defense objection, copies of the Judgment and Sentence from Utah (Supp. 24). The state then called Mike Fisher, a law enforcement officer from Colorado, to testify about defendant's alleged escape from Colorado authorities while awaiting trial on criminal charges (Supp. 25-33). Fisher was allowed, over defense objection, to testify that

defendant had escaped from a Colorado jail (Supp. 28-32). The state finally called Larry Simpson, an Assistant State Attorney in Leon County, Second Judicial Circuit, Florida (Supp. 34). Simpson testified, over defense objection, to the prosecution of defendant for crimes committed in Tallahassee, Florida (Supp. 37), and defendant's conviction on those charges (Supp. 38). The trial Judge denied a final defense motion for Judgment of Acquittal (Supp. 45).

The defense presented only one witness in mitigation, Carole Ann Boone (Supp. 46-66). Her testimony, however, was overshadowed by her exchange of marriage vows with the defendant.

On February 12, 1980, defendant was adjudicated guilty of the kidnapping and murder of Kimberly Diane Leach (Supp. 159) and was sentenced to life imprisonment for the kidnapping, and to death for the murder. (Supp. 194-195).

ARGUMENT

A. This Court Has the Authority and A Constitutional Duty To Stay Defendant's Execution Pending a Determination of Non-Frivolous Post-Conviction Claims

Defendant is scheduled to be executed at 7:00 a.m. tomorrow, less than 24 hours from now. At the same time, he has raised substantial, clearly non-frivolous issues, that warrant

review by this Court. Such a review cannot be undertaken in the time that remains. In the circumstances, this Court should stay defendant's execution pending a decision on the merits of defendant's appeal.

The grounds for a stay of execution are well established in death cases. In such a case, there is no dispute that the defendant will suffer irreparable injury if the stay is granted and that the injury would be irremediable. Moreover, since defendant is presently detained on Death Row in Florida State Prison, Starke, Florida, a stay of execution would not prejudice the State of Florida. Thus, the only real issue is whether there is a reasonable likelihood that defendant will suceed on the merits of his claims. In deciding whether to grant a stay, courts in death cases liberally construe this last factor. Sullivan v. State, 372 So. 2d 938, 941 (Fla. 1979).

In the circumstances of this case, defendant is constitutionally entitled to a stay of his execution, pending a full and fair hearing on the claims for relief that he has raised under Rule 3.850, Florida Rules of Criminal Procedure. Shaw v. Markin, 613 F.2d 487 (4th Cir. 1980). In Shaw, like here, the defendant sought a stay of his execution to permit him to pursue post-conviction relief in state court. The South Carolina courts and the federal district court denied the application. On appeal, the Fourth Circuit Court of Appeals granted the stay,

finding that the defendant had a constitutional right to pursue state and federal post-conviction remedies by raising issues that previously had not been addressed by state and federal courts. The court noted:

> "In the final analysis, there is required a pratical judgment whether in the particular situation 'the legal issues have been sufficiently relitigated that the law must be allowed to run its course'; and whether the criminal defendant's entitlement to 'all the protections which . . . surround him under our system prior to conviction and during trial and appellate review' (emphasis added) have been accorded.
>
> "My judgment, simply put, is that that point cannot fairly be thought to have been reached in this case. To deny a stay in the circumstances presented to me would be to prevent the following first instance decisions being made in matters now actually pending in the courts, each in an accepted traditional avenue of post-conviction review of state court crimiinal convictions: 1) a pending petition for rehearing of the denial of certiorari by the Supreme Court of the United States; 2) a pending appeal in the United States Court of Appeals's form the denial by the district court of a first petition for habeas corpus; and 3) a pending post-conviction proceeding in the state court system. None of these represents an attempt to relitigate an issue already decided by the same tribunal before which it is pending. Each, as indicated, lies within avenues of review so long and so well established that they must be counted among our basic 'protecitons' with which our system has 'surrounded' all persons convicted of crime. Under these circumstances it seems imperative to me that the jurisdiction of these courts to address the

> issues already regularly pending before them must be preserved against mooting by execution of the deatt sentence. (Footnote omitted.)"

Shaw v. Martin, supra, 613 F.2d at 491.

Under Shaw, a defendant's right to a stay of execution sentence does not depend on whether he will prevail on the post-conviction issues. Nor is the defendant even required to show that the post-conviction isses have "facial substance." All that is required is (1) "identification of the nature of the issue(s)" and (2) a showing that the issues have not already "been . . . fairly litigated on the merits under procedures designed for the purpose." Shaw v. Martin, supra, 613 F.2d at 491-492.

The Eleventh Circuit Court of Appeals has expressly applied this standard in staying the execution of death sentences pending judicial consideration of post-conviction issues. In Dobbert v. Strickland, 670 F.2d 938, 940 (11th Cir. 1982), for example, the court stated:

> "Where the merits cannot be satisfactorily considered prior to execution of a scheduled death sentence, as in this instance, a stay should be granted. Shaw v. Martin, 613 F.2d 487 (4th Cir. 1980)."

The Court also granted a stay in Goode v. Wainwright, 670 F.2d 941, 942, stating:

> " . . . '[t]he law requires that his trial and appeal comply with the Constitution of the United States, and when the matter is properly presented to us -- as it is in this case, by assertion of non-frivolous issues that are not foreclosed by the state court processes -- the law requires us to examine to see whether his trial and appeal did measure up to constitutional standards."

See also Armstrong v. Wainwright, Case No. 82-309-Civ.-T-WC (M.D. Fla. March 25, 1982).

In sum, it is clear beyond any doubt that this Court has the authority as well as the constitutional duty to stay the execution of defendant's death sentence while he pursues appeal of his non-frivolous post-conviction claims. This case is in the same procedural posture as the proceeding in Shaw v. Martin; defendant has raised substantial issues, discussed infra, that previously have not "been . . . fairly litigated on the merits under the procedures designed for the purpose." Accordingly, defendant's application for a stay of the execution of his death sentence should be granted.

B. A Stay of Execution is Appropriate Under the Circumstances of this Case

Defendant has raised non-frivolous claims that were not fairly considered by the court below and that are meritorious.

1. Petitioner Was Incompetent to Stand Trial and Was Denied His Right to a Full and Fair Hearing on That Issue.

The failure of the trial court to hold an adversary hearing into defendant's competence to stand trial deprived him of his due process right to a fair trial. The evidence of record, including defendant's conduct in the presence of the court, raised objectively substantial bona fide doubt that defendant had sufficient present ability to assist his counsel in planning and implementing his defense. Mason v. State, 11 F.L.W. 269 (Fla. June 20, 1986).

The United States Supreme Court, the lower federal courts, and the courts of this State have long recognized that a state cannot prosecute a person who lacks the capacity to understand the proceedings against him, to consult with his counsel, and to assist in preparing his defense. This limitation is fundamental to an effective adversary system of justice. Drope v. Missouri, 420 U.S. 162, 171-172 (1975); see also Winick & DeMeo, Competence to Stand Trial in Florida, 35 U. Miami L. Rev. 31 (1980); Comment, Incompetency to Stand Trial, 81 Harvard L. Rev. 454 (1967). In Dusky v. United States, 362 U.S. 402 (1960), the Supreme Court held that the test of a Defendant's competence to stand trial on a criminal charge "must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a

rational as well as factual understanding of the proceedings against him." To convict a person who lacks such competence before or during the trial would violate the due process clause of the Fourteenth Amendment.

The Supreme Court has also interpreted due process to require that a criminal defendant be afforded an adequate hearing on his competence to stand trial whenever the trial judge objectively has a bona fide doubt of the accused's competence. Pate v. Robinson, 383 U.S. 375 (1966). Failure of the court to make such an inquiry, even in the face of a stipulated expert testimony that a defendant is competent, deprives the defendant of his constitutional right to a fair trial. Id. at 385. Once a doubt has been raised, a defendant cannot waive his right to have his competency determined. Pate v. Robinson, 383 U.S. at 384: "[I]t is contradictory to argue that a Defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." Indeed, a hearing must be held once requested by a defendant's counsel, even over a defendant's objection. People v. Christopher, 65 N.Y.2d 417, 420-23, 492 N.Y.S.2d 566, 567-69, 482 N.E.2d 45, 46-47, (1985). The Supreme Court has emphasized that particular care should be taken by a court where there has been no hearing or inquiry into the competence of a Defendant appearing pro se. See Westbrook v. Arizona, 384 U.S. 150, 150-151 (1966); Vincent v. Louisiana, 105 S. Ct. 928, 930 (1985) (Brennan, J., dissenting).

Moreover, even if the trial judge determines that the accused is competent at the commencement of trial, the issue is not foreclosed. Instead, the court has a continuing obligation throughout the trial to remain alert to circumstances suggesting a change that would render the defendant unable to meet the standards of competence. Drope, 420 U.S. at 181; see also Pate v. Smith, 637 F.2d 1068 (6th Cir. 1981), and United States v. Davis, 365 F.2d 251 (6th Cir. 1966).

Since 1972, Florida's laws governing competence to stand trial have been revised frequently, see, Winick & DeMeo, supra, at 34, although the substance of those rules has remained essentially intact. The test outlined in Dusky v. United States provides the current Florida standard, Fla. Stat. § 916.12; Fla. R. Crim. P. 3.211(a),[3/] and this Court has followed the principles of Dusky, Pate, and Drope regarding competency to stand trial and applicable procedural requirements. See, e.g., Jones v. State, 362 So. 2d 1334 (Fla. 1978); Lane v. State, 388 So. 2d 1022 (Fla. 1980); Scott v. State, 420 So. 2d 595 (Fla. 1982).

3/ Florida Rule of Criminal Procedure 3.210 presents the procedure for raising the issue of competency. It requires consideration and analysis of the Defendant's mental condition as it affects a variety of factors related to the Defendant's ability to understand the charges against him and to assist his attorney in the presentation of his defense, including the Defendant's ability to assist his attorney in planning the defense; the Defendant's capacity to realistically challenge prosecution witnesses; and the Defendant's motivation to help himself in the legal process, Rule 3.211(a)(1)(vi), (vii) and (x).

Thus under Florida law, due process requires a trial court to hold a hearing if reasonable grounds exists to believe a Defendant incompetent, State v. Tait, 387 So. 2d 338, 341 (Fla. 1980); Mitchell v. State, 289 So. 2d 418, 419 (Fla. 1974).

In determining whether or not to order a competency hearing, the trial judge must consider all the circumstances. Jones v. State, 362 So. 2d 1334, 1336; compare Hill v. State, 473 So. 2d 1253 (Fla. 1985). By reviewing a number of factors, each minor by itself but together substantial, this Court recently held that the trial court erred in failing to order a competency hearing before the trial of a defendant later convicted of first-degree murder and sentenced to death. Scott v. State, 420 So. 2d 595, 597 (Fla. 1982). Central to the Court's reasoning was a factor relevant to the present case: the Defendant's self-defeating rejection of the plea bargain. See also, Walker v. Scott, 384 So.2d 730, 733 (Fla. Dist. Ct. App. 1980); Weber v. State, 438 So. 2d 982 (Fla. Dist. Ct. App. 1983). 4/

4/ See also United States v. Davis, 365 F.2d 281 (6th Cir. 1966) where a Defendant appealed an order committing him to the custody of the Attorney General until he became mentally competent to stand trial. 365 F.2d at 253-54. The Court of Appeals found that prior to trial, Davis had requested that the trial court discharge his attorneys and appoint additional counsel numerous times. The trial court, after several competency hearings, concluded that the Defendant was not able or willing to cooperate with defense counsel and was incompetent. The Court of Appeals affirmed. Id. at 253, 256.

Defendant's behavior throughout this case and the related Leon County case should have alerted the trial court to the fact that a competency hearing was required.

In the early spring of 1979, defendant's trial lawyer, Public Defender Miverna, began to believe that an insanity defense should be explored. He also began to question defendant's competence to stand trial and believed that an evaluation by an expert on this issue was required. He explored these issues with defendant on March 21, 1979, and defendant's response was unequivocal: that insanity was not and could not be an issue in this case. Defendant expressed the view that insanity is not a viable defense in a criminal case in general, that it was certainly not an issue in his case, and that execution under a death penalty while maintaining one's innocence would be preferable of the insanity defense. Minerva concluded that defendant was unable to grasp the strength of the State's evidence; despite careful description and evaluation of that evidence by counsel, defendant preferred to believe that the State lacked sufficient evidence upon which a conviction could be based.

Minerva asked Dr. Emanual Tanay, M.D., a clinical professor of psychiatry at Wayne State University College of Medicine, to conduct a preliminary evaluation of defendant. Dr. Tanay was asked, on a confidential basis, to review the allegations against defendant, prior evaluations of defendant by a

psychiatrist and a psychologist in Utah in 1976 and transcripts of defendant's interrogations by the authorities following his arrest in 1978 and advise Minerva whether in his opinion defendant was competent to assist in his defense or whether there was a basis for requesting a court-ordered evaluation of defendant's competence and/or his mental condition at the time of the offenses changed. After reviewing the materials Dr. Tanay advised Mr. Minerva that to proceed to trial without a psychiatric evaluation of competence "would constitute a significiant omission," and that Defendant's efforts to represent himself "attest to his self destructive tendencies" which are "predictably self-defeating." Dr. Tanay also noted that even if there was a basis for an insanity defense, the defense could not succeed without defendant's cooperation. Based on this preliminary assesssment, Minerva obtained an order of the Lake County court appointing Dr. Tanay to assist the defense and "perform such examinations and submit such reports as are warranted." (Order of May 17, 1979.)

After examining defendant, Dr. Tanay reported his findings to Minerva in a letter dated May 21, 1979. In his opinion defendant had "an incapacity to recognize the significance of evidence held against him" and "makes decisions based upon these distorted preceptions of reality" and is "neither concerned nor distressed in an appropriate manner by the charges facing him."

Regarding defendant's lengthy interrogations by the police, Dr. Tanay wrote:

> [T]he consequences of the verbal games which Mr. Bundy played with investigators was counterproductive to his defense and occurred against the advice of his counsel . . . . This behavior was not, in my opinion, the result of rational reflection and decision making process but a manifestation of the psychiatric illness from which Mr. Bundy suffers. Thus, it could be argued that Mr. Bundy does have factual understanding of the proceedings but lacks a rational understanding of what is facing him.

Id. at 6.

Concerning defendant's ability to perform the role of co-counsel, Dr. Tanay said:

> [M]r. Bundy functions in the role of 'a chief counsel,' and the public defender has been consistently manipulated into the role of 'associate counsel'. . . Mr. Bundy is guided by his emotional needs, sometimes to the detriment of his legal interests. The pathological need of Mr. Bundy to defy authority, to manipulate his associates and adversaries, supplies him with 'thrills', to the detriment of his ability to cooperate with his counsel . . . . I would anticipate that in the unlikely event that the prosecution's case against him would weaken, he would through his behavior bolster prosecution's case. I have much less doubt about Mr. Bundy's capacity to assist prosecution than his ability to assist his own counsel . . . .

Id. at 6-8.

As to defendant's ability to evaluate a negotiated plea bargin, Dr. Tanay observed:

> I have discussed with Mr. Bundy his appraisal of the evidence held against him. It is his view that the case against him is weak or even frivolous. This judgment of Mr. Bundy's is considered to be inaccurate by his defense counsel and, most likely, represents a manifestation of his illness. In view of the fact that on conviction he faces the death sentence, the acceptance of an offer of a life sentence in exchange for a guilty plea is a consideration. This possibility seems precluded by Mr. Bundy's view that the prosecution's case against him is weak. This is at least his explanation why he is unwilling to consider this particular approach. It is my impression that a major factor is his deep-seated need to have a trial, which he views as an opportunity to confront and confound various authority figures. In this last category, I include, for his purposes, not only judges and prosecutors but also his defense attorneys.
>
> In a certain sense, Mr. Bundy is a producer of a play which attempts to show that various authority figures can be manipulated, set against each other and placed in positions of internal conflict. Mr. Bundy does not have the capacity to recognize that the price for this 'thriller' might be his own life. Mr. Bundy, 'the super lawyer', does not recognize that his client, Mr. Bundy the Defendant, is not being adequately represented.

(Id. at 9.)

Dr. Tanay concluded that there was serious doubt whether Defendant had "sufficient present ability to consult with his lawyers with a reasonable degree of rational understanding" and recommended a judicial determination of his competency to stand trial." Id. at 10-11.

Prior to the hearings on defendant's pre-trial suppression motions in the Lake County case, the State offered to accept guilty pleas from defendant for the Chi Omega and Lake City murders in exchange for consecutive life sentences and an agreement that the State of Florida would not extradite defendant to face charges in other states. Minerva consulted Dr. Tanay about whether defendant was competent to enter into such a plea agreement. Tanay advised Minerva that if defendant accepted the agreement it would indicate competency, but that a rejection would confirm Tanay's suspicions of incompetence.

In May 1979, defense counsel, the prosecutors, The Circuit Court in this case and the court in the Lake County case agreed to a plea bargain pursuant to which the defendant would enter a plea of guilty in exchange for three consecutive life sentences and no extradition. Defendant agreed to enter the plea on May 31, 1979. At that time, defendant entered the courtroom clutching a pro se motion to replace Minerva and his staff as counsel, or, in the alternative, to represent himself. Minerva requested a recess and discussed with defendant the proposed plea and the motion. Defendant returned to court, dramatically compared the weight of the two motions in his hands, and elected to file his motion to remove counsel. He then seemed to consider the possibility of going ahead with the plea, but the prosecutors withdrew it.

On June 1, 1979, Minerva moved to withdraw as defendant's counsel. On June 4 the State moved in the Chi Omega case for appointment of a psychiatrist to examine defendant to ascertain his competency to stand trial. Minerva moved in camera for a hearing to determine defendant's competency under Fla. R. Crim. P. 3.210(a)(2). Defendant moved in pro per that Dr. Tanay's report not be considered at the competency hearing and that a special advisory counsel be appointed for the limited purpose of assisting him at the competency hearing. On June 5, the State, under the authority of Rule 3.210, moved for a competency hearing on the ground that Dr. Tanay's report "may have created some doubt as to the defendant's competency to stand trial."

On June 11, the Leon County court held a "competency hearing". That hearing, however, was not a meaningful inquiry into defendant's competency to stand trial. Both the State and defendant advocated defendant's competence:

- Defendant was represented by newly appointed competency counsel; Minerva was present but did not call or question witnesses.

- Defendant's competency counsel repeatedly stated that defendant did not assert his incompetency and that the motion filed by Minerva seeking a competency hearing was filed without consent. The Court thus proceeded to hear the evidence without any counsel present to bring out facts or otherwise advocate for a finding of incompetency.

- Mr. Minerva was present and prepared to testify about his experiences with defendant which had led him to the conclusion that defendant was not competent; he was not called by the Court, Defendant or the State.

- Two other witnesses were present at Minerva's request to testify about defendants interviews with the police; they were not called to testify by either party or by the court.

As a result of these circumstances, the court found itself in a unique position--no party before it argued that defendant was incompetent. The court concluded:

> Gentlemen, it is very seldom, at least in this court's career, that we have a opportunity to rule consistent with what both lawyers argued. I don't think I've ever been able to do that.

Leon County, R.O.A. at 3649. The court then did the inevitable and found defendant competent to stand trial. The court subsequently denied both defendant's motion to remove Minerva and Minerva's motion to withdraw. Voir dire commenced the next day. Minerva effectively ceased to participate in defendant's case, leaving the defense to inexperienced members of his staff.

Following the aborted plea, the trial court in this case did not separately consider or rule on defendant's competency to stand trial; nor did defendant's trial counsel or the prosecutor raise the issue. Nevertheless, in the penalty phase of the trial in this case, defendant's self-destructive behavior

re-surfaced and took its most dramatic form. Rather than submit evidence to influence the jury to spare his life, defendant called his fiance as a witness for the sole purpose of exchanging wedding vows. (Supp. Vol I.) He did so with his lawyers' knowledge and assistance. In addition, prior to sentencing, defendant's trial counsel presented the court with a copy of Dr. Taney's report in which medical doubt about defendant's competency was expressed.

The facts set forth above raise an objective bona fide doubt as to defendant's competency to stand trial. The trial court therefore was under a constitutional obligation to hold an adequate competency hearing, one at which the facts relevant to defendants competency were fully developed and witnesses with relevant evidence were heard. Ford v. Wainwright, No. 85-5543 (June 26, 1986). To the extent that the court below relied on the competency hearing in the Leon County case, it failed in this obligation because of the constitutional inadequacy of that hearing.[5/]

5/ Assuming it is permissable for a trial court to delegate its duty to ensure that a defendant is competent to stand trial, the Leon County hearing did not constitute a constitutionally adequate inquiry. The proceeding on June 11, 1979, was not the full and adequate adversary inquiry required by due process, see, Ford v. Wainwright, supra. It was a empty exercise, ignoring available relevant evidence. Moreoever, it was decidedly not adversarial in character. The finding of compentence was inevitable. Pate v. Robinson not only requires that a court hold a competency hearing where there is doubt as to

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Had the court below made the constitutionally mandated inquiry into defendant's competency, it would have found that at the time defendant's arrest and trial, defendant suffered from "Bipolar Mood Disorder," commonly know as manic-depressive psychosis. (Rule 3.850 Motion, ¶ 69.) This condition rendered defendant incompetent to stand trial, within the meaning of Florida R. Crim. P. 3.210 (a)(2). (Id.)

2. Defendant was unconstitutionally denied his choice of counsel.

Shortly after his indictment in the present case, defendant asked the trial court in both cases to grant the motion of Georgia attorney Millard Farmer to be admitted pro hac vice (R. 14,106-124). Although Mr. Farmer had extensive experience as a trial attorney in capital cases, was a member in good standing of the Georgia bar, among others, had been admitted pro hac vice in several other cases including cases in Florida, and had never been subjected to disciplinary proceedings by any bar

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the accused's competence, it also holds that the required proceedings must be constitutionally "adequate" to protect the Defendant is due process right to a meaningful inquiry into competence. 383 U.S. at 386. See also Drope v. Missouri, 420 U.S. at 172; Pedrero v. Wainwright, 590 F.2d 1383 (5th Cir.), cert. denied, 444 U.S. 943 (1979), holding that Lee v. Alabama, 386 F.2d 97 (5th Cir. 1967), aff'd, 406 F.2d 466 (1968), cert. denied, 395 U.S. 927 (1969) and its progeny require that the due process right to a competency hearing entails the right to an adequate or "meaningful" hearing. 590 F.2d at 1389.

association, the motion was denied. The ground for the court's denial was a contempt citation arising from Mr. Farmer's persistent objection, in a Georgia criminal matter, to the prosecutor referring to the black defendant by his first name rather than by his surname, as he referred to other persons in the proceeding (R. 14, 117). Farmer v. Holton, 146 Ga. App. 102, 245 S.E. 2d 457 (1978), cert denied, 440 U.S. 958 (1979).[6/]

Although the Fifth Circuit held that this court's refusal to admit Mr. Farmer did not violate his right to pursue his profession, it did not address the issue of defendant's Sixth amendment right to counsel of choice. Bundy v. Rudd, 581 F.2d 1126 (5th Cir. 1978), cert. denied, 441 U.S. 905 (1979). As a consequence of the court's refusal to admit Mr. Farmer, Defendant choose to proceed pro se. And, even with the eventual assistance of the Leon County Public Defender, conducted his own defense in a woefully inadequate manner.

Florida Rule of Judicial Administration 2.060(b) and Article II, subdivision 2 of the Intergration Rule of the Florida Bar permit the appearance pro hoc vice of an attorney who is a member in good standing of the bar of another state. The court's determination to admit such an attorney, while discretionary,

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6/ The Supreme Court of Georgia subsequently expressly overruled its holding in Farmer v. Holton. In re Crane, 324 S.E.2d 443, 446 (Ga. 1985).

may not be arbitrary. Ross v. Reda, 510 F.2d 1214 (5th Cir. 1978), cert. denied, 429 U.S. 1104. The sixth amendment to the United States Constitution, which guarantees the right to effective assistance of counsel, includes the notion that "a Defendant should be afforded a fair opportunity to secure counsel of his own choice." Powell v. Alabama, 287 U.S. 45, 53 (1932).

The United States Supreme Court has expressly reserved ruling on a defendant's constitutional interest in the admission of out-of-state counsel, Lewis v. Flynt, 439 U.S. 438, 442 (1979), but the Court has steadfastly held that the right to counsel is entitled to greater deference where the defendant has more at stake. See, e.g., Argersinger v. Hamlin, 407 U.S. 25 (1977). As the Third Circuit Court of Appeals has noted, "[t]o hold that defendants in a criminal trial may not be defended by out-of-the district counsel selected by them is to vitiate the guarantees of the Sixth Amendment." U.S. v. Bergamo, 154 F.2d 31, 35 (3d Cir. 1946).

In a case particularly relevant here, the California Supreme Court, pointing to "the gravity of the charges" and the "tumultous atmosphere" of the underlying murder case in Magee v. Superior Court of San Francisco, 8 Cal. 3d 949, 106 Cal. Rptr. 647, 506 P.2d 1023 (1973), remanded for reconsideration the trial court's refusal to permit out-of-state counsel to appear. The court noted that "the state should keep to a necessary minimum

its interference with the individual's desire to defend himself in the manner he deems best . . . and that that desire can constitutionally be forced to yield only when it will result in significant prejudice to the defendant himself or in a disruption of the orderly processes of justice reasonable under the circumstances of the particular case." Id. at 1025.

The trial court's refusal to admit Millard Farmer pro hac vice violated defendant's constitutional right to counsel. Defendant was on trial for his life and the atmosphere was at least "tumultuous" if not plainly prejudiced. Mr. Farmer specializes in the representation of capital defendants and the nature of his contempt citation was not a circumstance likely to repeat itself at defendant's trial. As a result of this court's action, an incompetent defendant defended himself at critical stages in these capital proceedings.

3. Petitioner was denied his Sixth Amendment right to the effective assistance of counsel.

The Sixth Amendment and due process clause of the Fourteenth Amendment guarantee a criminal defendant the right to effective assistance of counsel.[7/] The Sixth Amendment right to

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7/ Strickland v. Washington, 466 U.S. 668, 686 (1984); McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970); Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932); McCrae v. Wainwright, 439 So. 2d 868, 870 (Fla. 1983) ("The purpose of the ancient and high prerogative writ of habeas corpus is to inquire into the legality of a prisoner's present detention.").

counsel has four components: (1) right to have counsel, (2) minimally qualified counsel, (3) a reasonable opportunity to select and be represented by chosen counsel, and (4) right to a preparation period sufficient to assure minimum quality counsel. Birt v. Montgomery, 725 F.2d 587, 592 (11th Cir. 1984) (en banc). In this case, defendant was denied each of the component parts of the right and such denial was a "constitutional error that undermined the entire adversary process."[8/]

The Supreme Court in Strickland v. Washington, set forth the standards governing ineffective assistance claims. The gravamen of any such claim is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Under Strickland, the defendant is required to demonstrate:

> [T]hat counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the Defendant of a fair trial, a trial whose result is reliable.[9/]

8/ Pickens v. Lockhart, 714 F.2d 1455, 1459 (11th Cir. 1983); see Thomas v. Wyrick, 535 F.2d 407, 413 (8th Cir.), cert. denied, 429 U.S. 868 (1976).

9/ Id. at 687. Accord Tyler v. Kemp, 755 F.2d 741, 744 (11th Cir. 1985); Downs v. Wainwright, 476 So. 2d 654, 655 (Fla. 1985); Middleton v. Stake, 465 So. 2d 1218, 1222 (Fla. 1985).

"[T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal Defendants receive a fair trial." Strickland, 466 U.S. at 689.

The first prong of Strickland is satisfied where a defendant "show[s] that counsel's performance was deficient by identifying specific acts and omissions." Counsel's conduct, viewed as of the time of the actions taken, must have fallen outside of a range of reasonable professional assistance.

Under the second prong of Strickland, a defendant must show that the deficient performance was prejudicial or "that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." A reasonable probability is a probability sufficient to undermine confidence in the outcome.

The constitutional right to effective counsel and the Strickland standard pertaining to ineffective assistance of counsel attach "from the time of initial retention through the time of appeal."[10/] In addition to the duty owed by counsel to his

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10/ House v. Balkcom, 725 F.2d 608, 615 (11th Cir. 1982), cert. denied, ___ U.S. __ (1983); Mylar v. Alabama, 671 F.2d 1299, 1301 (11th Cir. 1982). See Down v. Wainwright, 476 So. 2d 654, 655 (Fla. 1985) (test applies to trial and appellate counsel).

client to perform effectively, external circumstances may preclude effective assistance of counsel,[11/] not withstanding counsel's good faith efforts. See United States v. Warden, 545 F.2d 21, 25 (7th Cir. 1976). "While the legal standard of effective representation does not change from case to case, this does not mean that the severity of the sentence faced by a criminal defendant should not be considered in determining whether counsel's performance meets this standard." Vela v. Estelle, 708 F.2d 954, 964 (5th Cir. 1983); Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982) ("[T]he number, nature, and seriousness of the charges against the defendant are all part of the 'totality of the circumstances in the entire record' that must be considered in the effective assistance calculus.").

The representation provided by various trial counsel for defendant in this action failed on numerous occasions to meet the requirements of Strickland, each occasion sufficient to undermine confidence in the outcome of defendant's trial.

11/ In Re Grand Jury Subpoena, 739 F.2d 1354, 1358 (8th Cir. 19894) (court weighs, "among other factors the time afforded to counsel, the gravity of the charge, and the complexity of possible defenses").

a. Counsel failed to perform an adequate and appropriate pre-trial investigation for the guilt/innocence phase given the nature of this case.

"At the heart of effective representation is the independent duty [of counsel] to investigate and prepare."[12/] Permissible trial strategy can never include the failure to conduct a reasonably substantial investigation into a plausible line of defense.[13/] "[T]he fact that . . . counsel may have performed impressively at trial [does] not excuse a failure to investigate a defense that may have led to the complete exoneration of his client."[14/] "Such omissions, of course, will rarely be visible on the surface of the trial, and to that extent that impression of a trial judge regarding the skill and ability of counsel will be incomplete." Id. In Baynes, the court held that the defendant's constitutional right to effective assistance of counsel

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12/ Weidner v. Wainwright, 708 F.2d 614, 616 (11th Cir. 1983) (ineffective assistance found where counsel failed to use or develop crucial information given to him by his client to develop the defense properly) (quoting Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982)), cert. denied, __ U.S. __ (1983).

13/ Weidner, 708 F.2d at 626. See also Baty, 661 F.2d at 394-95. (Ineffective assistance found where counsel conducted no pretrial investigation, failed to investigate pertinent sources of information and failure to speak at sentencing); Vela, 708 F.2d at 965 (ineffective assistance included failure to object to inadmissible testimony, failure to specify grounds of objection and committing several errors sufficiently grave to preclude review of serious claims on direct appeal).

14/ United States v. Baynes, 687 F.2d 659, 667 (3d Cir. 1982) (quoting Moore v. United States, 432 F.2d 730 (3d Cir. 1970)).

had been abridged and that defendant was prejudiced where trial counsel failed to listen to an exemplar of defendant's voice and compare it with the government's intercepted recording despite the fact that the tape recording constituted the primary evidence introduced against the defendant. Baynes, 687 F.2d 659.

The Baynes court found that counsel's inexcusable decision not to perform a careful and comprehensive comparison of the two recordings and his failure to investigate the exemplar in the first place constituted ineffective assistance even where an "expert" stated that spectrographic analysis indicated that defendant was a speaker in the incriminating telephone conversation. Id. at 666.

The court reasoned that "nothing in the record indicates that a spectrographic analysis is 'foolproof.'" Id. at 671. "In fact, the reliability of the procedure is the subject of considerable dispute . . . . For present purposes, it is sufficient to observe that the spectrographic process is not claimed to be infallible . . . and their reliability and significance are matters for resolution by a jury." Id. at 672. The Baynes court noted that proper cross-examination of the spectrographic expert "might [have] serve[d] to create a 'reasonable doubt' whether the voice exemplar constituted exculpatory evidence."15/

15/ Id. In addition, the court stressed that defendant did not have to prove that it was not his voice on the intercepted

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Similarly, in House v. Balkcom the court held, inter alia, that defendant was denied effective assistance of counsel at all phases of his trial where his attorneys failed to conduct an investigation, interview key witnesses and effectively dispute crucial evidence and take advantage "of significant and possibly exculpatory evidence available from the state's own scientific tests i.e., . . . that the materials resulting from nail scrapings and hair samples taken from defendant did not match samples taken from the crime scene." House, 725 F.2d at 614-15, 618.

The House court found that counsel failed to "'render[] reasonably effective assistance given the totality of the circumstances.'" Id. at 615. The court characterized counsel's failure to obtain even "rudimentary" discovery as "incredible" especially in light of counsel's response at a later habeas proceeding that counsel was "too busy" to learn crucial facts relevant to the client and his defense. Id. at 617. The court found that counsel's "admitted failure to investigate the facts is unconscionable and falls below the level of performance by

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recording, but had only to show that his trial attorney's exploration of the voice exemplar issue might have led to a viable defense and a verdict favorable to him. Id. at 671. Accord Thomas v. Lockhart, 738 F.2d 304, 308 (8th Cir. 1984) (failure of counsel to act upon crucial information supplied by client).

counsel required by the sixth amendment. . . . While we do not require that a lawyer be a private investigator in order to discern every possible avenue which may hurt or help the client, we do require that the lawyer make an effort to investigate the obvious." Id. at 618.

In the instant case counsel's violation of the constitutionally mandated duty to investigate is even more egregious than that in House and Baynes.

Defendant's trial counsel have admitted that when confronted with the fiber evidence introduced against Defendant, they failed to adequately challenge its admissability.[16/] This admission is clear evidence of a lack of investigation because even a cursory review of the literature in the field would have revealed the problems with the methodology employed by the State's experts and the fact that these experts were grossly overstating the precision of identification possible employing these techniques. See Rule 3.850 Motion ¶¶ 113-120.

In House, 725 F.2d at 671, the court found an egregious breach of the duty to investigate where counsel failed to adduce favorable testimony about a crucial bloodstain as consistent with

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16/ In the brief or appeal to the Florida Supreme Court, appellate counsel attempted to mitigate its error by asserting that the court should have raised the issue of the admissability of the fiber evidence sua sporte.

the blood type of Petitioner's wife. In the instant case, if trial counsel had not failed to challenge the admissibility of the fiber evidence it likely would have reduced the State's case to reliance almost entirely on hypnotically enhanced testimony that would have been insufficient to convict defendant, if not constitutionally inadmissible.

b. Counsel failed to protect defendant's plea agreement that would have avoided a sentence of death.

As a result of trial counsel's lack of preparation and failure to exercise independent judgment, defendant lost the opportunity to enter a guilty plea to murder in this and the Leon County case, avoid a sentence of death, and avoid extradition. Both the State and the court below had agreed to the plea agreement. When the time came for defendant to plea, he treated it like a game and literally balanced a motion to discharge his lawyer and the guilty plea.

Mr. Minerva, defendant's trial counsel during this time period, believed at the time of the plea bargain, that defendant was incompetent to make rational decisions about this case, but he took no action to protect defendant from himself. Instead, he continued with the negotiations for the plea, disclosing to the prosecution information that at the time he knew and believed would be damaging to defendant if the plea fell through.

When defendant appeared to enter his plea, he disclosed to Mr. Minerva his thoughts about discharging his trial counsel. Mr. Minerva sought a brief recess but permitted defendant to return to open court where he attempted to fire his lawyer on the ground that, in defendant's view, Mr. Minerva no longer believed in defendant's innocence.

As a result of the botched plea bargain, the strength of the state's case against defendant -- and the state's confidence in its case -- significantly increased. At the time of the proceeding to accept defendant's plea, defendant's trial counsel had reason to doubt defendant's competency to stand trial; indeed after the plea failed he moved for a competency hearing. As a result of not resolving his doubt about defendant's competence before the plea bargain was negotiated, defendant's trial counsel provided constitutionally ineffective assistance of counsel.

c. Counsel failed to develop and present important evidence in mitigation at the penalty phase.

As the Supreme Court has often noted in its capital punishment decisions, one of the key requirements of the penalty trial is that the sentence be individualized, i.e., the jury's discretion should be focused on the particularized nature of the crime and the characteristics of the individual defendant. Without that information, a jury cannot make the life/death decision in a rational and individualized manner. Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985).

In Tyler, the court found that where the jury was given no information to aid them in the penalty phase, the death penalty that resulted was robbed of the reliability essential to assure confidence. Id. The court reached the same conclusion in King v. Strickland, 748 F.2d 1462 (11th Cir. 1984) where counsel failed to present available character testimony in mitigation at the penalty phase. The underlying rationale in both cases revolved around the fact that "[t]here is a sufficient probability that effective counsel could have convinced a sentencer that the death sentence should not be given to undermine confidence in the outcome." Id. at 1465.

In this case, "counsel's ineffectiveness cries out from a reading of the transcript." See Douglas v. Wainwright, 739 F.2d 531 (11th Cir. 1984). At the penalty hearing, defendant's counsel presented almost nothing in mitigation. Instead they assisted defendant in carrying out a marriage ceremony. Not only were counsel per se ineffective by failing to prepare and present an adequate penalty phase, but their conduct in allowing defendant to ignore the gravity of the consequences and subvert the criminal process by staging his marriage before the jury amount to a violation of counsel's duty as officers of the courts. In addition, despite counsel's expression of doubt as to defendant's competence, counsel offered no evidence at the penalty phase going to the mental mitigating factors.

Counsel's crucial failure to render effective assistance demonstrably and substantially prejudiced defendant. See King, 748 F.2d at 1462. With little or no effort, counsel could have presented evidence to the jury that at the time of the crime for which defendant was convicted, defendant was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (Rule 3.850 Motion, ¶ 100.) The existence of such evidence was indicated by the report of Dr. Tanay, which counsel offered to the Court after the jury had recommended death. Defendant's failure to produce that evidence, or any evidence of defendant's past, undermined confidence in the outcome of the sentencing proceeding.

d. Counsel was ineffective in challenging the state's reliance on defendant's prior convictions as aggravating circumstances.

Defendant's prior convictions ultimately supported the trial court's imposition of the death sentence and instituted two of the four aggravating factors that were found. Counsel failed to adequately investigate, prepare, and present facts which would have raised the infirmity of defendant's Utah and Leon County convictions. On account of counsel's failure, defendant's death sentence may have been "founded at least in part upon misinformation of constitutional magnitude." See United States v.

Tucker, 404 U.S. 443, 447 (1972) (sentence based upon prior, unconstitutional convictions).

In a sentence proceeding for a capital felony, a court in Florida is prohibited from permitting "the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida." Fla. Stat. § 921.141(1) (West 1985). Under Tucker and its progeny, where constitutionally invalid convictions are weighed in the determination of a sentence, the defendant is entitled to a resentencing hearing without any consideration of those prior convictions.[17/]

In Tucker, the trial court considered the defendant's prior convictions in imposing a heavier prison sentence than it otherwise would have imposed. Later, it was determined that two of the previous convictions were constitutionally invalid under Gideon v. Wainwright, 372 U.S. 335 (1963). The Supreme Court held that the court of appeals was correct in remanding the case to the trial court for resentencing since the trial judge might not have imposed the maximum sentence if he had been aware that the prior convictions were unconstitutionally obtained. 404 U.S. at 447-49. Such invalid convictions may not be "used against a

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17/ See e.g., Tucker, 404 U.S. at 447-449; Torres v. United States, 490 F.2d 862, 863 (5th Cir. 1974); Johnson v. State, 362 So. 2d 465, 465 (Fla. Dist. Ct. App. 1978).

person to support guilt or enhance punishment for another offense." Burgett v. Texas, 389 U.S. 109, 115 (1967). Reliance upon incorrect assumptions of a defendant's criminal record when passing sentence violates due process and constitutes plain error. See Townsend v. Burke, 334 U.S. 736, 741 (1948); United States v. Tobias, 662 F.2d 381, 388 (5th Cir. 1981), cert. denied, 457 U.S. 1108 (1982). 18/

Lipscomb, 468 F.2d at 1323.

18/ Tucker controls even if the unconstitutionality of prior convictions has not been fully adjudicated and is only alleged by the defendant. Lipscomb v. Clark, 468 F.2d 1321, 1323 (5th Cir. 1972). In Lipscomb, the unconstitutionality of the petitioner's prior convictions had not been established; the defendant had only alleged that these convictions had been obtained in violation of his constitutional right to counsel. Id. The court of appeals held that the case must be remanded since the constitutional claim had never been considered. Id. The court stated that on remand the district court should determine if, treating the convictions alleged to have been unconstitutional as void, the sentence imposed would still be the appropriate sentence. If the sentence is still appropriate, the court has met the requirements of Tucker. Id.

> If, on the other hand, the district court finds that should these prior convictions be proven unconstitutional and void that the maximum sentence would not be appropriate, then it should grant defendant an evidentiary hearing and allow him to present evidence on his claim that the prior convictions in question were unconstitutional due to Gideon. If the district court is convinced of the validity of defendant's allegations after such a hearing, it may then properly resentence. Such a procedure seems best designed to fully protect Defendant's rights.

Florida courts have held that a defendant is entitled to an evidentiary hearing to determine whether a prior conviction is constitutionally invalid, where the defendant has made an allegation which, if proven true, would vacate that previous conviction.[19] At the evidentiary hearing, the defendant has the opportunity to present any evidence he has to prove that the prior conviction is unconstitutional. Garcia, 358 So. 2d at 561.[20] If the conviction is determined to be invalid, the defendant should be resentenced without consideration of the unconstitutional conviction. Id.

In this case, the trial court relied on an possibly unconstitutional Utah and Leon County convictions to justify imposition of the death penalty because counsel failed to adequately inquire into the reliability of those convictions or to present evidence tending to impair its constitutionality. Both convictions were found to be aggravating circumstances under Fla. Stat. Ann. § 921.141(5). Had counsel been effective, the court would have had the opportunity to consider and reject the use of these convictions as aggravating factors.

19/ See, e.g., Garcia v. State, 358 So. 2d 561 (Fla. Dist. Ct. App. 1978); Glenn v. State, 338 So. 2d 2634 (Fla. Dist. Ct. App. 1976); Wolfe v. State, 323 So. 2d 650 (Fla. Dist. Ct. App. 1975).

20/ It is presumed that the Florida courts also would hold an evidentiary hearing when there exists some question as to the constitutionality of a conviction to be admitted as an aggravating circumstance. See Adams v. State, 449 So. at 820.

e. Counsel was ineffective for failing to move for a determination of defendant's competence to stand trial.

The most glaring omission of counsel was their failure to raise the issue of defendant's competence to stand trial in the present case. Mr. Minerva asserted defendant's incompetence in the Leon County Case based on defendant's behavior, his inability to make reasoned judgments, his rejection of the joint plea bargain, and Dr. Tanay's report. Yet, he did not raise that issue in this case at the time, even though he had been appointed to assist defendant in this case by this Court. Lynn Thompson, who acted as co-counsel in the present case, also represented defendant in the Leon County matter and, thus, was familiar with the facts that raised doubt as to defendant's competence to stand trial in this case. Both Mr. Thompson and Victor Africano, who was lead trial counsel in this case, knew or should have known of the facts in the Leon County case demonstrating defendant's inability to assist counsel. Mr. Africano, in fact, attended the competency hearing in the Leon County case at which Mr. Minerva offered to testify as to defendant's incompetence. Mr. Africano subsequently offered Dr. Tanay's report to the court below, but only after the jury's recommendation of death. (Supp. Vol II., 12). At that point, the state pointed out that the defense had knowledge of the Taney report at least since the competency hearing in the Leon County matter and that the State had suggested to Defendant's counsel then that if they were going to raise

competence to stand trial in this case, they should have done so at the same time it was raised as in the Leon County case. (Supp. Vol. II, 13). Counsel never raised the issue.

Nothing can reasonably explain, much less justify, counsel's failure to move for a determination of defendant's competence to stand trial in this case. In fact, at the time of trial, defendant was incompetent to stand trial. Counsel's ineffective assistance of counsel thus denied defendant his constitutional right not to be tried while incompetent.

f. Defendant was rendered ineffective assistance of counsel by counsel's failure properly to challenge the fiber evidence admitted against him.

(1) Counsel's inadequate preparation for the motion in liminae

During the Guilt/Innocence Phase of defendant's trial, the defense challenged the State's use of fiber evidence through a motion in liminae. Although the defense counsel could not locate any cases dealing with the admissability of fiber evidence, the argument presented was that the prejudicial effect of this fiber evidence outweighted its probative value. This characterization of the evidence was based upon counsel's apparent belief that the state's expert could not testify that particular fibers were unique. The State responded by citing a number

of cases and texts which demonstated that trial court's routinely admit expert opinion concerning fiber evidence. This bulk of authority convinced the trial court that the State's expert should be allowed to testify. The State's fiber expoert subsequently testified that it was "extremely probable" that fibers found in a white van matched clothing from defendant and the victim. The defense never examined those cases.

114. The defense counsel's failure to examine the case law permitting the use of fiber evidence had disastrous results. In each of the cases cited by the prosecution, the expert had only testified that the fiber evidence rendered a particular factual conclusion possible. At the time of the defendant's trial, no court had ever permitted a prosecution expert to testify that fiber evidence indicated that a particular factual conclusion was probable. If defense counsel had brought out this point during the hearing on the motion in liminae, the trial judge might have issued a ruling that would have rendered inadmissable the State's expert testimony. If such a ruling had been issued, the jury would never have been told that the fiber evidence indicated it was "probable" that the defendant and the victim were in physical contact.

The defense counsel's failure at the hearing on the motion in liminae to inform the trial judge that the none of the authorities cited by the State permitted an expert to testify as

to probabilities lead the trial court to permit the prosecution's expert to testify in a way never before permitted. See Williams v. State, 312 S.E.2d 40, (1983) (Smith, J., dissenting). Given the novel character of the fiber anaylsis that the State sought to introduce, effective counsel would have required the State to establish that the scientific community generally accepts the reliability of this type of scientific evidence. See Frye v. United States, 293 F. 1013, 1014 (1923).

This omission is particularly glaring because the text cited by the State at the hearing raises substantial doubt as to whether microscopic anaylsis of fiber type and color could support the expert's conclusions that the defendant probably came into contact with the alleged victim. See Moenssens, Moses, Imbau, Scientific Evidence in Criminal Cases, 367 (1973). For instance, this text states that, "similar polymers (synthetic fibers) made by different manufacturers cannot be distinquished". Id. The text goes on to say that no effective means have been developed to compare fibers by dye color. Id. Indeed, a later edition of the text cited by the State rejects the notion that an expert can testify as to probabilities on the basis of fiber anaylsis. See id. 501-504 (1986) Under the Frye test, all that was needed to prevent the State fiber expert from presenting her completely novel opinion testimony was for counsel to inform the court of the position of these basic authorities on the use of fiber anaylsis as evidence. Defense counsel, however, was not

able to discharge this minimal obligation because counsel allegedly was unable to find any authority on fiber evidence. Indeed, as the record now stands, there is no indication that the trial court was even aware of its departure from prior precedent that occurred as a result of its ruling on the motion in liminae.

(2) Failure to object to the fiber expert's testimony

Defense counsel compounded the errors at the hearing on the motion in liminae by failing to make an objection to the State's expert fiber testimony when it was presented to the jury. By this point in the proceeding, reasonably competent counsel would have read the authorities cited by his opponent. If this had been done, the defense would have been armed with strong arguments for why the trial court should have prohibited the expert from testifying as to probabilities.

First, the expert's use of microscopy to perform her anaylsis could have been exposed as an inadequate method of performing fiber anaylsis. Much more sophisticated heat and chemical tests could have been described. See Grieve & Kotowski, The Identification of Polyester Fibers in Forensic Science, 22 J. For. Sci. 390 (1977); Compare Longhetti & Roche, Microscopic Identification of Man-Made Fibers from the Criminalistic Point of View, 3 J. For. Sci. 303 (1958). Given the daring conclusions reached by the fiber expert, the primitive character of her

techniques would have been particularly troubling to a court being asked to admit a completely novel form of expert opinion testimony.

Second, effective counsel would have stressed the lack of any foundation in the record for the fiber expert's opinion as to the probabilities. For instance, the record contained no reliable evidence showing the incident of each type of fiber matched by the expert as a percentage of all fibers. In the only case ever reported where the state used fiber evidence to prove probabilities, the prosecution at least made an attempt to prove that the possibility of a random match was remote. In this case, no such evidence was offered. Compare Williams v. State, 312 S.E.2d at 97-99 (Smith J., dissenting)

The State also failed to present any evidence as to the total number of fibers available from each of the three fiber sources. A cursory reading of a recent study attempting to determine the probability of chance match occurrences between fibers indicates that any attempt to draw a factual conclusion from fiber matches requires that the expert at least have some idea as to the total fiber population that he or she is analyzing. See Fong & Inami, Results of a Study to Determine the Probability of Chance Match Occurrences Between Fibers Known to be from Different Sources, 31 J. For. Sci. 65 (1986). As the record now stands, the state's fiber expert's testimony was mere

guesswork. Cf. Williams v. State, supra. Counsel's failure to require a foundation for the testimony before the expert rendered her opinion falls below acceptable standards for legal representation and undermines confidence in the outcome of Defendant's trial.

(3) Defense counsel's failure properly to handle the fiber expert opinion testimony prejudiced defendant in two ways

As a result of defense counsel's ineffectiveness, highly prejudicial evidence that otherwise would not have been admitted into the record was presented to the jury. The only other non-circumstantial evidence connecting defendant to the victim was the hypnotically enhanced orinduced testimony of Anderson, later found to have been inadmissible in part by this Court. Given the paucity of other evidence connecting the defendant to the alleged victim, one must conclude that counsel's errors contributed significantly to an adverse verdict.

Counsel's failure to object to the expert's testimony also foreclosed review by this Court of its admissability. Notwithstanding, defendant attempted to raise the issue here. The challenge was dismissed without reaching the merits. Bundy v. State, 471 So. 2d 9, 20 (Fla. 1985). The failure to preserve a right to appeal on this issue denied defendant an opportunity to obtain a reversal based on the State's inappropriate use of fiber

evidence. In its review of this case, this Court concluded that the alleged eye witness testimony of Clarence Anderson was tainted by hypnosis prior to the trial. The Court, nevertheless, found that there was sufficient evidence in the record, absent Anderson's tainted testimony for the jury to convict. See Bundy v. State, 471 So. 2d at 21. The fiber expert's opinion testimony is the only other evidence in the record that directly connected defendant with the victim. In light of this Court's decision on review of the record, counsel's failure to object to the fiber expert's testimony when it was presented at trial may have been determinative of the outcome in this case.

g. Defendant's trial counsel was ineffective for failing even to investigate whether an insanity defense was viable.

Given the nature of the crime for which defendant was convicted, defendant's trial counsel should have explored the viability of an insanity defense. Their failure to do so undermines confidence in the outcome of defendant's trial.

If defendant's counsel had explored a defense of insanity, they would have discovered that at the time of the crime for which defendant was convicted, defendant suffered from Bipolar mood disorder, or manic-depressive psychosis. (Rule 3.850 Motion, ¶ _____.) As a result of this illness, defendant periodically experienced obsessive and aggressive behavior over which he lacked control. He also lost touch with reality.

Had defendant's counsel investigated the existence of an insanity defense, they would have been able to advise defendant about whether to assert such a defense in light of defendant's mental condition at the time the crime took place. Instead, defendant went to trial unaware of the viability of an insanity defense and incompetent himself to determine whether such a defense was viable.

4. The trial court failed to conduct a proper Faretta inquiry into whether defendant should have been allowed to represent himself through critical states of the proceedings.

Under Faretta v. California, 422 U.S. 806 (1974), the accused in a criminal case has a limited, but not absolute, right to represent himself. Julius v. Johnson, 755 F.2d 1403 (11th Cir. 1985), The court is required to prohibit self-representation if the three prongs of the Faretta inquiry are not satisfied. First, the defendant must clearly and unequivocally demand to proceed pro se. Brown v. Wainwright 665 F.2d 607 (5th Cir. 1982). Second, he must knowingly and intelligently waive his right to counsel, Faretta 422 U.S. at 835, and that waiver must not be tainted by mental incapacity. See Goode v. Wainwright, 704 F.2d 593 (11th Cir. 1983). Third, the court must explicitly explain to the defendant the dangers of proceeding without the aid of counsel. Faretta, 422 U.S. at 835-836. And, finally, the defendant must have some valid reason for

undertaking the hardship of proceeding pro se. Williams v. State, 427 So. 2d 768 (Fla. App. 1983), and even where such a reason exists self-representation should not be allowed if it would jeopardize the defendant's right to a fair trial. Scott v. Wainwright, 617 F.2d 99 (5th Cir. 1980).

There is no evidence in the record suggesting that the court below conducted a Faretta inquiry into defendant's competence to represent himself. As discussed above, there existed substantial evidence that defendant was not only was incapable of representing himself but also was incompetent even to stand trial.

5. Imposition of the death penalty in this case violates defendant's rights under the Eighth and Fourteenth Amendments to the United States Constitution given the arbitrary manner in which death is imposed in Florida.

Defendant was sentenced to death in this case for the murder of a white female. Substantial social science research available for introduction at an evidentiary hearing on this issue would demonstrate that the death sentence is disporportionately imposed on those whose victims are white. See e.g., Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan. L. Rev. 27 (Nov. 1984); Radlet & Pierce, Race and

Prosecutorial Discretion in Homicide Cases, 19 L. Soc'y. Rev. 587 (1985); Foley & Powell, The Discretion of Prosecutors, Judges and Juries in Capital Cases, 7 Crim. Justice Rev. 16 (1982). See also, Gross, Race and Death: The Judicial Evaluation of Discrimination in Capital Sentencing, 18 U.C.D.L. Rev. 1275 (1985); Baldus, Woodworth & Pulaski, Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia, 18 U.C.D.L. Rev. 1375 (1985).

Although this Court has consistently refused to consider claims of this nature, see, Sullum v. State, 441 So. 2d 609 (Fla. 1983); Adams v. State, 449 So. 2d 819 (Fla. 1984), the United States Court of Appeals for the Eleventh Circuit has held that these studies may make out a prima facie showing sufficient to entitle a Defendant to an evidentary hearing. McClesky v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc); Griffin v. Wainwright, 760 F.2d 1084 (11th Cir. 1985) In the one case where the Eleventh Circuit refused to send a Florida case back for an evidentiary hearing on this issue, Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985) (en banc), the United States Supreme Court granted the writ of certiorari specifically to address to this issue. Hitchcock v. Wainwright ____ U.S. ___, No. 85-6756 (June 9, 1986).

In these circumstances, this Court should stay consideration of this issue until final action by the United States Supreme Court in Hitchcock.

6. Defendant was unconstitutionally denied a clemency hearing in this case.

On November 7, 1986, defendant filed application to stay his execution on the ground that the governor's failure to permit him to apply for clemency denied him due process and equal proteciton of the laws and invalidated the current warrant. The court below denied that motion on the ground that it did not have jurisdiction to hear it. That ruling was plainly wrong. Sullivan v. Askew, 348 So. 2d 312 (Fla. 1977). Moreover, for the reasons stated in the application filed in that court, a copy of which has been lodged in this Court, the warrant under which defendant is scheduled to be executed is invalid. Defendant hereby incorporates into this brief his argument from the Memorandum in support of the application for a stay.

C. Defendant is Entitled to An Evidentiary Hearing on the Claims Raised in His Rule 3.850 Motion.

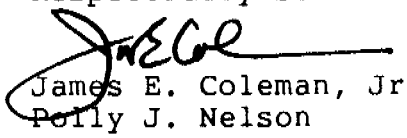
As demonstrated above, the claims raised in defendant's Rule 3.850 Motion are substantial and depend on the development of facts outside the record for resolution. This Court has repeatedly noted that an evidentiary hearing is appropriate unless the motion "conclusively shows that the movant is entitled to no relief." Porter v. State, 478 So. 2d 33, 35 (Fla. 1985). Clearly that is not the case here. Among others, defendant's

claims of ineffective assistance of counsel and his challenge to the failure of the trial court to hold a competency hearing are non-frivolous and clearly require an evidentiary hearing for resolution. The failure of the court below to hold such a hearing is reversible error.

CONCLUSION

For the reasons stated above, defendant's imminent execution should be stayed and the decisions appealed from reversed.

Respectfully submitted,



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